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## “SERVING THE HUNTER WHO TRAVELS”

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*“Hunting provides the principal incentive and revenue for conservation. Hence it is a force for conservation.”*

### Special To The Hunting Report World Conservation Force Bulletin

by John J. Jackson, III

#### ■ Special Report

### The Supreme Court Invalidates Overly Broad Cruelty Law In Light of the Acceptability of Hunting

■ The US Supreme Court has struck down a federal cruelty law (18 U.S.C. 48) that made video depictions of animal cruelty a felony, *U.S. v. Stevens*, decided April 20, 2010. The federal criminal law was held to be overly broad, as it could infringe on protected speech and activities, particularly recreational hunting. The case is important in its own right because the criminal statute was alarmingly broad and contrary to the interests of hunters, anglers and the First Amendment umbrella.

Sexual fetish “crush” videos were the original focus of the statute, but it clearly criminalized the creation, possession or showing of any harm to any animal (“where an animal is wounded or killed”) even if the underlying act is legal where it occurred. For example, a deer hunting video shown in one state depicting a hunting method not legal in that state but legal in the state where it occurred would be a felony offense. One of the videos Stevens was

prosecuted for depicted pit bulls being used to hunt wild boars. He was convicted at the trial level.

The second reason it is worthy of coverage is the protective treatment of hunting by the Court and the 28 briefs.



Eight of the nine justices joined in the opinion written by Chief Justice Roberts. Roberts quoted from the Amici Curiae brief of the Professional Outdoor Media Association (POMA), et al, the NRA, SCI and the Congressional Sportsmen’s Foundation and others.

Nevertheless, it was the dissenting opinion of Justice Alito that better recognizes the validity and societal acceptability of hunting. Justice Alito states that the majority opinion “analysis rests primarily on the proposition that section 48 substantially restricts the sale and possession of hunting depictions.” His dissenting opinion does not take issue with majority’s determination of the value and societal approval of hunting and fishing. He fully agrees with that valuation. He dissented because he would have not stricken the statute because hunting is so inherently accepted by society that any broad interpretation that hunting was included was far-fetched. He “would hold that section 48 (the statute) does not apply to depictions of hunting” for two reasons. First, that hunting is not animal cruelty. “Virtually all state laws prohibiting animal cruelty either expressly define the term ‘animal’ to exclude wildlife or else spe-

cifically exempt lawful hunting activities.” In an Appendix, the Justice attached a chart of all state laws from Alaska to Wyoming exempting hunting by definition from cruelty prohibitions.

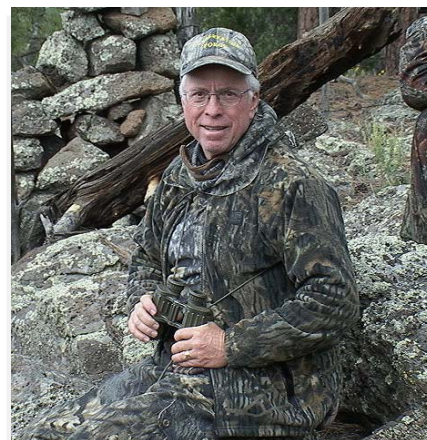
In the second leg of his position, the dissenting Justice is even more complimentary. “Second, even if the hunting of wild animals were otherwise covered by §48(a), I would hold that hunting depictions fall within the exception in §48(b) for depictions that have ‘serious’ (i.e., not ‘trifling’) ‘scientific,’ ‘educational,’ or ‘historical’ value. While there are certainly those who find hunting objectionable, the predominant view in this country has long been that hunting serves many important values, and it is clear that Congress shares that view. Since 1972, when Congress called upon the President to designate a National Hunting and Fishing Day, see S. J. Res. 117, 92d Cong., 2d Sess. (1972), 86 Stat. 133, Presidents have regularly issued proclamations extolling the values served by hunting. See *Presidential Proclamation No. 8421*, 74 *Fed. Reg.* 49305 (*Pres. Obama 2009*) (hunting and fishing are ‘ageless pursuits’ that promote ‘the conservation and restoration of numerous species and their natural habitats’); *Presidential Proclamation No. 8295*, 73 *Fed. Reg.* 57233 (*Pres. Bush 2008*) (hunters and anglers ‘add to our heritage and keep our wildlife populations healthy and strong,’ and ‘are [\*48] among our foremost conservationists’); *Presidential Proclamation No. 7822*, 69 *Fed. Reg.* 59539 (*Pres. Bush 2004*) (hunting and fishing are ‘an important part of our Nation’s heritage,’ and ‘America’s hunters and anglers represent the great spirit of our country’); *Presidential Proclamation No. 4682*, 44 *Fed. Reg.* 53149 (*Pres. Carter 1979*) (hunting promotes conservation and an appreciation of ‘healthy recreation, peaceful solitude and closeness to nature’); *Presidential Proclamation No. 4318*, 39 *Fed. Reg.* 35315 (*Pres. Ford 1974*) (hunting furthers ‘appreciation and respect for nature’ and preservation of the environment). Thus, it is widely thought that hunting has ‘scientific’ value in that it promotes conservation,

‘historical’ value in that it provides a link to past times when hunting played a critical role in daily life, and ‘educational’ value in that it furthers the understanding and appreciation of nature and our country’s past and instills valuable character traits. And if hunting itself is widely thought to serve those values, then it takes but a small additional step to conclude that depictions of hunting make a non-trivial contribution to the exchange of ideas. Accordingly, I would hold that hunting depictions fall comfortably within the exception set out in §48(b).

“I do not have the slightest doubt that Congress...had no intention of restricting the creation, sale, or possession of depictions of hunting. Proponents of the law made this point clearly. See H.R. Rep. No. 106-397, p. 8 (1999) (hereinafter H.R. Rep.) (‘[D]epictions of ordinary hunting and fishing activities do not fall within the scope of the statute’); 145 Cong. Rec. 25894 (Oct. 19, 1999) (Rep. McCollum) (‘[T]he sale of depictions of legal activities, such as hunting and fishing, would not be illegal under this bill’); *id.*, at 25895 (Rep. Smith) (‘[L]et us be clear as to what this legislation will not do. It will in no way prohibit hunting, fishing or wildlife videos’). Indeed, even *opponents* acknowledged that §48 was not intended to reach ordinary hunting depictions....”

Because this was a First Amendment case, Conservation Force signed on to the Outdoor Media Amici Curiae brief, POMA, et al. That POMA brief pointed out that “by its plain terms, the statute sweeps broadly: it criminalizes images ‘where an animal is wounded or killed’ even if the underlying conduct, as with lawful hunting and fishing, is legal where it occurred.” It pointed out that “the images covered by the statute are not some small, insignificant set. Over 60 million people participated in hunting and fishing during 2008... Hunters and anglers spend \$76 billion annually on hunting and fishing....”

“Specifically, there is a major industry in publishing and selling outdoor photography that includes images of harm to animals – e.g., a pheasant



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being shot or a fishing wriggling on a line. Magazines like *Field and Stream*, *American Hunter* and *Outdoor Life* each have circulation numbers of over 900,000. See *Advertising Age, Magazine Circulation Rankings 2006, Data Center*, at [http://adage.com/datacenter/datapopup.php?article\\_id=115101](http://adage.com/datacenter/datapopup.php?article_id=115101) (last visited July 24, 2009). Television networks showing hunting and fishing, including Sportsman Channel and ESPN Outdoors, are seen in many millions of homes.

“Furthermore, this speech is a real and important part of the marketplace of ideas. These pictures and videos are used for education in hunting and fishing technique, artistry in showing hunters and fishers practicing their trade, telling a story of how particular hunters and fishers work, and simple entertainment. Moreover, they are a valuable part of the legal debate itself over what kinds of hunting or fishing should be allowed or prohibited.

“The United States suggests that there is a compelling interest in preventing illegal conduct... and that the statute ‘only applies to depictions of illegal conduct.... However, this statement is demonstrably false. All of the covered images discussed above are of wholly lawful conduct. And there is no government interest – let alone a compelling one – in stopping hunting and fishing that is perfectly legal where it is practiced.”

The NRA is the largest hunting organization in the world. In its Amicus brief the NRA pointed out it is the oldest civil rights organization in America, founded in 1871. It said approximately 20 million people in the US engage in various forms of hunting. The NRA pointed out that it condemns animal cruelty, but the statute on its face criminalized a wide swath of protected speech related to hunting. It pointed out that “[a]lthough apparently intended to address only depictions of depraved animal cruelty such as crush videos, Section 48 also criminalizes hunting-related media that indisputably is entitled to First Amendment protection. For example, all of the following fall within Section 48(a)’s criminal prohibition: selling a

video depicting a deer hunt to a citizen of the District of Columbia, showing a television program depicting a dove hunt to a citizen of Iowa, or selling a magazine with a photograph of a mountain lion hunt to a citizen of California. Yet organizations like the NRA, retailers like Wal-Mart and Amazon.com, and media companies like ESPN create and sell these types of media into these states every day, and therefore potentially run afoul of Section 48.”

The NRA described hunting in the United States. “Since the founding of this country, countless Americans have hunted for sustenance and for sport. According to a survey by the National Sporting Goods Association, during 2008, 6.2 million Americans hunted with a bow and arrow and 18.8 million Americans hunted with a firearm. In 2006, hunted 220 million days and took 185 million hunting trips....



“The societal benefits of hunting are many. For example, the US Fish & Wildlife Service recognizes that ‘hunting is an important tool for wildlife management’ that ‘gives resource managers a valuable tool to control populations of some species that might otherwise exceed the carrying capacity of their habitat and threaten the well-being of other wildlife species, and in some instances, that of human health and safety.’ US Fish & Wildlife Service, *Hunting*, at <http://www.fws.gov/hunting>.

“According to a study by the Association of Fish & Wildlife Agencies – the organization that represents all of North America’s fish and wildlife agencies – if hunting were stopped, the following year there would be an additional 50,000 human injuries as a re-

sult of a 218 percent increase in auto-deer collisions, and auto repair costs related to auto-wildlife collisions would surge from \$1.2 billion to \$3.8 billion. Animal Use Issues Committee of the International Association of Fish and Wildlife Agencies, *Potential Costs of Losing Hunting and Fishing as Wildlife Management Tools*, at 6 (May 25, 2005), at [http://www.fishwildlife.org/pdfs/costs\\_of\\_losing\\_huntingandtrapping\\_US-Canada.pdf](http://www.fishwildlife.org/pdfs/costs_of_losing_huntingandtrapping_US-Canada.pdf).

“Finally, hunters are the primary financiers (to the tune of more than \$1.5 billion per year) of conservation programs in the United States. See National Shooting Sports Foundation, at <http://www.nssf.org/hunting/>.

“Given hunting’s societal benefits, and its deep roots in this country, it is not surprising that the federal and state governments protect and promote hunting. In fourteen states, the right to hunt is explicitly preserved by the state constitution. Ala. Const. amend. 597; Del. Const. art. I, §20; La. Const. art. I, §27; Minn. Const. art. XIII, §12; Mont. Const. art. IX, §7; Neb. Const. art. I, §1; Nev. Const. art. I, §11; N.M. Const. art. II, §6; N.D. Const. art. I, §1 & art. XI, §27; Okla. Const. art. II, §36; Vt. Const. ch. II, §67; Va. Const. art. XI, §4; W. Va. Const. art. III, §22; Wis. Const. art. I, §25 & art. I, §26. Every state has a hunter anti-harassment law.

“In addition to various state initiatives to promote hunting, President George W. Bush ordered federal agencies in 2007 ‘to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat.’ Exec. Order No. 13,443, 72 Fed. Reg. 46,537 (Aug. 20, 2007). Moreover, the US Fish & Wildlife Service currently states on its website that, ‘[w]orking together with the US Forest Service, Bureau of Land Management, and 17 sportsmen organizations, the Service continues to promote and improve access to federally-managed public lands for hunters and anglers... Hunters and anglers, who are often called the original conservationists, are among our greatest partners.’ US Fish & Wildlife Service, *Hunting and Fishing*, at [www.fws.gov/home/huntingandfishing/](http://www.fws.gov/home/huntingandfishing/).

## “Serving The Hunter Who Travels”

“Despite being widespread, socially beneficial and encouraged by both state and federal governments, there are some who hold extreme negative views on the subject of hunting....These views are not shared by the vast majority of Americans. Approximately 73% of Americans support legalized hunting. See Congressional Sportsmen’s Foundation, *Hunting and Fishing: Bright Stars in the American Economy*, at 13 (‘Bright Stars’), available at <http://www.nssf.org/07report/CompleteReport.pdf> (last visited July 23, 2009). Very few Americans would equate legal hunting with animal cruelty such as in crush videos. But the existence of organized, well-funded, and outspoken hatred for hunting must be considered in evaluating the potential for abuse of Section 48.

“Hunting not only provides food, recreation and social benefits, but also supports jobs and economic activity on which thousands rely. Surveys indicate that hunting contributes anywhere from \$34 billion to more than \$30 billion annually to the US economy and supports approximately 600,000 to 1 million jobs. See National Shooting Sports Foundation, at <http://www.nssf.org/hunting>; 2006 wildlife Survey at 4-6; Bright Stars at 7.”

The SCI and Congressional Sportsmen’s Foundation brief stated that, “[t]o allow Section 48 to encompass legal hunting activities would interfere with and jeopardize conduct that is of great value to society and to the environment, at least to the extent these depictions help encourage hunting. Hunting plays a strategic role in wildlife management and conservation throughout the world. Courts, presidents, state legislatures and federal agencies have acknowledged the benefits of hunting....

“[B]eing one of the priority wildlife-oriented recreational activities on hundreds of National Wildlife Refuges, hunting serves to control wildlife populations and to improve habitat. For example, hunting of deer and geese on Moosehorn National Wildlife Refuge (‘NWR’) in Maine helps the US Fish and Wildlife Service (‘FWS’) improve habitat for a variety of the refuge’s

migratory bird populations:

A lack of hunting on the refuge diminishes the Refuge’s ability to manage wildlife populations. Wildlife habitats susceptible to damage, such as native wetlands and marshes, would continue to be overgrazed by increasing numbers of resident Canada geese, resulting in increasingly degraded habitat for black ducks, green-winged teal and other ducks, as well as sora, Virginia rail and other waterbirds



(Haramis and Kearns 2000). Likewise, an increased local deer population to a density of 15-20 deer per square mile would likely negatively affect forest regeneration, resulting in degradation of habitat for woodcock, chestnut-sided warbler, and other migratory birds that use regenerating forest; negative effects of deer browsing on forest regeneration have been demonstrated by numerous researchers (see review by

Russell et al. 2001) when deer population densities have reached 15-20 deer per square mile.

Amended Environmental Assessment, Public Hunting on Moosehorn NWR, April 2007, p.28, <http://www.fws.gov/northeast/pdf/moosehorn.pdf> (retrieved July 16, 2009).

“Federal law has also made hunting an essential component of the financial aspect of wildlife and habitat management and conservation throughout the United States. The Federal Aid in Wildlife Restoration Act, 16 U.S.C. § 669 *et seq.* (1937), directs a portion of the excise tax on sporting arms and ammunition to the states to finance approved projects involving wildlife habitat, introduction of wildlife onto habitat and wildlife research. Under the Federal Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. § 718a *et seq.* (1934), ‘duck stamps’ serve as the license for hunting migratory waterfowl and the means of funding the conservation of those waterfowl. State of the Birds, p.20 (2009) (duck stamps purchased primarily by hunters have generated over \$700 million for wetland conservation) [http://www.stateofthebirds.org/pdf\\_files/State\\_of\\_the\\_Birds\\_2009.pdf](http://www.stateofthebirds.org/pdf_files/State_of_the_Birds_2009.pdf) (retrieved July 15, 2009).

“Legal hunting activities take place around the country and around the world. The images of hunting on which SCI, CSF and other groups rely, depict these legal activities to promote increased participation in hunting and the recruitment of new hunters. Hunting enhances the environment and brings joy to those who use the outdoors and should therefore be encouraged. Hunting media play a significant role in those efforts.”

The *antis* filed Amicus briefs, but with the exception of depictions of hog hunting with dogs, they left hunting alone.

The very idea that the depiction of legal hunting in another state where it is not legal is a criminal felony was outrageous. This court decision should help Congress and state legislatures be more careful in excluding lawful hunting activities from prohibition. – *John J. Jackson, III.*

### Conservation Force Sponsor

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