April 20, 2010

Justices Reject Ban on Videos of Animal Cruelty

By ADAM LIPTAK

WASHINGTON — In a major First Amendment ruling, the Supreme Court on Tuesday struck down a federal law that made it a crime to create or sell dogfight videos and other depictions of animal cruelty.

Chief Justice John G. Roberts Jr., writing for the majority in the 8-to-1 decision, said that the law had created “a criminal prohibition of alarming breadth” and that the government’s aggressive defense of the law was “startling and dangerous.”

The decision left open the possibility that Congress could enact a narrower law that would pass constitutional muster. But the existing law, Chief Justice Roberts wrote, covered too much speech protected by the First Amendment.

It has been more than a quarter-century since the Supreme Court placed a category of speech outside the protection of the First Amendment. Tuesday’s resounding and lopsided rejection of a request that it do so, along with its decision in Citizens United in January — concluding that corporations may spend freely in candidate elections — suggest that the Roberts Court is prepared to adopt a robustly libertarian view of the constitutional protection of free speech.

And in the next couple of months, the court is set to decide several other important First Amendment cases about anonymous speech, the right of free association and a federal law that limits speech supporting terrorist organizations.

Tuesday’s decision arose from the prosecution of Robert J. Stevens, an author and small-time film producer who presented himself as an authority on pit bulls. He did not participate in dogfights, but he did compile and sell videotapes showing the fights, and he received a 37-month sentence under a 1999 federal law that banned trafficking in “depictions of animal cruelty.”
Dogfighting and other forms of animal cruelty have long been illegal in all 50 states. The 1999 law addressed not the underlying activity but rather trafficking in recordings of “conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed.”

It did not matter whether the conduct was legal when and where it occurred so long as it would have been illegal where the recording was sold. Some of Mr. Stevens’s videos, for instance, showed dogfighting in Japan, where the practice is legal.

The government argued that depictions showing harm to animals were of such minimal social worth that they should receive no First Amendment protection at all. Chief Justice Roberts roundly rejected that assertion. “The First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content,” he wrote.

The chief justice acknowledged that some kinds of speech — including obscenity, defamation, fraud, incitement and speech integral to criminal conduct — have historically been granted no constitutional protection. But he said the Supreme Court had no “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”

Chief Justice Roberts rejected the government’s analogy to a more recent category of unprotected speech, child pornography, which the court in 1982 said deserved no First Amendment protection. Child pornography, the chief justice said, is “a special case” because the market for it is “intrinsically related to the underlying abuse.”

Having concluded that the First Amendment had a role to play in the analysis, Chief Justice Roberts next considered whether the 1999 law swept too broadly.

The law was enacted mainly to address what a House report called “a very specific sexual fetish” — so-called crush videos.

“Much of the material featured women inflicting the torture with their bare feet or while wearing high-heeled shoes,” according to the report. “In some video depictions, the woman’s voice can be heard talking to the animals in a kind of dominatrix patter.”

When President Bill Clinton signed the bill, he expressed reservations, prompted by the First Amendment, and instructed the Justice Department to limit prosecutions to “wanton cruelty to animals designed to appeal to a prurient interest in sex.”

The law, said Wayne Pacelle, the president of the Humane Society of the United States, “almost immediately dried up the crush video industry.”

But prosecutions under the law appear to have been pursued only against people accused of
trafficking in dogfighting videos.

The federal appeals court in Philadelphia struck down the law in 2008 in Mr. Stevens’s case, overturning his conviction. Tuesday’s decision in United States v. Stevens, No. 08–769, affirmed the appeals court’s ruling.

In it, Chief Justice Roberts said the law was written too broadly. Since all hunting is illegal in the District of Columbia, for instance, he said, the law makes the sale of magazines or videos showing hunting a crime here.

“The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude,” he wrote.

The law contains an exception for materials with “serious religious, political, scientific, educational, journalistic, historical or artistic value.” Those exceptions were insufficient to save the statute, the chief justice wrote.

“Most hunting videos, for example, are not obviously instructional in nature,” he said, “except in the sense that all life is a lesson.”

Justice Samuel A. Alito Jr. dissented, saying the majority’s analysis was built on “fanciful hypotheticals” and would serve to protect “depraved entertainment.” He said it was implausible to suggest that Congress meant to ban depictions of hunting or that the practice amounted to animal cruelty.

Chief Justice Roberts replied that Justice Alito “contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. “But, he went on, the 1999 law “addresses the value of the depictions, not of the underlying activity.”

The exchange was unusual, as Chief Justice Roberts and Justice Alito are almost always on the same side. In the last term, the two justices, both appointed by President George W. Bush, agreed 92 percent of the time, more than any other pair of justices.

Justice Alito said the analogy to child pornography was a strong one. The activity underlying both kinds of depictions are crimes, he wrote. Those crimes are difficult to combat without drying up the marketplace for depictions of them and both kinds of depictions contribute at most minimally to public discourse, he added.

A number of news organizations, including The New York Times Company, filed a brief urging the court to rule in favor of Mr. Stevens.
Chief Justice Roberts concluded his majority opinion by suggesting that a more focused law “limited to crush videos and other depictions of extreme animal cruelty” might survive First Amendment scrutiny.

Mr. Pacelle, of the Humane Society, called for a legislative response to Tuesday’s ruling. “Congress should within a week introduce narrowly crafted legislation,” he said, “to deal with animal crush videos and illegal animal fighting activities.”