



THE BEEF WITH SLAUGHTERING THE SLAUGHTERHOUSE INSPECTOR

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ABSTRACT

This Note spotlights the attempt made by Tyson Foods, Inc. (Tyson) in 2019 to reduce the number of federal inspectors from the post-mortem inspection process in a Kansas beef slaughterhouse and explores the legality of slaughterhouse inspection privatization under the Federal Meat Inspection Act (FMIA). Responding to competition from a growing plant-based meat economy and pressure from recent judicial rulings frustrating the industry's longstanding transparency evasion efforts through ag-gag laws, the slaughterhouse industry sought to capitalize on a political climate that favored increased delegation, decreased regulation, and relaxed enforcement by pushing for slaughterhouse privatization. Opponents of slaughterhouse inspection privatization, however, recognize that the absence of objective federal inspectors closely examining every carcass runs afoul of FMIA's procedural and substantive objectives thus compromising the integrity of the slaughterhouse process and the wholesomeness of the slaughterhouse product.

In stark contrast to the delegation language incorporated in legislation regulating the aerospace industry, the finite breadth of FMIA's safeguards, which extend only to appointed federal employees, reinforces the court's disposition to reject delegation in the absence of meaningful independent review by qualified representatives over a private party's actions. This Note explores the concerns associated with slaughterhouse delegation and concludes that the government has a statutory obligation to reject

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Tyson's proposal and prevent the slaughterhouse industry from slaughtering the federal inspector's role along with the cattle.

TABLE OF CONTENTS

I.	INTRODUCTION.....	944
II.	A HISTORY OF THE FEDERAL INSPECTOR'S ROLE IN POST-MORTEM INSPECTIONS.....	947
III.	THE ISSUE TODAY	952
	A. <i>Upholding Kansas's Reputation</i>	952
	B. <i>Barriers to Transparency</i>	954
	C. <i>Political Influence</i>	956
	D. <i>It's Cattle's Turn</i>	958
IV.	WHY DELEGATION TO SLAUGHTERHOUSES IS IMPERMISSIBLE	959
	A. <i>The Debate Over Delegation – A Boeing Example</i>	960
	B. <i>Comparing Aerospace Delegation to Slaughterhouse Delegation</i>	963
	C. <i>The Court Frowns on Delegation Under FMIA</i>	965
	D. <i>FMIA's Safeguards Extend Only to Federal Inspectors</i>	968
	E. <i>Delegation Thwarts the Effectiveness of FMIA Mandates</i> ..	969
V.	CONCLUSION.....	970

I. INTRODUCTION

It's May 1, 2019, and the news headline reads "How the Beyond Meat Burger is Taking on the Multibillion-Dollar Beef Industry."¹ Beyond Meat makes plant-based products that substitute for meat, pork and poultry.² After more than doubling its revenue every year, growing from \$16 million in 2016, to \$33 million in 2017, and then to \$88 million by 2018,³ Beyond Meat's stock soared following its initial public offering

1. *How the Beyond Meat Burger is Taking on the Multibillion-Dollar Beef Industry*, CNBC (Jan. 21, 2019, 9:01 AM), <https://www.cnbc.com/video/2019/01/20/how-the-beyond-meat-burger-is-taking-over-the-beef-industry-the-upstarts.html> [hereinafter *Beyond Meat Burger*].

2. Christine Wang & Leslie Picker, *Plant-Based Burger Company Beyond Meat Set for Public Debut at \$25 per Share*, CNBC (Oct. 1, 2019, 3:01 PM), <https://www.cnbc.com/2019/05/01/beyond-meat-prices-ipo-at-25-per-share-source.html> [hereinafter *Plant-Based Burger*].

3. *Vegan Burger Firm Valued at \$1.5bn as It Aims to Take a Bite Out of Meat Industry*, RTE (May 2, 2019, 6:15 PM), <https://www.rte.ie/news/newslens/2019/0502/1047030-beyond-meat/>.

(IPO).⁴ At the May 2019 IPO the highly demanded stock was quoted as being “thirty times oversubscribed,”⁵ meaning investors asked for thirty times the amount of stock being sold in the offering. The initial public offering started at \$25 per share; the stock closed its first day of trading at \$65.75 per share, up by almost 160 percent, earning recognition as the year’s best first day for a U.S. IPO.⁶ Ethan Brown, Beyond Meat’s founder and Chief Executive Officer, pointed at the meat industry as his biggest competitor and envisioned that “[s]omeday . . . plant-based meat will overtake animal protein as the main source of meat but I can’t predict when; I do believe it will happen in my lifetime.”⁷

In 2018, U.S. retail sales of plant-based meat grew by 24 percent as compared to 2 percent in animal meat sales.⁸ In the midst of this increasingly competitive market, on March 11, 2019, Tyson Foods, Inc. (Tyson), one of the country’s largest processors of beef, petitioned the United States Department of Agriculture (USDA) for a regulatory waiver authorizing Tyson employees to replace federal inspectors in conducting post-mortem pre-sortation slaughterhouse activities in its Holcomb, Kansas, beef slaughterhouse.⁹ These activities include “identification and trimming of isolated [carcass] defects, and identification of conditions that would require additional disposition by the Public Health Veterinarian.”¹⁰ Allowing Tyson’s proposed “beef modernization protocol plant request”¹¹ would reduce the number of governmental inspectors present on the slaughterhouse line for post-mortem sortation activities.¹²

4. Team Kalkine, *Meat Industry in the US and a Look at Beyond Meat*, KALKINE MEDIA (July 2, 2019, 01:55 PM), <https://kalkinemediacom/2019/07/02/meat-industry-in-the-us-and-a-look-at-beyond-meat/>.

5. *Plant-Based Burger*, *supra* note 2.

6. Team Kalkine, *supra* note 4.

7. Andrea Kramar & Catherine Clifford, *How Beyond Meat Became a \$550 Million Brand, Winning Over Meat-Eaters with a Vegan Burger That ‘Bleeds’*, CNBC:MAKE IT (Jan. 21, 2019, 9:02 AM), <https://www.cnbc.com/2019/01/21/how-bill-gates-backed-vegan-beyond-meat-is-winning-over-meat-eaters.html>.

8. Elaine Watson, *US Retail Sales of Plant-Based Milk Up 9%, Plant-Based Meat Up 24% YoY*, FOODNAVIGATOR-USA (Aug. 10, 2018, 8:57 PM), <https://www.foodnavigator-usa.com/Article/2018/07/30/US-retail-sales-of-plant-based-milk-up-9-plant-based-meat-up-24-YoY#> (noting that U.S. retail sales of plant-based meat grew by six percent in 2017).

9. Letter from Tyson Foods, Inc. to Dr. Bryan Trout, USDA/FSIS 1 (Mar. 11, 2019) [hereinafter Letter from Tyson].

10. *Id.*

11. *Id.*

12. *Id.* at 2; Suzy Khimm, *Tyson Wants Fewer Government Inspectors in One of Its Beef Plants*, NBC NEWS (Aug. 14, 2019, 4:30 AM), <https://www.nbcnews.com/politics/white-house/tyson-wants-fewer-government-inspectors-one-its-beef-plants-food-n1041966>.

While Tyson's letter includes a "note of transparency [that] our intent is to maintain the current daily harvest levels,"¹³ the USDA has historically supported higher line speeds when fewer adulterated carcasses would be presented for federal inspection.¹⁴ Indeed, in the early 1990s, the USDA incentivized cattle slaughterhouses with waivers for increased line speeds if facilities agreed to participate in a modernized inspection system trial that involved replacing federal inspectors with slaughterhouse employees.¹⁵ Although the impact of increased line speeds on animal welfare, worker safety, and the environment has been debated both in and outside the legal community,¹⁶ the changing role of the federal inspector has received far less attention.

The beef slaughterhouse industry's recent push towards privatized slaughterhouse inspections promotes delegation and deregulation contrary to the letter and spirit of the Federal Meat Inspection Act (FMIA or "the Act"). The Act established requirements "to prevent adulterated . . . meat and meat products from being sold as food and to ensure that meat and meat products are slaughtered and processed under sanitary conditions."¹⁷ The Act requires that inspections be carried out by

13. Letter from Tyson, *supra* note 9, at 3. See generally Jacqui Fatka, *FSIS Looks to Modernize Beef Slaughter Inspections*, FEEDSTUFFS (June 12, 2019), <https://www.feedstuffs.com/news/fsis-looks-modernize-beef-slaughter-inspections> (explaining that Tyson's Holcomb, Kansas, slaughterhouse is approved to operate at the current maximum line speed allowable—390 heads per hour). But see Smriti Chand, *The Change in Supply: Increase in Supply and Decrease in Supply*, YOUR ARTICLE LIBR., <http://www.yourarticlelibrary.com/education/the-change-in-supply-increase-in-supply-and-decrease-in-supply-economics/9198> (last visited Apr. 6, 2021) (suggesting that increased line speeds create a financially attractive incentive for for-profit corporations like Tyson). Increased line speeds facilitate increased slaughters and reduced prices thereby increasing demand and the ability to capture greater market share. See Priya Wadhwa, *Are You Still Lowering Prices to Capture Market Share?*, SME10X (Sept. 30, 2019), <https://www.sme10x.com/10x-industry/are-you-still-lowering-prices-to-capture-market-share>.

14. *Am. Fed'n Gov't Emps. v. Veneman (The 2002 Veneman Appellate Case)*, 284 F.3d 125, 130 (D.C. Cir. 2002); see Khimm, *supra* note 12.

15. Kerri E. Machado, Comment, "Unfit for Human Consumption": *Why American Beef is Making Us Sick*, 13 ALB. L.J. SCI. & TECH. 801, 817–18 (2003) (referring to the Streamlined Inspection System for Cattle); see Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6774, 6777 (proposed Feb. 3, 1995) [hereinafter *Pathogen Reduction*].

16. *E.g.*, Notice, 83 Fed. Reg. 49048, 49056–59 (Sept. 28, 2018); Dan Flynn, *Meat Inspectors' Unions Go to Federal Court Over Line Speeds*, FOOD SAFETY NEWS (Oct. 9, 2019), <https://www.foodsafetynews.com/2019/10/meat-inspectors-unions-go-to-federal-court-over-line-speeds/> [hereinafter Flynn, *Meat Inspectors' Unions Go to Federal Court Over Line Speeds*]; MERCY FOR ANIMALS, STRATEGIC PLAN 2019-2021 7 (2019), <https://mfa.cachefly.net/mfa/pdfs/MFA-Three-Year-Strategic-Plan.pdf>.

17. *United States Code Annotated. Title 21. Food and Drugs. Chapter 12. Meat Inspection*, MICH. ST. U.C.L. ANIMAL LEGAL & HIST. CTR. (Mar. 2018), <https://www.animallaw.info/statute/us-meat-chapter-12-meat-inspection>. The FMIA regulates

government-appointed inspectors.¹⁸ The Act's safeguards, which aim to protect the integrity of the slaughterhouse process, apply specifically to federal inspectors.¹⁹ Thus, requests like Tyson's to slaughter the federal inspector's role in the inspection process must be rejected.

Part I of this Note provides background regarding the federal inspector's prominent role in the slaughterhouse post-mortem inspection process across the twentieth century and the legal challenges that followed from the government's efforts to modernize the inspection process at the turn of the twenty-first century. Part II examines the strategic and historic significance of Tyson's present-day request for inspection privatization. Part III argues against the permissibility of delegating post-mortem inspection duties to slaughterhouse employees because it violates a fundamental premise of FMIA—that inspections will be undertaken by federal employees.

II. A HISTORY OF THE FEDERAL INSPECTOR'S ROLE IN POST-MORTEM INSPECTIONS

From the 1906 enactment of the Federal Meat Inspection Act until the 1996 implementation of the Pathogen Reduction/Hazard Analysis and Critical Control Points (HACCP), post-mortem inspection meant a hands-on process carried out by federal government inspectors.²⁰ Following President Roosevelt's receipt of evidence corroborating the deplorable conditions of the meat packinghouse, publicized in Upton Sinclair's 1906 novel, *The Jungle*, the U.S. government enacted FMIA.²¹ Through the Act, and specifically the post-mortem inspection of carcasses conducted by Food Safety and Inspection Service ("FSIS") federal inspectors,²² the federal government sought to "protect the health and welfare of consumers by assuring that meat and meat food products distributed to them are wholesome, not adulterated . . ." ²³ The Act

meat food products of cattle, sheep, swine, goats, and equines. 21 U.S.C.A. § 601(j) (West 2021).

18. 21 U.S.C.A. § 621 (West 2021).

19. 21 U.S.C.A. §§ 622, 675 (West 2021).

20. Eileen Starbranch Pape, Comment, *A Flawed Inspection System: Improvements to Current USDA Inspection Practices Needed to Ensure Safer Beef Products*, 48 HOUS. L. REV. 421, 434 (2011).

21. *Celebrating 100 Years of FMIA*, U.S. DEPT OF AGRIC. (Feb. 12, 2015), https://www.fsis.usda.gov/wps/wcm/connect/fsis-content/fsis-questionable-content/celebrating-100-years-of-fmia/overview/ct_index. See generally 21 U.S.C.A. §§ 601–695 (West 2021); UPTON SINCLAIR, *THE JUNGLE* (1906).

22. 21 U.S.C.A. § 604 (West 2021).

23. *Id.* § 602 (West 2021).

established the U.S. Secretary of Agriculture as the sole authority to appoint federal inspectors to examine and inspect all carcasses.²⁴

Throughout most of the twentieth century government inspectors, primarily concerned with detecting animal diseases and carcass defects (such as tumors, parasites, and inflammation), engaged exclusively in organoleptic examinations which involved the use of sight, touch, and smell.²⁵ Federal inspectors, under the supervision of veterinarians, conducted these post-mortem inspections of every carcass while stationed at fixed spots along the slaughterhouse processing line.²⁶ But two developments prompted FSIS to reengineer the slaughterhouse processing system throughout the United States. First, technology developed to detect microbial pathogen meat adulteration,²⁷ conditions undetectable through organoleptic techniques.²⁸ Second, national concern mounted following the 1993 E. coli outbreak from contaminated meat consumed at Jack in the Box restaurants, the nation's fifth largest hamburger chain.²⁹

By promulgating the HACCP final rule in 1996, which required meat and poultry plants to develop and install a system of prevention controls, FSIS sought to minimize the risk of foodborne pathogens and ensure the safety of slaughterhouse products.³⁰ Thus, FSIS advanced the new HACCP philosophy of giving processing plants greater control over production decisions by reworking the roles of federal inspectors in slaughterhouses.³¹

Under the first iteration of the FSIS HACCP-Based Inspection Models Development Project ("Models Project"), the task of separating adulterated carcasses shifted to industry personnel; federal inspectors

24. *Id.* § 621 (West 2021).

25. *Am. Fed'n. Gov't Emps. v. Glickman* (*The 2000 Glickman Appellate Case*), 215 F.3d 7, 8 (D.C. Cir. 2000); Pape, *supra* note 20, at 434.

26. *Pathogen Reduction*, *supra* note 15, at 6777.

27. Microbial pathogen meat adulteration refers to human-disease-causing microorganisms that use meat as a nutrient source for survival but whose growth does not usually alter a food's aesthetic quality. ARUN K. BHUNIA, *FOOD BORNE MICROBIAL PATHOGENS 1-23* (2d ed. 2018). These foodborne pathogens cause outbreaks, illnesses, and mortalities. *Id.*

28. *Pathogen Reduction*, *supra* note 15, at 6777, 6780.

29. Michael R. Taylor, *Preparing America's Food Safety System for the Twenty-First Century—Who Is Responsible for What When It Comes to Meeting the Food Safety Challenges of the Consumer-Driven Global Economy?*, 52 *FOOD DRUG L.J.* 13, 18 (1997); *Jack in the Box's Worst Nightmare*, *N.Y. TIMES* (Feb. 6, 1993), <https://www.nytimes.com/1993/02/06/business/company-news-jack-in-the-box-s-worst-nightmare.html>.

30. *Am. Fed'n. Gov't Emps. v. Veneman* (*The 2002 Veneman Appellate Case*), 284 F.3d 125, 127 (D.C. Cir. 2002).

31. *Id.*

played the role of overseer and verifier.³² While “[o]versight inspectors observed establishment personnel as they processed carcasses, [the] . . . verification inspectors randomly sampled carcasses” to validate the plant’s compliance with performance standards.³³

The American Federation of Government Employees (“AFGE”) challenged this new approach in *American Federation of Government Employees v. Glickman (The 1999 District Court Case)*, claiming that it violated FMIA and the Poultry Products Inspection Act (“PPIA”).³⁴ The statutes, AFGE argued, did not permit “federal inspectors to step back from the processing lines and perform their inspection duties by overseeing inspections conducted by plant employees.”³⁵ In *American Federation of Government Employees v. Glickman (The 2000 Glickman Appellate Case)*, the D.C. Circuit agreed.³⁶ The court maintained that both FMIA and PPIA clearly contemplated that inspections would be done by federal inspectors, not private employees, and that federal inspectors “will make the critical determination whether a product is adulterated or unadulterated.”³⁷ Because federal employees were inspecting people and not carcasses, the court held that USDA violated its statutory duty to conduct post-mortem carcass inspections.³⁸

In a subsequent related case, *American Federation of Government Employees v. Glickman (The 2001 District Court Case)*, the district court held that the decision in *The 2000 Glickman Appellate Case* narrowly meant that, while delegation was not wholly impermissible, federal inspectors bore “the affirmative duty to do more than observe.”³⁹ The district court maintained that “the heart of the Court of Appeals’ analysis is not about who inspects the carcasses, but about whether an observation amounts to inspection.”⁴⁰

In response to the litigation, FSIS implemented the second iteration of the Models Project, which involved reclassifying the role of oversight inspector to carcass inspector while maintaining the role of verification

32. *Id.*; *Am. Fed’n. Gov’t Emps. v. Glickman (The 2000 Glickman Appellate Case)*, 215 F.3d 7, 9 (D.C. Cir. 2000). An adulterated carcass “contains [a] . . . poisonous or deleterious substance which may render it injurious to health” and thus falls below regulatory requirements for safe consumption. 21 U.S.C.A. § 601(m)(1) (West 2021).

33. *The 2002 Veneman Appellate Case*, 284 F.3d at 127.

34. *Am. Fed’n. Gov’t Emps. v. Glickman (The 1999 District Court Case)*, No. 98-0893, 1999 U.S. Dist. LEXIS 24082, at *2 (D.D.C. July 23, 1999).

35. *The 2002 Veneman Appellate Case*, 284 F.3d at 128–29.

36. *The 2000 Glickman Appellate Case*, 215 F.3d at 10.

37. *Id.*

38. *Id.*

39. *Am. Fed’n. Gov’t Emps. v. Glickman (The 2001 District Court Case)*, 127 F. Supp. 2d 243, 247 (D.D.C. 2001).

40. *Id.* at 247 n.4.

inspector.⁴¹ A single federal poultry carcass inspector would be stationed at the end of each slaughter line and, “after the carcasses were eviscerated, sorted, washed and trimmed by establishment employees,” the inspector would “examine each poultry carcass for adulteration.”⁴² At hog plants the program required up to three carcass inspectors.⁴³ The poultry and swine federal inspectors directly examined carcasses rather than overseeing others performing that work.⁴⁴

In *American Federation of Government Employees v. Veneman* (*The 2002 Veneman Appellate Case*), AFGE challenged this remodeled version, arguing again that the program violated FMIA and PPIA because it “did not require federal inspectors to subject each carcass to a close and critical appraisal,”⁴⁵ the standard established by the court in *The 2000 Glickman Appellate Case*.⁴⁶ In this second appeal, however, the court ruled against AFGE.⁴⁷ The court in *The 2002 Veneman Appellate Case* considered whether federal carcass inspectors were properly performing inspections as required by FMIA and PPIA.⁴⁸ The statutes’ ambiguity complicated the analysis⁴⁹ because each Act specified what must be inspected and by whom⁵⁰ but neither statute defined “inspection” to identify exactly what an inspection entailed.⁵¹

The courts ultimately deferred to the USDA’s judgement for decisions regarding what an inspection entailed as long as federal inspectors examined every carcass and did more than just observe.⁵² The court, in the *2001 District Court Case* decision, addressed the ambiguity surrounding what an inspection entailed by applying *Chevron* deference.⁵³ *Chevron* deference compels courts to uphold agency statutory interpretations that reasonably—albeit, not necessarily the *most* reasonably—construe ambiguous provisions.⁵⁴ The court deferred to the USDA’s view of “inspection” when it liberally mandated that federal

41. *The 2002 Veneman Appellate Case*, 284 F.3d 125, 128 (D.C. Cir. 2002).

42. *Id.*

43. *Id.* at 129.

44. *See id.* at 129–30.

45. *Id.* at 128.

46. *Am. Fed’n. Gov’t Emps. v. Glickman* (*The 2000 Glickman Appellate Case*), 215 F.3d 7, 10 (D.C. Cir. 2000).

47. *The 2002 Veneman Appellate Case*, 284 F.3d at 130.

48. *Id.* at 129.

49. *Id.* at 130.

50. *The 2000 Glickman Appellate Case*, 215 F.3d at 10.

51. *The 2002 Veneman Appellate Case*, 284 F.3d at 129.

52. *Am. Fed’n. Gov’t Emps. v. Glickman* (*The 2001 District Court Case*), 127 F. Supp. 2d 243, 245, 248 (D.D.C. 2001); *The 2002 Veneman Appellate Case*, 284 F.3d at 130.

53. *The 2001 District Court Case*, 127 F. Supp. 2d at 245 (citing *Chevron v. Nat. Res. Defense Council*, 467 U.S. 837 (1984)).

54. *The 2001 District Court Case*, 127 F. Supp. 2d at 245.

inspectors do more than “merely observ[e] others perform[ing] inspections.”⁵⁵ The D.C. Circuit rejected the lower court’s *Chevron* reliance asserting that *Chevron* applied only when Congress delegated authority to the agency generally to make rules carrying the force of law.⁵⁶ Here, the USDA did not intend to act with the force of law; the USDA was merely testing various inspection models.⁵⁷

Although undeserving of *Chevron* deference, the appellate court nonetheless adhered to the USDA’s statutory interpretation.⁵⁸ The court maintained that “as the reasoned judgment of the federal agency charged with administering our federal meat and poultry inspection laws, [the] USDA’s view about the scope of inspection required by FMIA and PPIA constitutes ‘a body of experience and informed judgment’ to which we may properly resort for guidance.”⁵⁹

The inspection provision of FMIA called for a “post-mortem examination and inspection of the carcasses and parts thereof of all amenable species.”⁶⁰ The inspection provision of PPIA required that the carcass of each bird processed be inspected for adulteration.⁶¹ In reliance on the USDA’s determination that its modified inspection program would be sufficient to allow federal employees to detect adulterated meat and poultry, and acknowledging that federal inspectors would personally examine each poultry carcass leaving the slaughter line and all hog

55. *Id.* at 247.

56. *The 2002 Veneman Appellate Case*, 284 F.3d at 129.

57. *Id.*

58. *Id.* at 130.

59. *Id.* at 129 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The court’s decision relied on the USDA’s statutory interpretation for guidance, but the court overtly acknowledged that it was not compelled to uphold the interpretation because *Chevron* deference did not apply. *The 2002 Veneman Appellate Case*, 284 F.3d at 129. More recently, however, the Supreme Court has shown an increasing resistance to applying *Chevron* deference even when a delegated agency intends to make rules that carry the force of law. See generally *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227 (2017) (discussing several cases in which *Chevron* deference has not been applied by the Court). In 2007, five years after the decision in the *2002 Veneman Appellate Case*, the Court abandoned the principle of deference to agency decision-making in *Massachusetts v. EPA*, holding that greenhouse gases were air pollutants subject to the Clean Air Act (“CAA”) regulation, even though the Environmental Protection Agency concluded that the concentrations of carbon dioxide and other greenhouse gases allegedly affecting the global climate were beyond the scope of the CAA’s authorization to regulate. 549 U.S. 497, 532, 560 (2007) (Roberts, J., dissenting).

60. 21 U.S.C.A. § 604 (West 2021) (noting that the November 10, 2005, amendment substituted “amenable species” for cattle, sheep, swine, goats, horses, mules, and other equines).

61. 21 U.S.C.A. § 455 (West 2021).

carcasses, heads, and viscera, the court held that the USDA's inspection model did not violate FMIA or PPIA.⁶²

III. THE ISSUE TODAY

A. Upholding Kansas's Reputation

Tyson's Proposed Beef Modernization Protocol Plant Request for its Kansas slaughterhouse facility, the first of its kind for a beef plant,⁶³ has deep-rooted significance because of Kansas's notorious reputation as one of the most dangerous states for animals.⁶⁴ Kansas holds a prominent role in animal agriculture as the fifth largest animal agriculture producer state in the United States.⁶⁵ Kansas places among the top three states with the most cattle inventory.⁶⁶ Slaughtering 6.7 million cows a year, Kansas's commercial cattle kill-count ranked second in the United States in 2018.⁶⁷ In 2019 Kansas ranked among the top ten swine-producing states, contributing over 2 million hogs and pigs to the United States pork market.⁶⁸

In 1990 Kansas became the first state to enact an ag-gag law.⁶⁹ This Kansas statute, K.S.A. section 47-1827, criminalized undercover investigations and whistleblowing at slaughterhouses.⁷⁰ The law "gagged" would-be whistleblowers from entering a slaughterhouse

62. *The 2002 Veneman Appellate Case*, 284 F.3d at 130.

63. Letter from Tyson, *supra* note 9, at 1.

64. Complaint at 2, *Animal Legal Def. Fund v. Colyer*, No. 2:18-cv-02657 (D. Kan. Dec. 4, 2018), https://www.centerforfoodsafety.org/files/kansas-ag-gag-complaint_50497.pdf [hereinafter *ALDF* Complaint].

65. *Id.*

66. Rob Cook, *Ranking of States with the Most Cattle*, BEEF 2 LIVE (Apr. 2, 2021), <http://beef2live.com/story-cattle-inventory-state-rankings-89-108182> (ranking Texas and Nebraska as the top two states with the most cattle in 2021).

67. *Kansas Beef Industry Economics*, KAN. LIVESTOCK ASS'N, <https://www.kla.org/resources/industry-economics> (last visited Apr. 6, 2021). In 2019 Tyson's Holcomb, Kansas, plant alone "processed approximately 5,600 cattle per day, which represent[ed] 5% of the beef processed in the U.S. and nearly a quarter of cattle processing in Kansas." Corinne Boyer, *Tyson Plant Fire Sends Ripples of Uncertainty Through Western Kansas, Cattle Industry*, KCUR 89.3 (Aug. 22, 2019, 5:49 PM), <https://www.kcur.org/post/tyson-plant-fire-sends-ripples-uncertainty-through-western-kansas-cattle-industry#stream/0>.

68. M. Shahbandeh, *Top U.S. States by Number of Hogs and Pigs 2020*, STATISTA (Apr. 30, 2020), <https://www.statista.com/statistics/194371/top-10-us-states-by-number-of-hogs-and-pigs/>.

69. *Court Rules Kansas Ag-gag Law Unconstitutional*, ANIMAL LEGAL DEF. FUND (Jan. 22, 2020), <https://aldf.org/article/court-rules-kansas-ag-gag-law-unconstitutional/>.

70. See KAN. STAT. ANN. § 47-1827 (West 2021); *ALDF* Complaint, *supra* note 64, ¶ 1.

without the owner's consent.⁷¹ Kansas enacted its law during a time of rapid expansion in the industrial hog industry and in response to increased animal activism in the form of slaughterhouse trespass.⁷²

On January 22, 2020, the district court in Kansas held the state's ag-gag law to be unconstitutional because it violated the First Amendment.⁷³ Federal courts in three other states have rendered similar rulings.⁷⁴ Notably, all of these decisions have been made within the past four years.⁷⁵ The absence of "ag-gag" law protection pressures

71. See § 47-1827; see also Roxana Hegeman, *Lawsuit: Kansas "Ag-Gag" Law Violates Free Speech Rights*, AP NEWS (Dec. 4, 2018), <https://apnews.com/d1ac7862c31c4fd98e2456d3430c73f5>.

72. Alicia Prygoski, *Detailed Discussion of Ag-Gag Laws*, ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws>.

73. Jane Wolfe, *Court Strikes Down Unconstitutional Kansas 'Ag Gag' Law*, LADY FREETHINKER (Jan. 27, 2020), <https://ladyfreethinker.org/court-rules-law-criminalizing-factory-farm-videos-and-photographs-unconstitutional/>; see generally Erica Shaffer, *Federal Court Strikes Down Kansas 'Ag-Gag' Law*, MEAT + POULTRY (Jan. 27, 2020), <https://www.meatpoultry.com/articles/22531-federal-court-strikes-down-kansas-ag-gag-law> (explaining Kansas's "ag-gag" law and why the court held it unconstitutional: "[T]he Kansas Farm Animal and Field Crop Research Facilities Protect Act . . . made it a crime to 'damage or destroy an animal facility or an animal or property at an animal facility; exercise control over an animal facility, an animal from an animal facility or animal facility property with the intent to deprive the owner of it; enter an animal facility that is not open to the public to take photographs or recordings; and remain at an animal facility against the owner's wishes' . . . US District Judge Kathryn Vratil . . . rul[ed] that the law placed 'content-based and viewpoint discriminatory restrictions on speech.'").

74. Wolfe, *supra* note 73 (identifying Idaho, Iowa, and Utah as the three other states where "ag-gag" laws have been held unconstitutional); see generally *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/ag-gag/> (last visited Apr. 6, 2021) (identifying the status of "ag-gag" laws in every state, including those states with in-force legislation).

75. See *Ag-Gag Laws Face the First Amendment*, FIRST AMEND. WATCH, <https://firstamendmentwatch.org/deep-dive/ag-gag-laws-face-the-first-amendment/> (last visited Apr. 6, 2021) (explaining, with regard to Iowa, that "In January 2019, . . . the U.S. District Court for the Southern District of Iowa ruled that the 2012 law that made it illegal to gain access to an agricultural production facility under false pretenses with the intent to record at the facility without permission was unconstitutional[;]" with regard to Idaho, "In January 2018, the U.S. Court of Appeals for the Ninth Circuit struck down most of an Idaho law aimed at criminalizing the making of undercover videos at agricultural facilities. The court said that audio and video recording is protected speech, and criminalizing misrepresentation used to enter an agricultural facility was overly broad, and the law's purpose was to target investigative journalists and protected speech[;]" and with regard to Utah, "In July 2017, U.S. District Judge Robert Shelby ruled that Utah's ag-gag law—enacted in 2012, and which criminalized lying to get into an agricultural facility and recording once inside—was unconstitutional. The federal judge concluded that: 'Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry, and as history shows, it has a variety of constitutionally permissible tools at its disposal to do so. Suppressing broad swaths of protected speech without justification, however, is not one of them.'").

slaughterhouses to find alternate means to evade external scrutiny as they attempt to provide affordable meat.⁷⁶

B. Barriers to Transparency

Ag-gag laws, in all of their forms, eliminate or severely hamper undercover investigations.⁷⁷ These investigations have “reliably revealed truthful information about shocking animal cruelty, unsafe food safety practices, environmental hazards, and inhumane working conditions”⁷⁸ Although few means exist for the government and the public to uncover the practices inside the slaughterhouse walls, the two primary ways include “government inspections and whistleblowing by employees not working undercover.”⁷⁹ A privatized inspection process thwarts both of these means.

Tyson’s waiver request proposes reducing the number of beef slaughterhouse government inspectors by replacing federal inspectors with Tyson team members.⁸⁰ Its consequences arguably infringe on a fundamental strength of the USDA system—“that it puts [qualified] government inspectors in a position to promptly detect and correct visibly observable food safety and sanitation problems.”⁸¹ The recently implemented New Swine Inspection System (“NSIS”) in 2019,⁸² which delegated federal inspector duties to facility employees in swine slaughterhouses, underscores the concern.

76. See Kelsey Piper, *Kansas’s Ag-Gag Law Has Been Ruled Unconstitutional*, VOX (Jan. 23, 2020, 3:00 PM), <https://www.vox.com/future-perfect/2020/1/23/21078810/kansas-animal-abuse-law-unconstitutional-factory-farming> (“People want affordable meat. They also don’t want animals treated cruelly. Right now, the industry is trying to provide the meat and hide the cruelty.”).

77. See generally Prygoski, *supra* note 72 (describing the different types of ag-gag laws, including (1) agricultural interference laws which “place outright bans on recording sounds or images within an industrialized farming operation, usually when done without the owner’s consent,” (2) agricultural fraud laws which “criminalize obtaining access to industrialized farming operations by false pretenses or misrepresentation, or applying for employment at an industrialized farming operation under false pretenses or misrepresentation,” and (3) rapid-reporting laws which “require[] anyone who records an image or sound at an industrialized farming operation to turn all copies of the recordings over to authorities within a certain amount of time, usually within twenty-four to forty-eight hours”).

78. ALDF Complaint, *supra* note 64, ¶ 1.

79. Larissa Wilson, Comment, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 GOLDEN GATE UNIV. L. REV. 311, 325 (2014).

80. Letter from Tyson, *supra* note 9, at 5.

81. Taylor, *supra* note 29, at 17.

82. Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300, 52300 (Oct. 1, 2019) (to be codified at 9 C.F.R. pt. 301, 309, 310).

NSIS prevents federal inspectors from examining the overall condition of each swine during the sorting process.⁸³ Swine slaughterhouse employees,

with no approved formal training or educational qualifications, police themselves by sorting carcasses and parts, incising and palpating lymph nodes to detect the presence of animal disease, and identifying condemnable conditions or problems before carcasses are presented to online inspectors for post-mortem inspection. Like with ante-mortem inspection, under- or untrained plant employees do this based on the non-binding compliance guideline that is used to identify carcasses affected with condemnable conditions.⁸⁴

NSIS precludes the trained federal inspector from “critically appraising all carcasses for conditions such as Septicemia, Cysticercosis, and feces, ingesta, and milk contamination”⁸⁵ The likelihood of diseased carcasses entering the food supply increases as “the lone federal inspectors at the head, viscera, and carcass stations cannot critically appraise animals for these condemnable conditions due to NSIS plants’ increased line speeds.”⁸⁶

Adding to transparency challenges, slaughterhouse employees have been discouraged from reporting problems.⁸⁷ Whereas federal employees receive whistleblower protection for wrongful termination stemming from reporting violations, such protection does not extend to

83. See Complaint at 20, *Ctr. for Food Safety v. Perdue*, No. 3:20-cv-00256 (N.D. Cal. Jan. 13, 2020) [hereinafter *Ctr. for Food Safety* Complaint].

84. *Id.* at 25 (citation omitted).

85. *Id.* at 25–27 (describing Cysticercosis as a condition transmitted from a swine tapeworm to humans whose diagnosis “requires a detailed examination of the cheeks, heart, esophagus, tongue, and diaphragm by sight and number incisions by a [Public Health Veterinarian.]”). Septicemia refers to blood poisoning. See generally Frank Marshall et al., *Blood Poisoning—What You Need to Know This Spring*, THE PIG SITE (May 30, 2004, 12:00 AM), <https://thepigsite.com/articles/blood-poisoning-what-you-need-to-know-this-spring> (defining septicemia as “the presence of pathogenic bacteria living and multiplying in the blood . . . [that] can cause overwhelming infection and death.”). Signs and symptoms of Septicemia include purple ears, swollen joints, and red and blotchy skin. *Id.*

86. *Ctr. for Food Safety* Complaint, *supra* note 83, at 25–26.

87. Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of a Safe Meat Supply*, 33 WILLAMETTE L. REV. 411, 456 (1997); see also *Slaughterhouse Workers*, FOOD EMPOWERMENT PROJECT, <https://foodispower.org/slaughterhouse-workers/> (last visited Feb. 18, 2021) (describing slaughterhouse workers as mainly poor black or brown people employed at-will and subjected to supervisor intimidation techniques that threaten their employment thus discouraging them from reporting safety concerns, injuries, or serious issues).

slaughterhouse employees.⁸⁸ Without this safeguard, industry employees have little incentive to report food safety violations.⁸⁹ Thus, the USDA system fails to provide the consumer-demanded assurance that “an objective . . . inspector has overseen the production of the product.”⁹⁰

C. Political Influence

Tyson raised its request at a politically opportune time for the slaughterhouse industry. For many years critics have recognized an “incestuous relationship” between the USDA and the beef industry, commenting that the “USDA has become tainted by the beef industry’s large donations to the Republican Party.”⁹¹ Actions taken by the Republican Party over the past few years demonstrate a trend towards deregulation and decreased oversight particularly in matters involving animal welfare.⁹²

In February 2017, President Donald Trump’s administration (the “Trump administration”) ordered the USDA to remove the following from its website: inspection reports, regulatory correspondence, and enforcement records documenting the treatment and welfare of thousands of animal-related facilities, including zoos, research laboratories, and dog breeding operations.⁹³ Animal welfare advocates and journalists frequently used these documents to monitor government regulation of animals and report on facility violations.⁹⁴ The USDA now encourages those seeking information from the Animal and Plant Health Inspection Service concerning violations involving the Animal Welfare Act and the Horse Protection Act to submit a Freedom of Information Act

88. Pape, *supra* note 20, at 450.

89. *Id.*

90. See Taylor, *supra* note 29, at 17.

91. Machado, *supra* note 15, at 826–28 (highlighting that from 1987 to 1996 the meatpacking industry funded Texas Republican Senator Phil Gramm, a member of the Senate Agriculture Committee, more than any other senator).

92. See, e.g., *Trump Administration Strips Animal Rights Safeguards, Pets Now at Risk*, BIPARTISAN REP. (Feb. 4, 2017), <https://bipartisanreport.com/2017/02/04/trump-administration-strips-animal-rights-safeguards-pets-now-at-risk/> [hereinafter *Trump Administration Strips Animals Rights Safeguards*].

93. See *Updates to APHIS’ Website Involving Animal Welfare Act and Horse Protection Act Compliance Information*, U.S. DEP’T OF AGRIC. (Feb. 3, 2017), https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa-2017/sa-02/awa-hpa-compliance [hereinafter *Updates to APHIS’ Website*]; *Trump Administration Strips Animals Rights Safeguards*, *supra* note 92; Karin Brulliard, *USDA Abruptly Purges Animal Welfare Information from Its Website*, WASH. POST (Feb. 3, 2017, 6:57 PM EST), <https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/>.

94. Brulliard, *supra* note 93.

(“FOIA”) request,⁹⁵ a process criticized for the lengthy lag time—i.e. potentially several years—between the making and granting of a request.⁹⁶

In 2018 the Trump administration overturned a 2016 rule which established minimum animal welfare and living condition standards required for earning the “certified organic” seal.⁹⁷ As a result, poultry are not required to be housed in large enough spaces to allow birds to fully stretch their wings and livestock may be deprived of complete access to the outdoors.⁹⁸ The USDA estimates that “about half of all organic eggs come from hens living in total confinement.”⁹⁹ Reflecting on the gross statistical disparity between the forty-seven thousand public comments the proposed rule drew and the twenty-eight comments in support of its withdrawal, organic agricultural researcher Mark Kastel commented that “[t]his is representative of the influence lobbyists and election money has at the Trump administration’s USDA.”¹⁰⁰

With regard to USDA animal welfare inspection citations, while the number of inspections has declined 6 percent—from 8,869 to 8,354—between 2016 and 2018, the number of citations issued has plunged 65 percent—from 4,944 to 1,716—during this same time period.¹⁰¹ These numbers evidence the Trump administration’s push for deregulation and relaxed rules and enforcement.¹⁰² USDA Animal Care division leaders instruct inspectors to treat research labs, zoos, breeders, and others

95. See *Updates to APHIS’ Website*, *supra* note 93; see also *AWA Inspection and Annual Reports*, U.S. DEP’T OF AGRIC., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports (Feb. 5, 2021) (confirming that APHIS continued to direct the public to submit FOIA requests as of September 2019).

96. *Trump Administration Strips Animal Rights Safeguards*, *supra* note 92.

97. Nicole Goodkind, *Trump Administration Eliminates Animal Welfare Rule*, NEWSWEEK (Mar. 12, 2018, 4:00 PM), <https://www.newsweek.com/animal-welfare-factory-farms-usda-organic-841753>.

98. *Id.*

99. *Id.*

100. *Id.*; see also Melody Meyer, *Trump Administration Runs Afoul on the Organic Animal Welfare Rule*, HUFFPOST (Dec. 26, 2017, 1:11 PM EST), https://www.huffpost.com/entry/trump-administration-runs-afoul-on-the-organic-animal_b_5a42903be4b06cd2bd03dccc (asserting that powerful egg producers “put extreme pressure on the USDA to withdraw the rule”).

101. Karin Brulliard & William Wan, *Caged Raccoons Drooled in 100-Degree Heat. But Federal Enforcement Has Faded*, WASH. POST (Aug. 22, 2019, 6:00 AM EDT), https://www.washingtonpost.com/science/caged-raccoons-drooled-in-100-degree-heat-but-federal-enforcement-has-faded/2019/08/21/9abf80ec-8793-11e9-a491-25df61c78dc4_story.html.

102. *Id.* (substantiating the claim of relaxed rules and enforcement with the following examples: EPA fines and other actions against polluters have sharply declined, the Food and Drug Administration (“FDA”) is issuing fewer warnings to pharmaceutical and medical firms, and the Department of Transportation is levying fewer fines against U.S. air carriers for tarmac delays and other problems).

regulated by the agency more like partners than as potential offenders.¹⁰³ Additionally, the USDA encourages inspectors to count violations as “teachable moments” instead of issuing citations.¹⁰⁴ The changes perpetuated during the Trump administration have “systematically dismantled and weakened the inspection process.”¹⁰⁵

On October 1, 2019, the New Swine Inspection System went into effect.¹⁰⁶ The USDA’s new rule reduced the number of government-employed safety inspectors on the lines by forty percent and eliminated maximum line speeds.¹⁰⁷ Commentators have recognized that “[r]educing the number of trained federal inspectors and increasing line speeds is a recipe for disaster” and describe the USDA’s new approach as “letting the wolf guard the hog-house.”¹⁰⁸

D. *It’s Cattle’s Turn*

Tyson’s Proposed Beef Modernization Protocol Plant Request is the first of its kind for a beef plant since cattle slaughterhouses have historically been exempted from the government’s slaughterhouse modernization efforts.¹⁰⁹ Between 1980 and 1986, the USDA introduced the Streamlined Inspection System (“SIS”) in poultry slaughterhouses, in which establishment employees performed carcass quality inspections under Food Safety and Inspection Service supervision.¹¹⁰ However,

103. *Id.*

104. *Id.* (noting that the shift in citing practices coincided with the appointment of a new Animal Care deputy administrator in 2016 near the end of the Obama administration).

105. *Id.* (quoting veterinarian William Stokes who oversaw inspectors in twenty-seven states and two U.S. territories during his tenure as an assistant director from 2014 to 2018).

106. Flynn, *Meat Inspectors’ Unions Go to Federal Court Over Line Speeds*, *supra* note 16.

107. *Id.*

108. *Lawsuit Challenges USDA’s New Swine Inspection System; Cites Public Safety*, FOOD SAFETY NEWS (Jan. 14, 2020), <https://www.foodsafetynews.com/2020/01/lawsuit-challenges-usdas-new-swine-inspection-system-cites-public-safety/> (noting that even under pre-NSIS line-speed limits, adulterated swine “may cause as many as 1.5 million cases of foodborne illnesses, 7,000 hospitalizations, and 200 deaths in the United States each year.”). On January 22, 2021, President Joseph Biden signed an Executive Order withdrawing the USDA’s proposed rule to increase poultry line speeds from 140 birds per minute to 175 birds per minute. *Biden Repeals USDA Proposal to Increase Poultry-Processing Line Speeds*, SAFETY+HEALTH (Feb. 1, 2021), <https://www.safetyandhealthmagazine.com/articles/20794-biden-repeals-usda-proposal-to-increase-poultry-processing-line-speeds>.

109. See Dan Flynn, *Tyson Seeks Waiver from FSIS to Modernize Kansas Beef Plant*, FOOD SAFETY NEWS (Jun. 17, 2019), <https://www.foodsafetynews.com/2019/06/tyson-seeks-waiver-from-fsis-to-modernize-kansas-beef-plant/> (explaining that “there is no 25-year-history of pilot projects in beef [modernization] as there was with poultry and swine.”).

110. See *Pathogen Reduction*, *supra* note 15, at 6777.

Congress stopped some in-progress pilot tests because federal inspectors and consumers “equated SIS for cattle with deregulation-license for industry to increase line speeds at the expense of public health.”¹¹¹

The launch of the HACCP-Based Inspection Models Project (“HIMP”) in the 1990s impacted poultry and hog facilities, reducing the number of FSIS inspectors and allowing company employees to perform inspection duties.¹¹² Cattle slaughterhouses have not operated under HIMP.¹¹³

In 2015, FSIS finalized regulations to modernize its processes for poultry inspections.¹¹⁴ In October 2019, FSIS modernized swine inspections under the New Swine Inspection System.¹¹⁵ The central concerns raised throughout these modernization efforts focused on the “increasing delegation of inspection responsibilities to local plant employees, who are not obligated to have undergone any particular training in food safety or regulatory compliance.”¹¹⁶

IV. WHY DELEGATION TO SLAUGHTERHOUSES IS IMPERMISSIBLE

The Federal Meat Inspection Act charges the federal inspector with maintaining the integrity of the post-mortem inspection process.¹¹⁷ Courts have not adhered to a consistent interpretation of the permissibility of delegation under FMIA.¹¹⁸ However, the D.C. Circuit has followed a general rule that delegation is the exception rather than the rule.¹¹⁹ Furthermore, based on the statute’s objectives, mandates, certification requirements, and protections afforded specifically and exclusively to federal inspectors, it can reasonably be argued that legislators did not contemplate inspection delegation to industry personnel when enacting FMIA.

111. *Id.*

112. Fatka, *supra* note 13.

113. *Id.*

114. *Id.*

115. See Flynn, *Meat Inspectors’ Unions Go to Federal Court Over Line Speeds*, *supra* note 16.

116. Kelsey Piper, *A New USDA Rule Gives Pork Producers More Control. That Could Endanger Consumers*, VOX (Sept. 18, 2019, 8:00 AM), <https://www.vox.com/future-perfect/2019/9/18/20869186>.

117. See 21 U.S.C.A. § 621 (West 2021).

118. See *infra* Part III.C.

119. See *Am. Horse Prot. Ass’n v. Veneman*, No. 01-00028 (HHK), 2002 WL 34471909, at *4 (D.D.C. July 9, 2002).

A. The Debate Over Delegation – A Boeing Example

The movement towards, and effects of, delegation from the government to private actors has facilitated practical functionality for several U.S. operations. For example, the Occupational Safety and Health Administration (“OSHA”) and the Environmental Protection Agency employ programs delegating safety and compliance measures to private sector entities.¹²⁰ The engagement by the Federal Aviation Administration (“FAA”) in similar practices, including the 2005 establishment of the Organization Designation Authorization (“ODA”) process,¹²¹ has recently grabbed the public’s attention because of two deadly Boeing 737 Max crashes, which killed 346 people in March and October 2019.¹²²

Prior to the crashes, and via Congress’s authorization conditioned on FAA’s monitoring of Boeing and certification of safety, FAA delegated a substantial portion of aircraft testing and inspection work to Boeing.¹²³ Following the crashes an independent task force concluded that “the FAA would likely have scrutinized the aspects of the 737 Max that caused the accidents had it been more familiar with the technical details.”¹²⁴

Governmental proponents favored FAA’s delegation to aerospace manufacturers because it “leverage[d] limited agency resources by drawing on the expertise and resources of private industry.”¹²⁵ The

120. Connor Raso, *Boeing Crisis Illustrates Risks of Delegated Regulatory Authority*, BROOKINGS (Dec. 18, 2019), <https://www.brookings.edu/research/boeing-crisis-illustrates-risks-of-delegated-regulatory-authority/> (describing OSHA’s Voluntary Protection Program which “allow[s] employers to take proactive safety measures in exchange for being exempted from routine OSHA inspections,” and the EPA’s programs that “delegate additional discretion to private sector entities to develop new methods to comply with environmental rules”).

121. Bart Elias, *Delegation of Federal Aviation Administration Certification Authorities to Aviation Manufacturers*, IN FOCUS (Mar. 25, 2019), <https://fas.org/sgp/crs/misc/IF11145.pdf> (“[T]he resulting Organization Designation Authorization (ODA) process . . . provides the framework under which approved organizations are delegated certain certification responsibilities on behalf of the FAA.”).

122. See David Gelles, *Boeing 737 Max: What’s Happened After the 2 Deadly Crashes*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/interactive/2019/business/boeing-737-crashes.html>.

123. Raso, *supra* note 120; see Kathryn A. Wolfe & Brianna Gurciullo, *How the FAA Delegated Oversight to Boeing*, POLITICO (Mar. 21, 2019, 8:32 PM), <https://www.politico.com/story/2019/03/21/congress-faa-boeing-oversight-1287902> (noting that Boeing employees performed over ninety percent of the tasks being certified).

124. Raso, *supra* note 120.

125. *Id.*; see also Dominic Gates, *With Close Industry Ties, FAA Safety Chief Pushed More Delegation of Oversight to Boeing*, SEATTLE TIMES (April 24, 2019, 4:13 AM), <https://www.seattletimes.com/business/boeing-aerospace/with-close-industry-ties-faa-safety-chief-pushed-more-delegation-of-oversight-to-boeing/> (describing the FAA as having “only

complex nature of aviation products and the constant growth and changes in global manufacturing models made it “virtually impossible for regulators to have all necessary expertise in every FAA office throughout the country.”¹²⁶ The shortage of aviation engineers provoked competition between the public and private sector;¹²⁷ the higher salaries paid by the latter attracted the talent and further underscored the need for delegation.¹²⁸

Aerospace industry proponents favored the delegation because it facilitated increased production speed and greater internal control.¹²⁹ With their limited headcount, FAA staff completed less than 10 percent of the airline certification tasks.¹³⁰ Delegated entities, buffered from the interruptions caused by government shutdowns, experienced more reliable production schedules.¹³¹ Delegation perpetuated a quasi-self-regulated environment.

Boeing insisted that company employees underwent an “extensive qualification process” and “act[ed] independently on behalf of the FAA when performing in [the FAA’s] role.”¹³² Nonetheless, opponents criticized the delegation “given the sheer number of industry employees acting as the FAA’s eyes and ears while on private companies’ payrolls,”¹³³ the appearance that FAA managers concerned themselves

about 1,300 personnel in its certification offices around the country, compared to the 56,000 engineers at Boeing”). See generally Elias, *supra* note 121 (discussing the staffing, budgetary, and subject-matter-complexity challenges faced by the FAA).

126. Gates, *supra* note 125.

127. *Id.*

128. See Raso, *supra* note 120.

129. See Gates, *supra* note 125 (“[I]f any certification glitch occurs to slow down an airplane program, the FAA must automatically elevate the issue to management and resolve it within a time period agreed with the manufacturer.”).

130. See Raso, *supra* note 120 (“[T]he FAA lacked adequate staff to certify airliner safety. Furthermore, the FAA staff working on the 737 Max were relatively inexperienced and had inadequate knowledge of the important technical details. This was partly a product of the FAA’s struggle to attract and retain engineering talent given the higher salaries available in the private sector from companies like Boeing.”).

131. Elias, *supra* note 121.

132. Wolfe & Gurciullo, *supra* note 123; see also Alex Lee, *FAA Delegates Aircraft Certification to Boeing. And Yet They Recorded the Best Safety Record Ever*, MEDIUM (Mar. 27, 2019), <https://medium.com/@alexlee611/faa-delegates-aircraft-certification-to-boeing-and-yet-they-recorded-the-best-safety-record-ever-e72fc38af274> (describing the extensive qualification process, including that Boeing Engineering Unit Members must undergo eleven technical evaluations “each with a unique set of training and testing material. . . . All designees need to be familiar with sections of the Code of Federal Regulation related to their task.”).

133. Wolfe & Gurciullo, *supra* note 123.

more with Boeing's production timeline than safety,¹³⁴ and the political impartiality, due to lobbying efforts, that seemingly influenced delegation decisions.¹³⁵

While the public debated the sensibility of the government's decision to allow the delegation of FAA inspection duties to private industry, critics did not dispute that the law permitted such delegation. The Organization Designation Authorization process allowed FAA to delegate aspects of aircraft safety certification to Boeing.¹³⁶ Notably, 49 U.S.C.A. § 44702(d) authorized FAA to delegate certain certification functions to qualified private parties;¹³⁷ the Code of Federal Regulations ("CFR"), 14 C.F.R. sections 183.41–183.61, explicitly described the requirements to obtain and maintain an ODA, including sections dedicated to applicant qualifications, limitations and responsibilities of an ODA Holder, and inspection rights of the Federal Aviation Administrator.¹³⁸ The Code charged the ODA Holder with ensuring that no "interference affects the performance of authorized functions by ODA Unit members."¹³⁹

The Organization Designation Authorization is subject to the Administrator's approval of an applicant's procedures manual.¹⁴⁰ The manual must specify, inter alia, the training requirements of ODA Unit personnel, the knowledge and experience required for each ODA Unit position, and the procedures for communicating with the appropriate FAA officers regarding administration of the delegation authorization.¹⁴¹ Thus, the regulation advanced a proactive approach endeavoring to ensure personnel competency, collaboration, and unobstructed duty performance.

134. See Lewis Kamb, *Top FAA Officials Defend Delegation of 737 MAX's Safety Certification to Boeing During Senate Hearing*, SEATTLE TIMES (July 31, 2019, 8:50 PM), <https://www.seattletimes.com/business/boeing-aerospace/top-faa-officials-defend-delegation-of-737-maxs-safety-certification-to-boeing-during-senate-hearing/>; see also Raso, *supra* note 120 (referencing FAA administrator Stephen Dickson's appeals to FAA employees to resist the pressure of placing production speed over safety).

135. See Gates, *supra* note 125 (suggesting that heavy lobbying influenced top FAA administrators who, since the late 1990s, have been wives of senators).

136. Lee, *supra* note 132; see 14 C.F.R. § 183.41 ("[An ODA] allows an organization to perform specified functions on behalf of the Administrator related to engineering, manufacturing, operations, airworthiness, or maintenance.").

137. 49 U.S.C.A. § 44702(d) (West 2021) (approved Oct. 30, 2020) ("Subject to regulations, supervision, and review the Administrator may prescribe, the Administrator may delegate to a qualified private person, or to an employee under the supervision of that person, a matter related to—(A) the examination, testing, and inspection necessary to issue a certificate under this chapter . . . and (B) issuing the certificate.").

138. See 14 C.F.R. §§ 183.41–183.67.

139. § 183.57.

140. § 183.53.

141. *Id.*

B. Comparing Aerospace Delegation to Slaughterhouse Delegation

In his article, *Cooperative Implementation of Federal Regulations*, law professor Douglas C. Michael proffered three ingredients for delegation feasibility:

- (1) regulatory standards are written to leave discretion in methods of compliance and that discretion is within the competence of the regulated entities; (2) there are economic incentives to offset the additional costs to these entities; and (3) the entities self-report their own compliance, the agency closely monitors the program, and the agency maintains a residual program of traditional surveillance and direct enforcement.¹⁴²

In its delegation approach with the aerospace industry, and through the combination of these ingredients, the government sought “[t]o protect public safety and maintain confidence in the regulatory system” by identifying and proactively addressing “the conditions under which delegation is likely to go awry.”¹⁴³ Consequently, from 2009 until 2018, U.S. airliners recorded no deaths.¹⁴⁴ The absence of the combination of these ingredients in the government’s contemplated delegation approach with cattle slaughterhouses foreshadows problematic consequences.¹⁴⁵

Delegation offers economic incentives for both aerospace manufacturers and slaughterhouses because delegation creates opportunities for increased production speeds.¹⁴⁶ Unlike the

142. Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535, 535 (1996); see Lee, *supra* note 132.

143. Raso, *supra* note 120.

144. Lee, *supra* note 132. All three of Michael’s specified ingredients are present: (1) Boeing had an extensive qualification process, (2) delegation made the current rate of airplane delivery feasible thus creating an economic incentive and, (3) the FAA’s forty-person office oversaw the ODA program. See *id.*

145. See Michael, *supra* note 142, at 535 (“[T]hose [delegation] programs that were not wholly successful failed to satisfy one or more of [the ingredients].”). With regard to meat inspection, Professor Michael asserted that the then-recently-introduced HACCP-based inspection program embodied all three cooperative-implementation elements. *Id.* at 571. He based his conclusion on HACCP’s focus on prevention rather than detection. See *id.* Although HACCP shifted responsibility for developing a plan for producing safe food to the slaughterhouses, the government still maintained its role as inspectors charged with verifying that the slaughterhouse carried out its plan. *Id.* However, current day proposals to reduce federal inspectors from the detection process impede the FSIS’s ability to closely monitor and/or directly enforce the inspection program. See *id.* at 535.

146. See, e.g., Flynn, *Meat Inspectors’ Unions Go to Federal Court Over Line Speeds*, *supra* note 16 (explaining that the rule modernizing swine inspections “eliminates maximum line speeds”); see also David Gelles & Thomas Kaplan, *F.A.A. Approval of Boeing Jet Involved in Two Crashes Comes Under Scrutiny*, N.Y. TIMES (Mar. 19, 2019), <https://>

government's delegation to aerospace manufacturers, however, where the CFR broadly outlined the delegation policies and procedures but left tactical implementation discretion, via the industry-drafted procedures manual, within the manufacturer's competence,¹⁴⁷ FMIA provides no guidance on delegation to the regulated slaughterhouses whatsoever.¹⁴⁸ And, although the potential for an absence of close monitoring threatens the effectiveness of delegation for both programs, the CFR mitigates the hazard for aerospace manufacturers ex-ante by establishing agreed upon industry-inspector competency levels.¹⁴⁹ No such prerequisites have been established for slaughterhouse personnel.¹⁵⁰

Boeing maintained an extensive educational and training program approved by the Administrator.¹⁵¹ Boeing inspectors demonstrated a competency beyond the government inspector's capabilities.¹⁵² The constant advancement in aerospace technology made it realistically impractical for federal inspectors to maintain the relevant knowledgebase.¹⁵³ In the slaughterhouses, however, the government does not require industry inspectors to receive training that exceeds or meets the level received by federal inspectors.¹⁵⁴ The slaughterhouse inspection process changes slowly; the training is not constantly evolving.¹⁵⁵ Furthermore, FSIS failed to provide the raw data used to calculate federal inspector vacancy rate totals in 2018 and 2019.¹⁵⁶ The absence of

www.nytimes.com/2019/03/19/business/boeing-elaine-chao.html (explaining that a speedier regulatory process facilitates quicker production and allows manufacturers to effectively compete in the marketplace).

147. See 14 C.F.R. §§ 183.41–183.67.

148. See 21 U.S.C.A. §§ 601–695 (West 2021).

149. See 14 C.F.R. § 183.53.

150. See 21 U.S.C.A. §§ 601–695 (West 2021).

151. See 14 C.F.R. § 183.53; Lee, *supra* note 132.

152. See Gates, *supra* note 125.

153. See *id.*

154. See *Ctr. for Food Safety Complaint*, *supra* note 83, ¶ 21 (“[A]fter slaughter, under these new [swine inspection system] rules, plant employees without minimum education or training . . . are now solely charged with trimming carcasses that may have problems such as bruises from drug injections . . . Under- or un-trained plant employees are now charged with identifying and notifying government inspectors when swine carcasses show serious diseases.”).

155. See Pape, *supra* note 20; see also Press Release, U.S. Dep’t of Agric., USDA Modernizes Swine Slaughter Inspection for the First Time in Over 50 Years (Sept. 17, 2019), <https://www.usda.gov/media/press-releases/2019/09/17/usda-modernizes-swine-slaughter-inspection-first-time-over-50-years>.

156. Press Release, Food & Water Watch, USDA Won’t Disclose Latest Meat Inspector Vacancy Rates as Shortages Threaten Food Safety (Dec. 19, 2018), <https://www.commondreams.org/newswire/2018/12/19/usda-wont-disclose-latest-meat-inspector-vacancy-rates-shortages-threaten-food> [hereinafter Food & Water Watch Press Release]; see also Brett Bachman & Samantha Stokes, *Critics Worry About Food Safety as Federal*

this data has fueled the debate over whether vacancy rates are due to intentional government understaffing or recruitment and retention issues.¹⁵⁷

The Supreme Court has described delegating to interested private persons as “obnoxious” and noted a fundamental difference between producing a product—a private activity—and regulating its production—a “necessarily governmental function.”¹⁵⁸ Whereas the explicit requirements detailed in the CFR facilitated the government retaining its power to regulate the production of aircraft but still reap the benefits of delegation, the notable absence of similar provisions in FMIA frustrates the government’s ability to accomplish the same in slaughterhouses. The framework established by the government with the aerospace manufacturing industry supported delegation.¹⁵⁹ But, even under this framework, two massive failures ensued in 2019.¹⁶⁰ With slaughterhouses, the government has not even taken preliminary steps to establish a delegation framework.

C. *The Court Frowns on Delegation Under FMIA*

The courts have offered conflicting interpretations of the permissibility of delegation under the Federal Meat Inspection Act. In *The 2000 Glickman Appellate Case*, the D.C. Circuit recognized that FMIA (and the Poultry Products Inspection Act) “clearly contemplate that when inspections are done, it will be federal inspectors—rather than private employees—who will make the critical determination whether a product is adulterated or unadulterated.”¹⁶¹ The court concluded its opinion by plainly stating that “[d]elegating the task of inspecting carcasses to plant employees violates the clear mandates of FMIA and PPIA.”¹⁶²

Meat Inspectors Face Work Overload, Burnout, COUNTER (Sept. 20, 2019, 2:20 PM), <https://thecounter.org/federal-meat-inspectors-overload-burnout-fsis/>.

157. Bachman & Stokes, *supra* note 156; Food & Water Watch Press Release, *supra* note 156.

158. *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936) (striking down a portion of the Bituminous Coal Conservation Act of 1935 that unlawfully delegated the authority to set maximum labor hours and minimum wage standards to a subset of the producers and miners in a given mining district).

159. See Gates, *supra* note 125.

160. The massive failures include the two 2019 deadly Boeing 737 Max crashes. Raso, *supra* note 120.

161. *Am. Fed’n. Gov’t Emps. v. Glickman (The 2000 Glickman Appellate Case)*, 215 F.3d 7, 10 (D.C. Cir. 2000).

162. *Id.*

But the lower court, a year later, dismissed the notion of delegation-impermissibility and insisted that “the best interpretation of the Court of Appeals’ decision is . . . that the [federal inspector] bears the affirmative duty to do more than observe.”¹⁶³ However, in an unrelated 2002 case, *American Horse Protection Association, Inc. v. Veneman*, the same court rejected this delegation-permissibility argument, holding that *The 2000 Glickman Appellate Case* decision stood for the proposition that the USDA lacked delegation authority based on the express requirements of the FMIA statute.¹⁶⁴ *The 2002 Veneman Appellate Case* left the issue unresolved; the court recognized that FMIA and PPIA “delineate what must be inspected and by whom,”¹⁶⁵ but failed to closely examine the notion of delegation-impermissibility altogether.¹⁶⁶

In general, the law “frowns on delegations from agencies to private actors.”¹⁶⁷ However, the court has made two exceptions to this general rule. When the statute does not expressly require that inspections be carried out by government employees, or when the statute specifically authorizes delegation to a certain entity, the court will recognize the permissibility of delegation.¹⁶⁸ For example, the Horse Protection Act, debated in *American Horse Protection Ass’n*, neither expressly required that government employees carry out horse inspections nor explicitly mentioned delegation to private parties.¹⁶⁹ The district court recognized the USDA’s lawful delegation of show horse inspection duties to private Horse Industry Organizations when it held that “delegations need not be expressly authorized by statute in order to be lawful.”¹⁷⁰

The court in *American Horse Protection Ass’n* distinguished its holding from *The 2000 Appellate Glickman Case*.¹⁷¹ In the latter case, the D.C. Circuit found the USDA’s delegation of inspection authority to a private party unlawful “because the statute expressly required that

163. *Am. Fed’n. Gov’t Emps. v. Glickman (The 2001 Glickman District Court Case)*, 127 F. Supp. 2d 243, 247 (D.D.C. 2001).

164. *Am. Horse Prot. Ass’n v. Veneman*, No. 01-00028 (HHK), 2002 WL 34471909, at *8 n.5 (D.D.C. July 9, 2002).

165. *Am. Fed’n. Gov’t Emps. v. Veneman (The 2002 Veneman Appellate Case)*, 284 F.3d 125, 129 (D.C. Cir. 2002).

166. *See id.*

167. *Am. Horse Prot. Ass’n*, 2002 WL 34471909, at *4 (citing the court’s agreement in *Perot v. Fed. Election Comm’n*, 97 F.3d 553, 559 (D.C. Cir. 1996), with the general proposition that, “when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor”).

168. *Am. Horse Prot. Ass’n*, 2002 WL 34471909, at *4–5, *4 n.5.

169. *Id.* at *4.

170. *Id.* (citing *Tabor v. Joint Bd. for the Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977)).

171. *Am. Horse Prot. Ass’n*, 2002 WL 34471909, at *4 n.5.

inspections be carried out by government employees” whereas the Horse Protection Act included no such directive in *American Horse Protection Ass’n*.¹⁷²

The court also recognized that “delegations to a private party are particularly suspect when the private actor’s objectivity may be questioned due to a conflict of interest.”¹⁷³ In *Sierra Club v. Sigler*, the Army Corps of Engineers engaged a private consulting firm to prepare the draft and final Environmental Impact Statement required under the National Environmental Policy Act.¹⁷⁴ The court found this troubling because the consulting firm “had a stake in the project which it was evaluating.”¹⁷⁵ While the delegation did not remove the Corps from the preparation process entirely, the court expressed a “concern[] [with] the relatively brief time the Corps was given to review and comment on the [contractor-prepared] documents, and the degree of thoroughness of the Corps’ review and supervision.”¹⁷⁶

A federal court will recognize a lawful delegation if the agency retains meaningful independent final review authority over the private party’s actions.¹⁷⁷ In *American Horse Protection Ass’n*, the district court recognized lawful delegation of the USDA’s inspection duties to a private agency because the USDA intended to closely monitor the Horse Industry Organizations.¹⁷⁸ Similarly, in *Friends of Endangered Species, Inc. v. Jantzen*, the Northern District of California recognized the permissibility of the federal agency’s delegation of environmental research to a third party because the federal agency adequately reviewed the third party’s work.¹⁷⁹ In addition to multiple experienced United States Fish and Wildlife Service representatives personally reviewing the study, the study received favorable reviews by independent experts.¹⁸⁰

Replacing federal inspectors with Tyson slaughterhouse employees undisputedly creates a conflict of interest; Tyson has a stake in the beef it is evaluating. In *Sierra Club*, delegation did not remove the Corps from the Environmental Impact Statement preparation process entirely;¹⁸¹ in Tyson’s proposal, delegation would not remove federal inspectors from

172. *Id.*

173. *Am. Horse Prot. Ass’n*, 2002 WL 34471909, at *4.

174. *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983).

175. *Id.*

176. *Id.*

177. *Am. Horse Prot. Ass’n*, 2002 WL 34471909, at *4–5.

178. *Id.* at *5.

179. *Friends of Endangered Species, Inc. v. Jantzen*, 589 F. Supp. 113, 119 (N.D. Cal. 1984).

180. *Id.*

181. *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983).

the post-mortem inspection process entirely either.¹⁸² However, the same concerns over thoroughness plague both *Sierra Club* and Tyson's proposal. The *Sierra Club* court objected to the relatively brief time the Corps was given to review and comment on the contractor-prepared documents.¹⁸³ The combination of increased line speeds and fewer federal inspectors creates a tantamount situation under Tyson's proposal.¹⁸⁴ The ability of federal inspectors to fulfill their duty of closely monitoring, a practice explicitly considered by the court in its decision to approve delegation in *American Horse Protection Ass'n*,¹⁸⁵ becomes impossible.

D. FMIA's Safeguards Extend Only to Federal Inspectors

The legal authority of FSIS to take administrative, civil, or criminal actions against individuals and slaughterhouses for violations of FMIA enhances its monitoring and enforcement powers.¹⁸⁶ But FSIS's privileged authority to slow or stop facility production lines and seize products represents an even more critical power to immediately block adulterated food from reaching consumers.¹⁸⁷ Plant employees lack this authority.¹⁸⁸

The Federal Meat Inspection Act provides safeguards to protect the objectivity of inspectors and the integrity of the inspection process.¹⁸⁹ These safeguards extend to federal inspectors only, not facility employees.¹⁹⁰ For example, section 675 of FMIA recognizes that any person who "opposes, impedes, intimidates, or interferes" with a federal

182. Letter from Tyson, *supra* note 9, at 2.

183. *Sierra Club*, 695 F.2d at 962 n.3.

184. See Letter from Tyson, *supra* note 9, at 2.

185. *Am. Horse Prot. Ass'n v. Veneman*, No. 01-00028 (HHK), 2002 WL 34471909, at *5 (D.D.C. July 9, 2002).

186. U.S. DEPT AGRIC., FSIS DIRECTIVE 8010.5 REVISION 5, CASE REFERRAL AND DISPOSITION (2017).

187. *Id.*; see also Israel Cook, *How Fast Is Too Fast? OSHA's Regulation of the Meat Industry's Line Speed and the Price Paid by Humans and Animals*, 18 SUSTAINABLE DEV. L. & POL'Y 39, 39 (2017) ("[T]he only time the speed of the line is slowed down is when a USDA Food Safety and Inspection Service (FSIS) inspector halts the line because she or he identifies an animal carcass that appears contaminated (e.g., fecally, bruised and hemorrhaged).").

188. See *Slaughterhouse Workers*, *supra* note 87 ("In an industry where profit margins are slim and volume is everything, workers are endlessly pressured to kill more animals in less time There are other types of manufacturing industries that take great pride in ensuring safe working conditions and even empower workers to shut down machinery when they feel that conditions are potentially unsafe. Slaughterhouse and 'meat'-processing workers are made to feel the opposite—even when they know that conditions are extremely unsafe, they work on in fear of being reprimanded by supervisors.").

189. See Letter from Tyson, *supra* note 9, at 2.

190. See *id.*

inspector commits a punishable offense.¹⁹¹ These repercussions do not extend to facility employees. Section 622 of the Act explicitly prohibits bribes or gifts to inspectors and the acceptance of gifts.¹⁹² Specifically, any pay that is given with the intent to influence a federal inspector is punishable under the statute.¹⁹³ Facility employees are paid by the slaughterhouse. Shifting inspection duties to facility employees, whose income completely depends on the slaughterhouse owner-employer, necessarily frustrates the legislators' goal of objectivity sought in FMIA.¹⁹⁴

Federal inspectors receive required training and certification to perform their duties.¹⁹⁵ The U.S. Secretary of Agriculture approves the adequacy of the curricular and instructional training materials and equipment.¹⁹⁶ Under Tyson's proposal, Tyson maintained that workers would be required to go through a certification process but Tyson has not detailed what the training would entail.¹⁹⁷ Concern regarding industry employee inspector competency has already been raised by critics of the New Swine Inspection System because "[t]he rule . . . allow[s] the plants to use their own employees—with no required training—to monitor compliance with health and safety standards."¹⁹⁸

E. Delegation Thwarts the Effectiveness of FMIA Mandates

The Federal Meat Inspection Act mandates that federal inspectors perform a carcass-by-carcass evaluation.¹⁹⁹ This requirement has never changed since the statute's 1906 enactment because "carcass-by-carcass inspection continued to address the wholesomeness and quality aspect of meat and poultry that consumers demanded."²⁰⁰ In the late 1970s the government recognized that increased line speeds forced inspectors to work at speeds "well over those at which peak effectiveness is

191. 21 U.S.C.A. § 675 (West 2021).

192. 21 U.S.C.A. § 622 (West 2021).

193. *Id.*

194. See Letter from Tyson, *supra* note 9, at 2.

195. See 21 U.S.C.A. § 683(a)(2). (West 2021).

196. 21 U.S.C.A. §§ 661(a)(3), 683(a)(2) (West 2021).

197. Khimm, *supra* note 12.

198. Flynn, *Meat Inspectors' Unions Go to Federal Court Over Line Speeds*, *supra* note 16 (quoting the United Food and Commercial Workers Union); see Complaint at ¶¶ 21, 82, Ctr. for Food Safety v. Perdue, No. 3:20-cv-00256 (N.D. Cal. Jan. 13, 2020) (noting that swine slaughterhouse employee inspectors average four hours of education and training which falls below the minimum standard and that facility employees are "guided by nothing more than the nonbinding compliance guideline written for qualified veterinarians").

199. 21 U.S.C.A. § 621 (West 2021).

200. *Pathogen Reduction*, *supra* note 15, at 6777.

expected.”²⁰¹ But Tyson’s proposal creates a scenario of fewer federal inspectors *combined with* increased line speeds, relegating the carcass-by-carcass inspection mandate to mere puffery.²⁰²

V. CONCLUSION

Through the enactment of FMIA, the federal government became the public’s fiduciary, ensuring that slaughterhouses introduced wholesome and unadulterated meat products.²⁰³ Although the statute does not specify *how* the inspection process should be carried out, it clearly states *who* should be carrying it out.²⁰⁴ The Act charges federal inspectors with the duty of protecting the health and welfare of consumers via post-mortem inspection of all carcasses.²⁰⁵ As such, the Act provides safeguards, specific to federal inspectors, to ensure the integrity of the process.²⁰⁶ Tyson’s request to privatize the beef slaughterhouse inspection process undermines the letter and spirit of FMIA by reducing the federal inspector’s involvement.²⁰⁷ Until plant-based meat completely supplants the meatpacking industry,²⁰⁸ the government has a statutory

201. *Id.* (internal quotations omitted).

202. See Carey Gilliam, *Retired USDA Inspectors Share Concerns About HIMP Project*, FOOD SAFETY NEWS (Nov. 16, 2015), <https://www.foodsafetynews.com/2015/11/retired-usda-inspectors-share-food-safety-concerns-about-himp-project/> (offering comments from retired USDA inspectors who “witnessed line speeds moving so fast that it’s nearly impossible to detect abscesses, lesions, fecal matter and other defects that may make the hog carcass unsafe or unwholesome” following the implementation of HIMP).

203. 21 U.S.C.A. § 602 (West 2021).

204. 21 U.S.C.A. § 621 (West 2021).

205. *Id.*

206. See *supra* notes 17–19 and accompanying text.

207. See Khimm, *supra* note 12 (“Tyson’s request comes as the Trump administration is finalizing a similar overhaul for pork plants, which will allow them to reduce the number of USDA inspectors by having factory workers take over more quality control tasks.”).

208. The regulation of plant-based meat, including the Impossible Burger and Beyond Burger, poses fewer unresolved controversial product-integrity concerns:

Another commonly raised concern is the specter of GMOs [genetically modified organisms]. The anti-GMO Center for Food Safety has campaigned against the Impossible Burger and many figures in the anti-GMO community have joined in. The Beyond Burger, to be clear, contains no GMOs. The Impossible Burger uses modified soy and a special ingredient that is derived from a genetically modified plant: the ‘heme’ that makes the burgers ‘bleed’ comes from soybean roots, but Impossible Foods manufactures it from yeast in order to produce the quantities they need. This has been cleared by the FDA.

Kelsey Piper, *Meatless Meat Is Becoming Mainstream—and It’s Sparking a Backlash*, VOX (Oct. 7, 2019, 7:50 AM), <https://www.vox.com/future-perfect/2019/10/7/20880318/meatless-meat-mainstream-backlash-impossible-burger>; see generally Catherine Lamb, *Beyond Meat*

2021]

THE BEEF WITH SLAUGHTERING

971

obligation under FMIA to protect the federal inspector's role from being slaughtered.

and Impossible Foods Get Label Wins, Score Big for Plant-Based Meat, SPOON (July 24, 2018), <https://thespoon.tech/beyond-meat-and-impossible-foods-get-label-wins-score-big-for-plant-based-meat/> (providing background on the FDA's concern with, and ultimate approval of, heme).