Banning Crush Videos: Legislative Response to the Supreme Court's Ruling in *U.S. v. Stevens* and Lingering First Amendment Questions

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Summary

In 2000, Congress enacted 18 U.S.C. § 48 to criminalize the creation and sale of some depictions of animal cruelty. On April 20, 2010, the Supreme Court found the provision to be unconstitutional under the First Amendment. Congress has expressed interest in drafting a new statute to replace 18 U.S.C. § 48 that would more narrowly define the prohibited depictions and survive First Amendment scrutiny. The House of Representatives passed H.R. 5566, entitled the Prevention of Interstate Commerce in Adult Crush Videos Act of 2010 on July 21, 2010, which was submitted to the Senate. The Senate passed its amended version of H.R. 5566, entitled the Animal Crush Video Prohibition Act on September 28, 2010 (S. 3841). This report will give a brief background of the earlier version of § 48, provide an analysis of the Supreme Court case, and discuss the legislative response.

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Background

The legislative history of § 48 reveals that one of the primary motivations for the enactment of the statute was to prevent the sale of "crush videos" in the United States.[1] Crush videos depict the killing of small animals such as cats and squirrels by women who step on them, effectively crushing the animals to death.[2] The act of crushing the animals in this way, in and of itself, is typically prohibited by animal cruelty laws. Section 48 sought to outlaw the *depictions* of the acts of animal cruelty, rather than the acts of cruelty themselves.

The statute read as follows:

> Depiction of animal cruelty:
>
> (a) Creation, Sale, or Possession – Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years or both.
>
> (b) Exception. – Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, or artistic value.
>
> (c) Definitions. – In this section –
>
> (1) the term 'depiction of animal cruelty' means any visual or auditory depiction, including any photograph, motion picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State: and
>
> (2) the term 'State' means each of the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.[3]

[1] H.Rept. 106-397 (1999).

[2] *Id.*

[3] 18 U.S.C. § 48.

Upon reading the language of the statute, it is clear that it could be interpreted to apply to a broader array of depictions of animal cruelty than "crush videos." In the recent Supreme Court case, *U.S. v. Stevens*, this statute was used to prosecute Robert J. Stevens, a man who sold videos of dog fights. Stevens challenged his prosecution on the grounds that § 48 violated the First Amendment. The Supreme Court agreed.

U.S. v. Stevens Opinion

In *U.S. v. Stevens*,[4] the Supreme Court struck down a federal statute that banned depictions of animal cruelty because the Court determined that the statute was substantially overbroad. In the Court's analysis, it was substantially overbroad because it applied to far more constitutionally protected speech than was necessary to achieve the statute's stated purpose.[5]

Initially, the Court, in an opinion written by Justice Roberts, addressed the question of whether depictions of animal cruelty fall outside the speech protections of the First Amendment. The government had argued that depictions of animal cruelty, such as those described in § 48, fall outside the bounds of First Amendment protection, and therefore may be restricted or criminalized without regard for the First Amendment. Basing its argument on the Supreme Court's description of other categories of unprotected speech, the government opined that depictions of animal cruelty "are of such minimal redeeming value as to render [them] unworthy of First Amendment protection."[6]

The Court rejected this argument. According to the Court, categories of speech that are currently unprotected (i.e., obscenity and defamation) are well defined and narrowly limited classes of speech the regulation of which, historically, has raised little or no concern.[7] In reviewing its case law related to those categories of speech that fall outside the amendment's protection, the Court found that it had never created a "test" for determining new categories of speech that would fall outside the amendment's protections. The Court concluded the following:

[4] No. 08-769, slip op. (Apr. 20, 2010), 559 U.S. ____ (2010). http://www.supremecourt.gov/opinions/09pdf/08-769.pdf.

[5] Justice Alito, in his dissent, argued that it was inappropriate for the Court to apply the doctrine of substantial overbreadth in this context. *Id.* (Alito J., dissenting). In general, parties seeking First Amendment protection must assert that government action has violated their own First Amendment rights. Alito pointed out that the overbreadth doctrine is traditionally understood to be an exception to that rule. The overbreadth doctrine allows parties whose speech otherwise would be constitutionally prohibitable to challenge a statute as being substantially overbroad, essentially allowing these parties to assert the First Amendment rights of *other citizens* whose constitutionally protected speech might be affected by the overbroad statute. Because it is an exception to the general rule and might allow otherwise unprotected speech to escape punishment, the overbreadth doctrine has been applied sparingly and has been described as "strong medicine." Justice Alito argued that it was inappropriate to apply this doctrine to § 48 in this context, because an "as applied" challenge would have been more appropriate. *Id.* (Alito J., dissenting) slip op. at 3 (citing Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 484-485 (1989) ("it is not the usual judicial practice, ... nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied."). Alito found that Stevens could have asserted that § 48 violated his First Amendment rights as applied to the videos that he was selling and it would have been unnecessary to strike down the whole statute, using a doctrine that was not designed for the circumstances before the Court.

[6] *Stevens*, slip op. at 7 (quoting the Brief for the United States).

[7] *Id.* at 6.

> Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.[8]

Because the Court did not carve out an exception from First Amendment protections for animal cruelty depictions, it was required to analyze § 48 based on existing First Amendment jurisprudence. The Court began by noting that the legislative history indicated that the statute was intended to prevent the sale of so-called "crush videos."[9] However, when reading the statute, the Court determined that the language swept far more broadly than "crush videos" and had the potential to punish many forms of protected speech.

For example, the Court noted that § 48 did not appear to require that the intentional killing or wounding of an animal in the depiction actually be cruel.[10] Rather, it applied broadly to all depictions of the intentional killing, maiming, or wounding of an animal regardless of whether the killing was, in fact, "cruel." One possible limitation on the types of depictions that would be illegal under § 48 was that the conduct had to be illegal. However, the Court pointed out that the statute made no distinctions based on the reasons an intentional killing might be illegal, noting that the humane slaughter of a stolen cow could be covered.[11]

Furthermore, the Court found that in order to be criminal under § 48, the depicted conduct "need only be illegal in 'the State in which the creation, sale, or possession takes place, regardless of whether the ... wounding ... or killing took place in [that] State.'"[12] The Court pointed out that hunting, in all of its forms, is illegal in the District of Columbia, but other jurisdictions encourage hunting.[13] It, therefore, appeared that videos of hunting could be covered if they were sold in the District of Columbia, because they showed the intentional killing of an animal in a way that is illegal in that jurisdiction.

The Court did not believe that the statute could be saved by the exceptions created for depictions of animal cruelty that have "serious religious, political, scientific, educational, journalistic, or artistic value."[14] The Court seemed concerned, primarily, with the fact that in order to be eligible for the exception the depictions had to have "serious" value. The Court noted that most hunting programs or videos have, at most, recreational or entertainment value, and this may not rise to the level of "serious" value in every case. The Court opined:

> *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical or artistic value" (let alone serious value), but it is still sheltered from government regulation…. Thus, protection of the First Amendment presumptively extends to

[8] *Id.* at 9.

[9] *Id.* at 2.

[10] *Id.* at 12.

[11] *Stevens*, slip op. at 12-13.

[12] *Id.* at 13.

[13] *Id.*

[14] *Id.* at 15.

> many forms of speech that do not qualify for the serious value exception of § 48(b), but nonetheless fall within the reach of § 48(c). (emphasis in original)[15]

Lastly, the Court declined to accept the government's argument that it would only apply the statute narrowly.[16] The Court ultimately found that § 48 could apply to many forms of protected speech, far beyond the "crush videos" to which it was originally intended to apply. As a result, the Court did not determine whether a criminal statute tailored only to apply to "crush videos" would be constitutional. Instead, § 48 was struck down because it was found to be "substantially overbroad, and therefore invalid under the First Amendment."[17]

Justice Alito was the only dissenting Justice.[18] Justice Alito argued that the case should be remanded for a determination of whether the videos at issue in this particular case were constitutionally protected and would not have struck the statute down in its entirety.

Legislative Response

On May 26, 2010, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the Supreme Court's decision in *U.S. v. Stevens*.[19] The participants, including constitutional scholars, testified about potential legislative responses to the Court's decision. Those who testified argued that crush videos fit within the definition of obscenity, which falls outside the protection of the First Amendment, and that a law banning only crush videos that were obscene would likely be constitutional.[20] Furthermore, the Humane Society submitted evidence for the hearing indicating that, following the Court's decision, "a robust market for crush videos reemerged on the Internet."[21] Following the hearing, the House passed H.R. 5566, entitled the Prevention of Interstate Commerce in Animal Crush Videos Act on July 21, 2010.

H.R. 5566

H.R. 5566 is intended as a replacement for the statute struck down by the Supreme Court in the *Stevens* case; however, it applies in a far more circumscribed set of circumstances than the previous law.[22] Specifically, H.R. 5566 would make it illegal to "knowingly and for the purpose of commercial advantage or private financial gain [sell, offer to sell, or distribute, or offer to distribute] an animal crush video in interstate or foreign commerce." Violators of this prohibition could be fined, or imprisoned for up to five years, or both. Depictions of hunting, trapping,

[15] *Id.* at 17.

[16] *Id.* at 18-19.

[17] *Stevens*, slip op. at 20.

[18] *Stevens*, slip op. at 1 (Alito, J. dissenting).

[19] United States v. Stevens: The Supreme Court's Decision Invalidating the Crush Video Statute, Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Judiciary Comm., 111th Cong. (2010) (hereinafter "Subcomm. Hearing").

[20] Subcomm. Hearing, *supra* note 18 (prepared testimony of J. Scott Ballenger, at 10).

[21] H.Rept. 111-549 at 5, n. 15 ("The Humane Society of the United States, Animal Crush Videos Research and Investigation: Descriptive Catalogue of DVD Folders Content (May 22, 2009) (report submitted to the House Judiciary Committee, Subcommittee on Crime Terrorism and Homeland Security)").

[22] H.R. 5566, 111th Cong.

fishing, or customary and normal veterinary or agricultural husbandry practices explicitly are exempt from this prohibition.

For the purposes of H.R. 5566, animal crush videos are defined as "any obscene photograph, motion picture film, video recording, or electronic image that depicts actual conduct in which one or more living animals is intentionally crushed, burned, drowned, suffocated, or impaled in a manner that would violate a criminal prohibition on cruelty to animals under Federal law or the law of the State in which the depiction is created, sold, distributed, or offered for sale or distribution." This definition is more narrow than the previous definition, which criminalized a wider variety of depictions of animal cruelty and carried no requirement that the depictions be obscene. Because H.R. 5566 would require the prohibited depictions to be obscene in order to be in violation of the law, it is more likely that the statute would be upheld against a constitutional challenge. One question that remains is whether crush videos, as they have been described, are legally obscene under the First Amendment standard articulated by the Supreme Court. This question will be addressed in the next section.

S. 3841

Following the House passage of H.R. 5566, the bill was transmitted to the Senate. The Senate introduced an amendment to H.R. 5566 in the nature of a substitute, which consisted of the text of S. 3841, the Animal Crush Video Prohibition Act. The Senate passed its version of a prohibition on the distribution of animal crush videos on September 28, 2010. The Senate bill is similar to the House bill in that it would prohibit the sale of animal crush videos that are obscene, but the Senate bill differs in a number of important respects.

First, the Senate bill has a slightly narrower definition of what constitutes an animal crush video in that it specifies the types of animals that would be used in making the videos. The Senate bill defines crush videos as

> any photograph, motion picture film, video or digital recording, or electronic image that –
>
> (1) depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and [in the United States], would violate section 2241 or 2242); and
>
> (2) is obscene.

The Senate bill prohibits the sale or distribution of animal crush videos in interstate commerce, as the House bill does. The Senate bill also prohibits the *creation* of animal crush videos and the attempt or conspiracy to create such videos if the persons involved have reason to know that the video will be distributed in interstate commerce or the video is actually so distributed. The penalty for violations would be a fine and/or imprisonment for not more than seven years. The House bill allows maximum imprisonment of five years.

Furthermore, the Senate bill makes clear that the prohibition does not apply to the depiction of customary and normal veterinary and agricultural husbandry practices, the slaughtering of animals for food, hunting, trapping, or fishing. The Senate bill also provides a "good faith distributions" exception, wherein the prohibition will not apply to the good faith distribution of an

animal crush video to law enforcement or to a third party for the sole purpose of analysis to determine if it should be referred to law enforcement.

Because the Senate bill, like the House bill, limits the definition of animal crush videos to depictions that are "obscene," it is likely a reviewing court would find it to be constitutional. However, as mentioned above, the question is whether animal crush videos, as they have been described, fit the legal definition of obscenity.

Are Animal Crush Videos Obscene?

Because the bills at issue both require animal crush videos to be "obscene" in order to fall under the bills' prohibitions, the bills raise the question of whether animal crush videos are legally obscene. The Supreme Court has held that obscenity falls outside the protections of the First Amendment and established the word "obscene" as a legal term of art.[23] The Supreme Court, in *Miller v. California,* articulated the legal test for obscenity. The *Miller* test asks

> (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[24]

The first two elements of the test are matters to be decided by the trier of fact applying contemporary community standards.[25] The last element of the test applies a reasonable person standard to the work taken as a whole and is generally understood to be a national standard as opposed to the standard of the local community.[26]

For the sake of argument, one can assume that depictions of live animals being crushed to death or otherwise tortured that are produced for the purpose of appealing to a particular sexual fetish would be found by the average person applying contemporary community standards to appeal to the "prurient interest" in sex.[27] One can also assume that at least some if not all crush videos, taken as a whole, lack serious literary, political, or scientific value. However, it is less clear whether crush videos, as they are described by the Court in *U.S. v. Stevens*,[28] and Congress in the House Report[29] on H.R. 5566, "depicts or describes, in a patently offensive way, sexual conduct." Most case law surrounding this particular prong of the test focuses on whether the material is "patently offensive" when community standards are applied by the trier of fact. Generally, however, the trier of fact is analyzing depictions of sexual conduct. Though the crush videos

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[23] CRS Report 98-670, *Obscenity, Child Pornography, and Indecency: Brief Background and Recent Developments*, by Kathleen Ann Ruane.

[24] Miller v. California, 413 U.S. 15 (1973).

[25] Pope v. Illinois, 481 U.S. 497, 500 (1987).

[26] *Id.*

[27] Though these videos may not appeal to the common notion of "prurience," the Supreme Court has made clear that "where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest" expert testimony may be introduced as evidence of the existence of the particular sexual fetish. Paris Adult Theater v. Slaton, 413 U.S. 49, 56 n. 6 (1973).

[28] *Stevens*, slip op. at 2.

[29] H.Rept. 111-549 at 2-3.

might appeal to a particular subset of persons' sexual desires, the videos do not appear to depict sexual conduct.

The House Report argues that crush videos do fit the definition of obscenity articulated by the Supreme Court because the acts of cruelty "appeal to the 'prurient interest,' are 'patently offensive,' and 'lack serious literary, artistic, political or scientific value.'"[30] The report further argues that though obscenity generally refers to depictions of sexual conduct, case law indicates that obscenity might also encompass unusually deviant acts. For that proposition, the House Report cites the testimony of J. Scott Ballenger who cited the Sixth Circuit Court of Appeals case of *U.S. v. Thomas* as an example wherein obscenity included elements of "deviant violence," such as sado-masochism.[31] However, that case does not necessarily stand for the proposition that obscenity includes depictions that are not depictions of sexual conduct. The Sixth Circuit conducts no analysis of whether images that do not depict sexual conduct could be considered obscene.[32] Rather, the analysis of the court focused on the proper community standard to be applied. The court did not mention whether any of the depictions at issue in that case were not depictions of sexual conduct.

Nonetheless, the Supreme Court has held that the question of whether a depiction is "patently offensive" is a question for the trier of fact to decide, applying contemporary community standards.[33] The Court has also acknowledged that obscenity may include a "morbid interest ... in excretion," which may indicate that the Court would be willing to consider depictions of different types of extremely offensive conduct to be obscene.[34] The majority in *U.S. v. Stevens* made clear that it was not determining whether a criminal statute tailored only to apply to "crush videos" would be constitutional, leaving open the possibility that a statute prohibiting the sale of these depictions (whether or not they were legally obscene) may be constitutional.[35] Furthermore, Judge Posner of the Seventh Circuit has posited that extremely violent photographs might be offensive enough to be categorized as obscene.[36] Taken together, these cases could indicate that

[30] H.Rept. 111-549 at 5.

[31] Subcomm. Hearing *supra* note 18 (prepared testimony of J. Scott Ballenger, 12-13, citing U.S. v. Thomas, 74 F.3d 701 (6th Cir. 1996)). There were a number of images and videos subject to prosecution in the *Thomas* case, most, if not all, of them appear to have depicted sexual conduct. 74 F.3d at 705. It is unclear why this is the only case that the House Report cites from Ballenger's testimony. Ballenger cited a number of other cases to support his proposition that "the legal concept of 'obscenity' should be broadened to include materials that are not 'prurient' as heretofore defined, but that similarly appeal only to base instincts ... " Subcomm. Hearing *supra* note 18 (prepared testimony of J. Scott Ballenger, 12-13 citing, *Miller*, 413 U.S. at 19 n.2, Roth v. United States, 354 U.S. 476, 487 n.20, Am Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 575 (7th Cir. 2001)).

[32] U.S. v. Thomas, 74 F.3d 701 (6th Cir. 1996).

[33] *Pope*, 4481 U.S. at 500.

[34] Roth v. United States, 354 U.S. at 487 n.20.

[35] *Stevens*, slip op. at 19. In other words, a statute banning crush videos that contained no requirement that the videos be obscene may be constitutional under the strict scrutiny standard of review (the highest review standard the Court can apply to constitutionally protected speech). The Court leaves open the possibility that the government may be able to advance a successful argument that it has a compelling interest in banning these depictions and that a statute banning only these depictions is narrowly tailored to achieve that interest. The strict scrutiny analysis would only be done if the animal crush videos were not legally obscene and thus protected by the First Amendment. Because the bills at issue require the depictions to be "obscene" it is unlikely that strict scrutiny would be applied. Instead, only those videos that are legally obscene would be prohibited by the bill. *See also* CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Kathleen Ann Ruane.

[36] Am Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 575 (7th Cir. 2001)("Maybe violent photographs of a person being drawn and quartered could be suppressed as disgusting, embarrassing, degrading, or disturbing without proof that they are likely to cause any of the viewers to commit a violent act. They might even be described as (continued...)

the primary indicator for what is legally obscene might be a work's extremely offensive nature. In this light, it may not be necessary that a work depict sexual or sexually related conduct in order to fall outside constitutional protections.

It might also be argued that crush videos, like videos of sado-masochistic torture, are closely related to sexual activity, because the women in them often make sexual sounds, and the videos are produced specifically for the fulfillment of sexual desire.[37] It might also be argued that the creation of these videos is so closely related to sexual activity that a broadening of the legal definition of obscenity may not be necessary to include these videos within the category as it currently stands. If crush videos are found to be patently offensive, appeal to the prurient interest in sex (though not depicting sexual conduct), and lacking societal value of any kind, this may be enough to satisfy the *Miller* test regardless of whether the depictions contain sexual conduct. However, it is impossible to answer this question definitively until it is addressed by a court.

Finally, if animal crush videos are legally obscene, the enactment of new legislation may not be necessary to achieve congressional and law enforcement goals. 18 U.S.C. § 1465 makes it illegal to produce, sell, or distribute obscene materials in interstate or foreign commerce. If animal crush videos are obscene, their production, sale, and distribution likely violate existing federal law. Enforcement of § 1465 against these videos may be another avenue towards achieving the goal of eliminating the creation and sale of animal crush videos in the United States.

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(...continued)

'obscene,' in the same way that photographs of people defecating might be, and in many obscenity statutes are, included within the legal category of the obscene ... even if they have nothing to do with sex. In common speech, indeed, 'obscene' is often just a synonym for repulsive, with no sexual overtones at all.").

[37] *See e.g.*, United States v. Davidson, 283 F.3d 581 (5th Cir. 2002)(prosecution for depictions of torture, panic, and "snuff" films).