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Roger A. McEowen
Iowa State University

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

-by Roger A. 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.¹ 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.² As such, the Court’s ruling does not necessarily end the beef check-off litigation, and is not entirely precedent for the pork check-off litigation that awaits a determination as to whether the Supreme Court will hear the case.³

The Statutory Framework

The Beef Promotion and Research Act⁴ (Act) was passed by the Congress as part of the Food Security Act of 1985.⁵ Under the statute, the Secretary of Agriculture (Secretary) was directed to issue a Beef Promotion and Research Order (Order).⁶ The Act also directed the Secretary to appoint a Cattlemen’s Beef Promotion and Research Board (Board)⁷ which convened an Operating Committee (Committee) and imposed a $1 per-head assessment (the “check-off”)⁸ 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.⁹

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.¹⁰

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 check-off 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.¹¹ Based on that analysis, it was believed that the beef check-off would clear only the first and (perhaps)

* Associate Professor of Agricultural Law, Department of Agricultural Education and Studies, Iowa State University, Ames, Iowa. Member of the Nebraska and Kansas Bars.
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 “American’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 “American’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 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.
FOOTNOTES


2. Justice Thomas, in his concurring opinion, noted that the respondents (the original plaintiffs in the case) may be able to amend their complaint on remand to assert an attribution claim.


4. 7 U.S.C. § 2901 et. seq.


7. 7 U.S.C. § 2904(1).


10. See, e.g., 121 Cong. Rec. 38,116 (only “self-help” legislation proper for industry not traditionally recipient of government subsidies) (statement of Sen. Hansen); 121 Cong. Rec. 31,439 (“In keeping with their true free enterprise nature, cattlemen are asking only for enabling legislation”) (statement of Rep. Santini). In United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), the court stated, “The purpose underlying the Beef Promotion Act is ideologically neutral. The federal government...harbors no intent to prescribe orthodoxy or communicate an official view.”


12. See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995) (“[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message”).

13. See, e.g., Abbood v. Detroit Board of Education, 431 U.S. 209 (1977) (noting that reason for allowing the government to compel payment of taxes and to spend money on controversial projects is that government is representative of the people); Massachusetts v. Mellon, 262 U.S. 447 (1923) (noting that when government speech is funded with general tax revenue no individual taxpayer or groups of taxpayers can lay claim to special, or even strong, connection to money spent).

14. Indeed, Justice Souter, in his dissent, noted that the Act did not even require the beef ads to show any sign of being speech by the government and that experience has shown how effective the government has been at masking its role in producing the ads.

15. In any event, the majority opined that the beef advertisements were subject to sufficient political safeguards inasmuch as the basic message of the ads is prescribed by federal statute, specific requirements for the ads’ content are imposed by federal regulation promulgated after notice and comment, and that the Secretary (whom the court termed a politically accountable official – albeit unelected) has the statutory authority to oversee the program, appoint and dismiss key personnel and exercise veto power over the content of the ads.

16. The Court noted that while the advertising was controlled by non-governmental entities (the Board and Committee) the message was effectively controlled by the Federal Government. Congress and the Secretary, the majority pointed out, pursuant to the Act, have the authority to establish the overarching message and some of the campaign’s elements and have left the development of the remaining details to the Committee, half of whose members are appointed by the Secretary and all of whom are subject to removal by the Secretary. The majority also noted that the statutory language gave the Secretary final approval authority over every word in every promotional campaign, and that government officials attend and participate in meetings at which proposals are developed.

17. Justice Souter, in his dissenting opinion, pointed out that the challenge involved in the case was to the application of the statute through actual, misleading ads, not just, as the majority viewed the case, a facial challenge to the statutory language.


19. See note 2 supra.

20. That undoubtedly requires more than mere acquiescence to the decisions of the Board.

21. This is an important point given the growing number of cattlemen in recent years that are subject to the mandatory assessment, but are members of the producer group. R-CALF USA, that does not receive check-off dollars or indirect benefits from the check-off and is often politically opposed to the policy positions of the national cattle group that does receive check-off dollars and indirect check-off benefits.


23. The First Amendment provides for the right of people peaceably to assemble. The Supreme Court has expressly recognized that a right to freedom of association and belief is implicit in the First, Fifth and Fourteenth Amendments. This implicit right is limited to the right to associate for First Amendment purposes. The right of freedom of association prevents the government from compelling individuals to express themselves, hold certain beliefs, or belong to particular associations or groups. Thus, the concurring opinion of Justice Thomas points out that if the beef ads can be tied to the particular plaintiffs in the case, a violation of the freedom of association may be present because the government cannot compel individuals to hold certain beliefs even though the speech involved is government speech.
it is reasonable to believe he would have sided with the majority in Rust.


29 Id.

CASES, REGULATIONS AND STATUTES
by Robert P. Achenbach, Jr

ANIMALS

HORSES. The plaintiff was employed by the defendant as a stable hand and was injured while walking a horse in a barn as part of the plaintiff’s duties. The horse stepped on the plaintiff’s foot after being spooked by the barking of one of the defendant’s dogs. The plaintiff argued that the defendant was negligent in failing to properly restrain the dog. The court held that the defendant did not owe a duty to the plaintiff to restrain the dog because the existence of dogs and their interaction with horses was not an abnormally dangerous condition on a farm. In addition, the court noted that there was no evidence that the dog had any history of barking at the horses while the horses were in the barns. Rodriguez v. Gauger, 2005 Mich. App. LEXIS 1127 (Mich. Ct. App. 2005).

ADVERSE POSSESSION

FENCE. The disputed strip of land was located on the plaintiff’s side of a fence but was part of the recorded land of the defendant. Both parties used their land for farming and the evidence demonstrated that the plaintiff used the disputed strip as part of the plaintiff’s farming operations, relying on the fence as the boundary line between the properties. The defendant argued, however, that the plaintiff’s use of the strip was permissive because the fence was built to accommodate the plaintiff’s cattle access to a pond. The defendant also cited use of the disputed strip by the defendant and family for hunting and hiking. The trial court had granted summary judgment to the defendant based on the permissive use of the disputed land and the defendant’s use of the land. The appellate court reversed and remanded the case for trial, holding that the plaintiff had raised sufficient evidence to create an issue of fact as to whether the fence existed when the plaintiff’s father purchased the land, thus removing the possibility that the fence was built with the permission of the defendant. The court also rejected the claim that the defendant’s use of the disputed strip was sufficient to defeat the adverse possession claim, because the defendant’s use occurred after title would have passed by adverse possession. Wadsworth v. Thompson, 2005 Ala. Civ. App. LEXIS 257 (Ala. Ct. App. 2005).

The disputed strip of land was located on the defendant’s side of a fence but was part of the recorded title for the plaintiff’s land. The defendant had leased the plaintiff’s land for many years from the previous owners of the plaintiff’s property. However, the defendant pointed to the previous owner’s use of the defendant’s land as including the disputed strip for sufficient time for title to pass by adverse possession. The court held that the defendant could claim title by adverse possession under the previous owner’s adverse use of the land up to the fence if the defendant had received title through written conveyances which indicated that the conveyance included the land up to the fence. The court held that the defendant’s claim was supported by sufficient evidence to raise an issue of fact to reverse the trial court’s summary judgment ruling for the plaintiff. Moser v. Batchelor, 2005 Tex. App. LEXIS 3702 (Tex. Ct. App. 2005).

BANKRUPTCY

GENERAL

EXEMPTIONS

EARNED INCOME TAX CREDIT. The debtor claimed an exemption, under Ala. Code § 38-4-8, for a federal income tax refund which resulted from the earned income tax credit (EITC). The state exemption applied to amounts paid as public assistance. The court held that the EITC qualified as an amount paid as public assistance and allowed the exemption. In re James, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,367 (11th Cir. 2005).