

ISSUE BRIEF

No. 4466 | SEPTEMBER 29, 2015

The Federal Government Should Stop Limiting the Sale of Certain Fruits and Vegetables

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In June 2015, the United States Supreme Court decided *Horne v. Department of Agriculture*,¹ a case regarding the federal government's authority to fine raisin growers who did not hand over part of their crop to the government. Fortunately, the court held that forcing growers to turn over their raisins was a taking of private property requiring just compensation.

While the "raisin case" received much attention because of the outrageous nature of the government's actions, it is far from unique. In particular, the United States Department of Agriculture (USDA) uses its power to enforce a number of cartels through industry agreements known as marketing orders. Fruit and vegetable marketing orders² allow the federal government to authorize supply restrictions limiting how much of their goods agricultural producers may sell. While these marketing orders should be eliminated, this *Issue Brief* focuses on arguably the most egregious aspect of marketing orders: the supply restrictions.

What Are Marketing Orders?

The Agricultural Marketing Agreement Act of 1937³ authorizes the use of fruit and vegetable marketing orders. These New Deal programs attempt

to create stable markets for certain commodities.⁴ Marketing orders, among other things, authorize research and promotion of commodities, establish minimum quality standards, and sometimes limit supply through volume controls.⁵

Each individual order is initiated by industry and must be approved by a two-thirds vote of growers.⁶ Each order is enforced by the USDA and is binding upon the entire industry in the covered geographic area,⁷ regardless of whether an individual agricultural producer has supported it.⁸

In practical terms, an industry uses the power and force of the government to compel everyone affected by the specific order to abide by the order's legally enforceable regulations. In short, by using government to impose an order, industry members opt for government compulsion rather than private cooperation. Some order provisions, such as attempts to manipulate the market through volume controls, would likely violate federal antitrust law absent government intervention; in those cases, the government has effectively created fruit and vegetable cartels.⁹ These controls are supposed to help stabilize prices and match supply with demand. Representatives from industry engage in central planning by restricting supply based on what they have determined to be the proper supply of a commodity in a given time period,¹⁰ as opposed to letting the market dictate supply.

Problems with Volume Controls

The very idea that Americans should be unable to sell goods that they produce is outrageous, as is the idea that the federal government allows certain industry players to restrict supply, allegedly to

This paper, in its entirety, can be found at <http://report.heritage.org/ib4466>

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benefit the entire industry. This is a form of price fixing,¹¹ and the federal government gives such action its blessing. Consumer welfare and market demand is ignored,¹² usually at the expense of maximizing income for an industry or possibly just the biggest members involved with the marketing order cartel. The regulations might come at the expense of certain competitors in the industry, possible new entrants, and enterprising suppliers who are trying to meet the demands of the market.

The absurdity of the raisin marketing order was not lost on the U.S. Supreme Court. During

oral arguments in the “raisin case,”¹³ Justice Elena Kagan quipped, “And now, the Ninth Circuit can go and try to figure out whether this marketing order is a taking or it’s just the world’s most outdated law.”¹⁴

Even Justice Sonia Sotomayor, who held that the government had not actually taken the raisins, explained in her dissent: “The Order may well be an outdated, and by some lights downright silly, regulation. It is also no doubt intrusive.”¹⁵

The Supreme Court did hold that the raisin supply restrictions amounted to a taking requiring

1. *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), http://www.supremecourt.gov/opinions/14pdf/14-275_c0n2.pdf (accessed September 28, 2015).
2. These marketing orders cover fruits, vegetables, and specialty crops. See Agricultural Marketing Service, “Marketing Orders for Fruits, Vegetables, and Specialty Crops,” U.S. Department of Agriculture, <http://www.ams.usda.gov/rules-regulations/moa/fv> (accessed September 22, 2015). There are also milk marketing orders, but they are different from fruit and vegetable marketing orders. See Agricultural Marketing Service, “Federal Milk Marketing Orders,” U.S. Department of Agriculture, <http://www.ams.usda.gov/rules-regulations/moa/dairy> (accessed September 22, 2015).
3. Agricultural Marketing Agreement Act of 1937, Public Law 75-137.
4. Agricultural Marketing Service, “Marketing Orders and Agreements,” U.S. Department of Agriculture, <http://www.ams.usda.gov/rules-regulations/moa> (accessed September 22, 2015).
5. See, for instance, the various marketing orders listed for the functions that they perform, Agricultural Marketing Service, “Commodities Covered by Marketing Orders,” U.S. Department of Agriculture, <http://www.ams.usda.gov/rules-regulations/moa/commodities> (accessed September 22, 2015). Also see the marketing order regulations, 7 Code of Federal Regulations § 900 et seq., <http://www.ecfr.gov/cgi-bin/text-idx?SID=4ab8f18d8e1556cd75b8803c9c39db8c&mc=true&tpl=/ecfrbrowse/Title07/7chapterIX.tpl> (accessed September 22, 2015).
6. “If at least two thirds of the growers voting by number or by volume approve the proposal, the Secretary of Agriculture issues the marketing order.” Agricultural Marketing Service, “How to Create a Marketing Order,” <http://www.ams.usda.gov/rules-regulations/moa/howto> (accessed September 22, 2015).
7. *Ibid.* See also, USDA, “Marketing Orders and Agreements.”
8. For a more in-depth review of marketing orders and how they are developed, please see Alden Abbott, “Time to Repeal Agricultural Marketing Orders,” Heritage Foundation *Background* No. 3054, forthcoming.
9. *Ibid.*, footnote 18.
10. See, for instance, “Marketing Order Regulating the Handling of Spearmint Oil Produced in the Far West; Salable Quantities and Allotment Percentages for the 2015–2016 Marketing Year,” *Federal Register*, Vol. 80, No. 50 (March 16, 2015), pp. 13502–13508, <https://www.federalregister.gov/articles/2015/03/16/2015-05681/marketing-order-regulating-the-handling-of-spearmint-oil-produced-in-the-far-west-salable-quantities> (accessed September 22, 2015).
11. See the Federal Trade Commission’s definition of price fixing: “Price Fixing,” Federal Trade Commission, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing> (accessed September 22, 2015).
12. For a good discussion of the impact of supply restrictions in marketing orders, see Thomas Lenard and Michael Mazur, “Harvest of Waste: The Marketing Order Program,” *Regulation: AEI Journal on Government and Society*, Vol. 9, No. 3 (May/June 1985), pp. 19–26, <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1985/5/v9n3-4.pdf> (accessed September 22, 2015).
13. The Supreme Court issued two separate *Horne* opinions (not just the 2015 opinion). In *Horne v. Department of Agriculture*, 133 S. Ct. 2053 (2013) (*Horne I*), which dealt with a jurisdictional question, the court remanded the case back to the Ninth Circuit. See “*Horne v. Department of Agriculture*,” SCOTUS blog, <http://www.scotusblog.com/case-files/cases/horne-v-department-of-agriculture/> (accessed September 28, 2015). The Kagan quote is from the oral arguments in *Horne I*. For a brief summary of the history of the cases, see Jennifer Thompson, “U.S. Supreme Court Grants Cert in *Horne v. U.S.D.A.* aka The Raisin Takings Case,” Liberty Blog, Pacific Legal Foundation, January 16, 2015, <http://blog.pacificlegal.org/u-s-supreme-court-grants-cert-horne-v-u-s-d-aka-raisin-takings-case/> (accessed September 22, 2015).
14. Transcript of oral arguments (March 20, 2013) in *Horne v. Department of Agriculture*, 133 S. Ct. 2053 (2013), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-123_1537.pdf (accessed September 28, 2015).
15. *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015) (Sotomayor dissent).

compensation. However, it did recognize that, as a legal matter, a quota system that directly limited production (rather than setting aside some existing production) would be permissible and not require compensation. This may offer hope to those who want to restrict farmers from being able to enjoy the “fruits of their labor.”

However, as a matter of economics and principle, quotas are likely just as problematic as the taking of commodities. Ultimately, farmers are prevented from selling their fruits and vegetables. As the 8-to-1 majority¹⁶ in *Horne* explained: “A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower.”¹⁷

The Number of Marketing Orders, Volume Controls

There are now 28 fruit and vegetable marketing orders.¹⁸ Of these marketing orders, 10 have authorized volume controls and only two have volume controls that are considered active, i.e., in effect. (See Table 1.)¹⁹

As Table 1 illustrates, volume controls are not that prevalent, so it is clear that such extreme provisions are far from necessary for agricultural producers. However, more volume controls could kick in quickly if those authorized but inactive controls are applied again, or the other orders add volume controls.

This small number may be used as justification for not taking action to address volume controls since

they are not prevalent. However, volume controls do exist still and they are an outrageous restriction imposed upon farmers in the particular industry (one need only ask the farmers in the “raisin case”), and more volume controls can still be adopted. Further, since they are not prevalent now, eliminating these controls makes perfect sense; there is little reason not to.

What Congress Should Do

Congress should eliminate marketing orders altogether. At a minimum, Congress should amend the Agricultural Marketing Agreement Act of 1937 to prohibit volume controls of any kind. Further, the appropriations process should be used to deny funds for the implementation of any marketing order that has volume controls.

This should not be a controversial action. Industry participants covered in almost all of the existing marketing orders (26 of the 28) would not be affected today if volume controls were prohibited. Farmers should be able to grow and sell fruits and vegetables without fear that they could be breaking the law as developed by an industry cartel.

Conclusion

Agricultural policy is dominated by policies that divorce farmers and ranchers from the free market and encourage or require them to respond to

16. This case, *USDA v. Horne*, was decided 8-1 regarding Parts I and II of the case. Justices Breyer, Ginsburg, and Kagan did not join the majority opinion as it related to Part III of the case.

17. *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015).

18. Data from the USDA, “Commodities Covered By Marketing Orders.” See also communication with a USDA spokesperson on September 14, 2015. There are 29 marketing orders listed on the USDA fruit and vegetable marketing order Web page, but the Oregon-California marketing order was terminated as of February 25, 2014. According to the USDA communication, two marketing orders have been suspended, the Virginia-North Carolina potato marketing order and the Washington apricot marketing order. Information on the suspension of the Virginia-North Carolina potato marketing order can be found at *Federal Register*, Vol. 80, No. 62 (April 1, 2015), pp. 17307-17310, <https://www.federalregister.gov/articles/2015/04/01/2015-07320/irish-potatoes-grown-in-southeastern-states-suspension-of-marketing-order-provisions> (accessed September 22, 2015). Suspension of the Washington apricot marketing order at Agricultural Marketing Service, “Suspension of Handling Requirements of Apricots,” U.S. Department of Agriculture, <http://www.ams.usda.gov/rules-regulations/suspension-handling-requirements-apricots> (accessed September 22, 2015). There is a new proposed marketing order for pecans as stated in communications with the USDA; see Agricultural Marketing Service, “986 Pecans,” U.S. Department of Agriculture, <http://www.ams.usda.gov/rules-regulations/moa/986-pecans> (accessed September 22, 2015). The data on the active volume controls were based on the communication with the USDA (and another previous communication); the two active volume controls cover tart cherries and spearmint oil. A review of the USDA marketing order pages does indicate that of the 10 orders with volume controls, six do not have volume controls in effect. The USDA pages do not expressly state that the other four are inactive: Tart cherries and spearmint oil are not said to be inactive (presumably because they are in effect as explained by the USDA via communications), and the pages for cranberries and hazelnuts also do not indicate that their volume controls are inactive. It is not clear why the cranberry and hazelnut pages do not indicate that they are inactive as stated in communications from the USDA.

19. USDA, “Commodities Covered by Marketing Orders,” <http://www.ams.usda.gov/rules-regulations/moa/commodities> (accessed September 23, 2015).

TABLE 1

Current Fruit and Vegetable Marketing Orders

	Volume Controls	
	Authorized	Active
Almonds	✓	
Apricots		
Avocados		
Cherries—Sweet		
Cherries—Tart	✓	✓
Citrus—Florida	✓	
Citrus—Texas		
Cranberries	✓	
Dates	✓	
Grapes		
Hazelnuts	✓	
Kiwifruit		
Olives		
Onions—Idaho—Eastern Oregon		
Onions—South Texas		
Onions—Vidalia		
Onions—Walla Walla		
Pears—Oregon—Washington		
Pistachios		
Plums/Prunes—California (Dried Prunes)	✓	
Potatoes—Idaho—Eastern Oregon		
Potatoes—Washington		
Potatoes—Oregon—California		
Potatoes—Colorado		
Potatoes—Virginia—North Carolina		
Raisins	✓	
Spearmint Oil	✓	✓
Tomatoes		
Walnuts	✓	

Sources: U.S. Department of Agriculture, “Commodities Covered by Marketing Orders,” <http://www.ams.usda.gov/rules-regulations/moa/commodities> (accessed September 23, 2015), and communications with U.S. Department of Agriculture.

a government program or regulation. Marketing orders are a perfect example of farmers focusing on government intervention instead of the market. By eliminating volume controls, Congress can take one step toward allowing farmers to grow and sell legal products as they deem fit, while respecting consumers in the process.

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