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COOL gets another boost from U.S. courts, awaits WTO

By Jenny Hopkinson

The decision Tuesday by the U.S. Court of Appeals for the D.C. Circuit to uphold the Agriculture Department's country-of-origin labeling rules for meat looks to "disembowel" court precedent and put "crony capitalism or ideological arm-twisting" ahead of first amendment rights.

But that's just what one of the two dissenting judges had to say about it.

The nine judges who ruled in favor of USDA's controversial COOL rules say instead, that the government has a "substantial" interest in requiring meat processors to label where livestock was born, raised and slaughtered, including food safety concerns. And thus, the USDA's rules are not compelled speech in violation of the First Amendment, as the meat processing industry has charged.

The opinion issued today in *American Meat Institute, et al. v. USDA* comes even as the meat industry, cattle ranchers and other countries with an interest in importing meat and poultry into the United States await the publication of a final ruling by the World Trade Organization on whether the USDA labeling requirements constitute an unfair trading practice.

Copies of an interim WTO ruling -- which is believed to favor a challenge to USDA's COOL rules by Mexico and Canada -- were given to the department and other countries involved at the end of June, though the ruling has not yet been made public.

If the WTO rules against USDA, then "we have a conflict," said Bill Bullard, CEO of R-CALF USA and a supporter of USDA's COOL rule. "On the one hand our law has been deemed in full compliance with the constitution and with our statutes, and on the other hand, we have this unelected, un-appointed international tribunal who may well weaken that law."

Bullard added: "I think this could be an example of U.S. sovereignty being under attack."

But the USDA, Bullard and other supporters of the COOL rule might have at least a few days to enjoy their victory.

"This landmark ruling supporting common-sense consumer disclosure rules that are, as the court noted, 'purely factual and uncontroversial' ensures all Americans can know the source of the food they feed their families," Wenonah Hauter, executive director of Food & Water Watch, said in a statement.

"American consumers want to know basic information about where their meat comes from, and livestock producers across this great nation are very proud of what they produce and happy to let consumers know where their meat comes from" said National Farmers Union President Roger Johnson. "USDA's new COOL rules will significantly improve the information available to consumers by reducing confusion about the origins of meat products. It will also provide U.S. livestock producers the opportunity to differentiate their products, which they are proud to claim as theirs."

Rather than extolling the virtues of COOL for U.S. livestock producers, Senior Judge Stephen Williams, in his 18-page majority opinion, defends the right of the government to require the labels. He says "several aspects of the government's interest in country-of-origin labeling for food combine to make the interest substantial: the context and long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak."

What's more, given the long-standing use of labeling across a range of products -- from pens, to razors to clothing -- "country-of-origin information has an historical pedigree that lifts it well above 'idle curiosity,'" Williams wrote.

His opinion is backed by Chief Judge Merrick Garland as well as judges David Tatel, Thomas Griffith, Sri Srinivasan, Cornelia Pillard and Robert Wilkins, with judges Judith Rogers and Brett Kavanaugh issuing concurring opinions.

AMI calls the ruling "disappointing" and reiterates its concerns that "the country of origin rule harms livestock producers and the industry and affords little benefit to consumers." The trade association says it is "still evaluating" whether it will petition the Supreme Court for a review. Should it choose to do so, the arguments laid out by the judges who disagreed with the decision could help the industry make its case.

In a blistering 34-page dissenting opinion -- nearly twice as long as the favorable majority finding -- Judge Janice Rogers Brown, joined by Judge Karen LeCraft Henderson, argues that the rational of the other judges "is a jumble, a messy amalgam of standards, legislative history and administrative procedure."

The potential effect of the ruling, Brown continues, could be that "a business owner no longer has a constitutionally protected right to refrain from speaking, as long as the government wants to use the company's product to convey 'purely factual and uncontroversial' information."

USDA has defended its rule by arguing that it would require a factual and non-controversial disclosure of information that is needed to inform the public.

However, it was the court, Brown argued in her dissent, that brought "buy American" sentiment into the department's argument.

"Not only has the agency failed to raise or support any protectionist motive, it has, in fact, consistently denied one," Brown wrote.

"By substantiating the government's nebulous interests, the court essentially permits the government to commandeer the speech of others. There is no limiting principle for such a flimsy interest as the government asserted in this case," Brown continued. "More alarmingly, such self-referential interests can be marshaled in aid of any sort of crony capitalism or ideological arm-twisting. This labeling scheme is only one example."

The lawsuit against COOL was originally filed by AMI and several other groups in July 2013, roughly two months after USDA issued its revised rules to require meat products to include labels providing details about where the sourced livestock was "born, raised and slaughtered," among other things.

Following a September 2013 ruling rejecting AMI's initial complaint, the group appealed to the D.C. Circuit, where a three-judge panel sided with the USDA in March, noting that there are clear government interests for providing information to consumers and promoting American products through the labeling rules. But it lobbed the issue of whether the meat industry's speech rights were violated to the full court, suggesting the larger panel might resolve for the circuit whether "government interests in addition to correcting deception can sustain a commercial speech mandate that compels firms to disclose purely factual and non-controversial information."

And at least one judge hints that more review may be necessary. In her concurring opinion, Rogers argues that while she backs the court's conclusions, its interpretations of some precedent could be "blurring the lines between the standards" laid out in those rulings. As a result, the *en banc* opinion could result in "unnecessary confusion absent further instruction from the Supreme Court."

But those who favor Tuesday's ruling think they've heard enough from the courts.

"This marks the third time that COOL has won in court. There is no need for this case to proceed," said NFU's Johnson.

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