

Supreme Court Rules That Beef Check-Off Is Government Speech; But Check-Off Litigation May Not Be Over

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- by Roger McEowen

Overview

On May 23, 2005, the U.S. Supreme Court upheld the federally-mandated beef promotion program against a First Amendment challenge on the basis that the program constituted government speech. The Court, however, left open the possibility that the beef check-off could be successfully challenged on First Amendment grounds if it can be shown on remand that the advertisements attribute their generic pro-beef message to the plaintiffs. As such, the Court's ruling does not necessarily end the beef check-off litigation, and is not entirely precedential for the pork check-off litigation that awaits a determination as to whether the Supreme Court will hear the case.

The Statutory Framework

The Beef Promotion and Research Act (Act) was passed by the Congress as part of the Food Security Act of 1985. Under the statute, the Secretary of Agriculture (Secretary) was directed to issue a Beef Promotion and Research Order (Order). The Act also directed the Secretary to appoint a Cattlemen's Beef Promotion and Research Board (Board) which convened an Operating Committee (Committee) and imposed a \$1 per-head assessment (the "check-off") on all sales or importation of cattle, which is to be used to fund beef related projects, including promotional campaigns designed by the Committee and approved by the Secretary.

It is clear from the legislative history of the Act that the program was only intended as enabling legislation to establish an industry "self-help" program.

The Government Speech Issue

The case involved (in the majority's view) a narrow facial attack on whether the statutory language of the Act created an advertising program that could be classified as government speech. That was the only issue before the Court. While the government speech doctrine is relatively new and is not well-developed, prior Supreme Court opinions not involving agricultural commodity check-offs indicated that to constitute government speech, a checkoff must clear three hurdles - (1) the government must exercise sufficient control over the content of the check-off to be deemed ultimately responsible for the message; (2) the source of the check-off assessments must come from a large, non-discrete group; and (3) the central purpose of the check-off must be identified as the government's. Based on that analysis, it was believed that the beef check-off would clear only the first and (perhaps) the third hurdle, but that the program would fail to clear the second hurdle. Indeed, the source of funding for the beef check-off comes from a discrete identifiable source (cattle producers) rather than a large, non-discrete group. The point is that if the government can compel a targeted group of individuals to fund speech with which they do not agree, greater care is required to ensure political accountability as a democratic check against the compelled speech. That is less of a concern if the funding source is the taxpaying public which has access to the ballot box as a means of neutralizing the government program at issue and/or the politicians in support of the program. While the dissent focused on this point, arguing that the Act does not establish sufficient democratic

checks, Justice Scalia, writing for the majority, opined that the compelled-subsidy analysis is unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. That effectively eliminates the second prong of the government speech test. The Court held that the other two requirements were satisfied inasmuch as the Act vests substantial control over the administration of the check-off and the content of the ads in the Secretary.

Unresolved Issue

The court did not address (indeed, the issue was not before the court) whether the advertisements, most of which are credited to “America's Beef Producers,” give the impression that the objecting cattlemen (or their organizations) endorse the message. Because the case only involved a facial challenge to the statutory language of the Act, the majority examined only the Act's language and concluded that neither the statute nor the accompanying Order *required* attribution of the ads to “America's Beef Producers” or to anyone else. Thus, neither the statute nor the Order could be facially invalid on this theory. However, the Court noted that the record did not contain evidence from which the Court could determine whether the actual application of the check-off program resulted in the message of the ads being associated with the plaintiffs. Indeed, Justice Thomas, in his concurring opinion, noted that the government may not associate individuals or organizations involuntarily with speech by attributing an unwanted message to them whether or not those individuals fund the speech *and whether or not the message is under the government's control*. Justice Thomas specifically noted that, on remand, the plaintiffs may be able to amend their complaint to assert an attribution claim which ultimately could result in the beef check-off being held unconstitutional. If those facts are developed on remand, and the ads are found to be attributable to the complaining ranchers or their associated groups, the beef check-off could still be held to be unconstitutional.

Implications of the Decision

It seems clear from the opinion that the Secretary now must take steps to affirmatively exercise the authority vested in the Secretary under the Act, and run the check-off as the government program that the Court says it is. Likewise, organizations that

purport to speak for ranchers must actually represent them – failure to do so, coupled with receipt of check-off dollars (or indirect benefit from check-off dollars), will bolster a constitutional claim by members of non-check-off recipient cattle organizations (who must pay the assessment) on freedom of association grounds.

The opinion is also not entirely precedential for the pending pork check-off litigation. That case involves not only a government speech issue, but also a freedom of association claim. Thus, the pork case contains a remaining open claim on the compelled association issue.

The opinion may prove ultimately to not be that useful of a precedent on the government speech issue. Only four of the six justices that formed the majority in the case really believe that the beef ads constitute government speech. Justice Ginsburg concurred separately and stated that while she did not believe the beef ads amounted to government speech, the majority reached an adequate decision for the wrong reason. Justice Breyer also concurred separately and stated his continued belief that the beef check-off is a permissible form of economic regulation, but that the majority's government speech theory was an acceptable solution.

In any event, the majority opinion would appear to expand the application of the government speech doctrine. Apparently it is no longer the rule that permissible compelled public support for speech is limited to situations where the government does not exercise control over the speech and takes a viewpoint-neutral approach that lets private parties determine the content of the speech being supported.

What remains clear is that check-off funds cannot be used to promote the check-off itself.

What's Next?

The Court remanded the case to the Federal District Court in South Dakota. The Livestock Marketing Association will have to decide whether it will continue the litigation on the ad attribution rationale suggested by Justice Thomas. Beyond that, it is difficult to determine why the Court seemingly expanded the government speech doctrine. Clearly, Justices Scalia, Thomas and Rehnquist (all part of the majority) are sympathetic to the government

speech analysis in the context of abortion, and they may have ruled as they did in the beef case to expand the government speech doctrine for application in a case they will decide next term involving a federal law (known as the Solomon Amendment) that removes federal funds from institutions of higher education that do not permit military recruiters on campus. That case has been positioned as a government speech case (among other claims), and in late 2004 the United States Court of Appeals for the Third Circuit ruled that the Solomon Amendment was unconstitutional because it forced schools to agree with the government's policy of allowing gays to serve in the military only if they do not openly declare their sexual orientation.

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