

PolicyPennings by Dr. Daryll E. Ray

# Checkoff lawsuits: It ain't over 'till its over

To listen to some of the comments that have been made since the US Supreme Court ruling on the beef checkoff, it would be easy to think that the checkoff programs are on solid legal grounds and that the other checkoff cases will be dismissed. In fact, one such headline read; “Supreme Court Rules That Beef Checkoff Program Is Constitutional.” While that may eventually prove to be true, that is not what the Supreme Court ruled in this particular case. Let’s look at what the Supreme Court justices actually ruled.

To help us in our efforts, since we are agricultural economists and not lawyers, we sought the aid of a colleague of ours, Chris Clark, to look more deeply into what the justices did and didn’t say in their ruling. Clark was a practicing attorney before returning to graduate school to complete his PhD. He is currently on the faculty here at The University of Tennessee and teaches classes in both agricultural economics and agricultural law.

Clark notes that because the lower courts invalidated the beef checkoff program solely on First Amendment or “freedom of speech” grounds, the only issue before the Supreme Court was whether or not the program violated the free speech rights of beef producers who “disagreed” with the program’s generic “Beef. It’s what’s for dinner” advertising campaign. Thus, in overturning the lower court decisions, the Supreme Court simply held that the legislation authorizing the use of checkoff proceeds to fund an advertising campaign did not violate the First Amendment because it was “Government speech” that is exempt from First Amendment scrutiny.

In so doing, the Supreme Court also broke with one of its previous decisions that held that a similar law constituted “compelled speech” that violated freedom of speech right guaranteed by the First Amendment. In a 2001 ruling, the Supreme Court, in the mushroom checkoff case (US vs. United Foods), ruled that forcing mushroom producers to fund a mushroom advertising campaign violated their free speech rights because of the compelled nature of the funding mechanism, in the absence of other regulatory purposes. The issue of whether the campaign constituted “government speech” was not raised in that case.

Those challenging the beef checkoff made several arguments in support of their position that the advertising constituted compelled speech. First they argued that the speech cannot be the government’s because it is developed by the Beef Board and its Operating Committee. In response to this, Justice Scalia, writing for the majority, opined, “When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the

government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.”

The second point of challenge was “that the beef program does not qualify as ‘government speech’ because it is funded by a targeted assessment on beef producers, rather than by general revenues.” Negating this argument, Scalia wrote that the Court’s “analysis is altogether unaffected by whether the funds for the promotion are raised by general taxes or through a targeted assessment.”

The next point the challengers raised was that “crediting the advertising to ‘America’s Beef Producers’ impermissibly uses not only their money but also their seeming endorsement to promote a message with which they do not agree.” Because the legislation authorizing the checkoff does not require that the ads be attributed to “America’s Beef Producers,” and because insufficient sample material was presented to the court, the court did not rule on the validity of this argument.

However, Scalia’s majority opinion make it clear that the ads could be considered “compelled speech” and thus a violation of the First Amendment, if “a viewer would identify the speech as *respondent’s* [those challenging the checkoff].” Thus, while the Court has held that the program itself does not violate the First Amendment, the fate of the “brought to you by America’s Beef Producers” tagline remains much less clear.

In the final two paragraphs of the majority opinion, Scalia notes that those challenging the program have “asserted a number of other grounds for declaring the Beef Act, the Beef Order, or both invalid in their entirety.” Because the District Court did not have an occasion to address these other grounds, the “cases are remanded for further proceedings consistent with this opinion.”

Translated, that means that the District Court will now be hearing the other issues that were raised by the opponents of the beef checkoff, unless they were to drop the case. As Yogi Berra said, “It ain’t over till its over.”

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