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The *Supreme Beef Case*: An Opportunity to Rethink Federal Food Safety Regulation

By Blake B. Johnson*

I. Introduction

The food supply in America is among the safest in the world.¹ The horrific meat packing plant conditions depicted in Upton Sinclair's *The Jungle* are a thing of the past. However, while conditions in meat packing plants are certainly better than they were a hundred years ago, they still may not be as sanitary as necessary to protect consumers' health. Millions of consumers become sick,² and thousands die every year because of food-borne pathogens.³

For nearly a century meat produced in the United States has been subject to government regulation under the Pure Food and Drug Act of 1906 ("PFDA")⁴ and the Federal Meat Inspection Act of 1907 ("FMIA").⁵ Over the past hundred years these regulations have

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¹ Rob Longley, *New farm bill, deal with Russians could help farmers*, DAILY NEWS LEADER, Oct. 14, 2003, at 3A (quoting Undersecretary for Food Safety Elsa Murano, who noted that the United States has the lowest incidence of food-borne illness in the world), available at 2003 WL 6723378. See also Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 68 (2000); Joanne Bowlby, *Numerous Factors Can Contribute to Food-borne Illness*, WYOMING TRIBUNE-EAGLE, Dec. 3, 2000, at A10.

² *Beefing up food safety: Lawsuits underscore a report's call for new, science-based standards*, OMAHA WORLD-HERALD, July 10, 2003, at 6B, available at 2003 WL 5276273 [hereinafter *Beefing up food safety*].

³ Merrill & Francer, *supra* note 1, at 68.

⁴ Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) repealed by Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 392(a)).

⁵ Federal Meat Inspection Act, 21 U.S.C. §§ 601-80 (1907), amended by Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1260 (1907).

undergone a series of advancements designed to protect consumers, while at the same time recognizing meat producers' interest in keeping their products both cheap and popular.⁶ Recently, in response to outbreaks of pathogens like E. coli and Salmonella, the United States Department of Agriculture ("USDA") has developed new and innovative ways to enforce food safety standards.⁷

From 1998 to 2000, the USDA's inspection division, the Food Safety and Inspection Service ("FSIS"), phased in a system known as the Hazard Analysis and Critical Control Point program ("HACCP").⁸ This program allows the meat packing industry to develop safety guidelines that are overseen by the government.⁹

The first serious test of this new type of regulation in the meat packing industry came in *Supreme Beef Processors, Inc. v. United States Department of Agriculture*.¹⁰ In *Supreme Beef* the Fifth Circuit Court of Appeals held that the USDA overstepped its congressional mandate in enforcing the HACCP in a Supreme Beef meat packing plant.¹¹

This article will give a short history of government regulations in the meat packing industry, and the government's efforts to streamline such regulations. It will then discuss the current HACCP program. Next, the article will analyze *Supreme Beef* and its potential effect on the federal government's ability to monitor and regulate food safety. Finally, it will address what effect, if any, *Supreme Beef* will have on the consumer.

⁶ See Poultry Products Inspection Act of 1957, Pub. L. No. 85-172, 71 Stat. 441 (1957) (codified as amended at 21 U.S.C. §§ 451-69). See also Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 YALE J. ON REG. 535, 572 (1996).

⁷ See, e.g., USDA Hazard Analysis and HACCP Plan, 9 C.F.R. § 417.2 (2003). See generally Merrill & Francer, *supra* note 1, at 61. See also Caroline Smith DeWaal, *Delivering on HACCP's Promise to Improve Food Safety: A Comparison of Three HACCP Regulations*, 52 FOOD DRUG L.J. 331, 331 (1997).

⁸ USDA Hazard Analysis and Critical Control Point (HACCP) Systems, 9 C.F.R. § 417.1 (2003); Lawrence J. Dyckman, *Better USDA Oversight and Enforcement of Safety Rules Needed to Reduce Risk of Foodborne Illnesses*, General Accounting Office Reports, Report No. GAO-02-902 (Aug. 30, 2002). See also Melody Peterson & Christopher Drew, *The Slaughterhouse Gamble: The Risk of Self-Policing; New Safety Rules Fail to Stop Tainted Meat*, N.Y. TIMES, Oct. 10, 2003, at A1.

⁹ 9 C.F.R. § 417.2 (2003). See also DeWaal, *supra* note 7, at 333.

¹⁰ 275 F.3d 432 (5th Cir. 2001) [hereinafter *Supreme Beef II*].

¹¹ *Id.* at 443.

II. Background

A. Government Food Safety Regulation

The USDA was established in 1862 with one primary mission: to promote American agriculture.¹² Forty years later, when public concern about food safety grew strong enough to compel government intervention, the USDA was the logical choice, even though its charter said nothing about food safety.¹³ At the heart of this logic was a glaring conflict: how could an agency both promote American agriculture while fulfilling its duty to monitor and dispose of tainted agricultural products?¹⁴

In 1906 and 1907, in response to public pressure, Congress adopted the PFDA¹⁵ and the FMIA.¹⁶ This legislation made it a crime to introduce adulterated food into the stream of commerce and gave the federal government authority to examine food through federal inspectors, who would continually examine meat products.¹⁷ These acts represented the first time the federal government successfully passed legislation prohibiting adulterated food in interstate commerce.¹⁸

Throughout the twentieth century government policy adapted to meet the needs of a changing country. Responsibility for the regulation of food shifted between departments.¹⁹ In 1940, responding to what some perceived as a conflict between the mission of the USDA and its food safety goals, President Franklin D. Roosevelt removed the Food and Drug Administration (“FDA”), an

¹² Merrill & Francer, *supra* note 1, at 78.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) *repealed* by Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 392(a)). *See also* Merrill & Francer, *supra* note 1, at 79.

¹⁶ Federal Meat Inspection Act, 21 U.S.C. §§ 601-80 (1907), *amended* by Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1260 (1907) (codified as amended at 21 U.S.C. §§ 601-80). *See also* Merrill & Francer, *supra* note 1, at 79.

¹⁷ Merrill & Francer, *supra* note 1, at 79 (citing the PFDA).

¹⁸ *Id.*

¹⁹ *Id.* at 82.

agency responsible for regulation of non-meat products, from the USDA.²⁰ This measure left the USDA with only the power to regulate meat and poultry.²¹ The division of food safety duties grew in 1970 when President Richard M. Nixon delegated pesticide regulation to the Environmental Protection Agency (“EPA”), requiring the EPA to oversee governmental pesticide tolerances on food.²²

While federal food safety laws form the basis of the government’s authority to regulate the meat packing industry, they have not been amended in 22 years.²³ Worse, there has not been a major overhaul to the federal laws governing the industry since 1967.²⁴ The last major change to the federal meat inspection code came when contemporary science had no knowledge of two major food-borne pathogens: *Listeria* and *E. coli*.²⁵ This 1967 overhaul, in what became the Wholesome Meat Act,²⁶ did not even include among its goals the reduction of illness caused by tainted meat.²⁷ In fact, the USDA does not even have the authority to order a recall of contaminated meat.²⁸

B. The Evolution of USDA Food Safety Regulations

Today, the FSIS provides federal oversight of meat safety.²⁹ The FSIS continuously inspects every factory that processes meat or poultry bound for interstate distribution.³⁰ Federal law requires the FSIS to physically inspect each animal slaughtered in a meat packing

²⁰ Merrill & Francer, *supra* note 1, at 82-83.

²¹ *Id.* at 84.

²² *Id.* at 85.

²³ See Aparna Surendran, *Meat Inspection Suffers Because Industry, Government at Odds*, PHILADELPHIA INQUIRER, June 5, 2003.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 585 (1967).

²⁷ See Surendran, *supra* note 23.

²⁸ See Peterson & Drew, *supra* note 8, at A1.

²⁹ See USDA Administrator, Food Safety and Inspection Service, 7 C.F.R. § 2.53 (1998); Merrill & Francer, *supra* note 1, at 99 (outlining the work of the FSIS).

³⁰ See *id.*

plant.³¹

The FSIS has implemented a variety of different programs designed to prevent unsanitary food from entering the marketplace.³² In 1980, for example, the FSIS adopted a cooperative food safety implementation program.³³ Known as a “total plant quality control system,”³⁴ the program allowed meat packing plants to design their own food safety system, which was then presented to the FSIS for approval.³⁵ Following such approval, the FSIS allowed a plant to label its products as safe and was sometimes entitled to process certain products absent a federal inspector.³⁶ Some have criticized this program as a limited success, because of limited savings to meatpackers and because the program was not a significant deviation from the normal regulations.³⁷ However, the program did show that the USDA was willing to transfer some of its food safety authority to the industry that it oversaw.

Following the Processed Products Inspection Act of 1986,³⁸ Congress allowed the FSIS to shift federal inspectors away from plants with demonstrated records of compliance with food safety regulations and into plants with more questionable histories.³⁹ These actions were met with concern from consumer groups, the meatpacking industry, and even FSIS employees.⁴⁰ Faced with such a backlash, Congress did not renew the program’s statutory authority after it lapsed in November 1992.⁴¹

³¹ Michael, *supra* note 6, at 563.

³² *Id.* at 561.

³³ Voluntary Meat and Poultry Plant Quality Control Systems, 45 Fed. Reg. 54,310 (Aug. 15, 1980) (codified at 9 C.F.R. pts. 318 and 381); *see also* Michael, *supra* note 6, at 566.

³⁴ *See id.*

³⁵ *Id.*

³⁶ Voluntary Meat and Poultry Plant Quality Control Systems, 45 Fed. Reg. at 54,310; *see also* Michael, *supra* note 6, at 566-67.

³⁷ Michael, *supra* note 6, at 568.

³⁸ Processed Products Inspection Act of 1986, Pub. L. No. 99-641, § 403(a), 100 Stat. 3567 (1986).

³⁹ Michael, *supra* note 6, at 565.

⁴⁰ *Id.*

⁴¹ Processed Products Inspection Act of 1986 § 403(a); *see also* Michael, *supra* note 6, at 566.

In 1988 the FSIS proposed a “Streamlined Inspection System” (“SIS”),⁴² which delegated some federal inspection authority to plant employees while keeping inspectors in the plants.⁴³ The FSIS’ overarching goal in proposing the SIS was to increase plant productivity but maintain quality.⁴⁴ Unfortunately, reports indicated that the industry was thwarting the system,⁴⁵ and despite the best efforts of the USDA, consumer and industry groups also opposed this program.⁴⁶ Congress eventually cancelled funding for the SIS.⁴⁷

C. FSIS Implementation of the HACCP

Given the limited success of these programs, the FSIS proposed the HACCP for the meat and poultry industries.⁴⁸ On July 25, 1996 the FSIS issued a final rule pursuant to its power under the FMIA,⁴⁹ requiring all meat processors to develop and implement their own protocols to ensure the safety of their products.⁵⁰ The HACCP program followed widespread publicity of an E. coli outbreak in 1993, during which three children died and more than 450 people were sickened by hamburgers from Jack-in-the-Box restaurants.⁵¹

⁴² Streamlined Inspection System, 53 Fed. Reg. 48,262 (Nov. 30, 1998); Michael, *supra* note 6, at 563.

⁴³ Streamlined Inspection System, 53 Fed. Reg. at 48,264-65; Michael, *supra* note 6, at 563.

⁴⁴ *Id.*

⁴⁵ See Jack Anderson, *Meat Inspection By New System May Miss Dirt*, NEWSDAY, May 5, 1988, at 100 (describing an incident where a meatpacking plant was able to isolate and specially clean a batch of cattle tongues that was set for inspection), available at 1988 WL 2950233.

⁴⁶ See Arthur S. Brisbane, *Health, Safety Charges Put Poultry Industry Under Broiler*, WASH. POST, July 26, 1989, at A2 (describing a news conference featuring consumer groups attacking the SIS for causing a sharp increase in Salmonella contamination), available at 1989 WL 2042415. See also Michael, *supra* note 6, at 563.

⁴⁷ Michael, *supra* note 6, at 563.

⁴⁸ DeWaal, *supra* note 7, at 331.

⁴⁹ Federal Meat Inspection Act, 21 U.S.C. §§ 601-80 (2003).

⁵⁰ USDA Hazard Analysis and HACCP Plan, 9 C.F.R. § 417.2 (2003). See also *Supreme Beef Processors, Inc. v. USDA*, 113 F. Supp. 2d 1048, 1049 (N.D. Tex. 2000), *aff’d*, 275 F.3d 432 (5th Cir. 2001) [hereinafter *Supreme Beef I*].

⁵¹ Nigol Manoukian, Note, *The Federal Government’s Inspection and Labeling of Meat and Poultry Products: Is It Sufficient to Protect the Public’s*

The HACCP is basically a two step process: first, the plant identifies the “critical points” where food-borne pathogens are most likely to be introduced into meat.⁵² Second, it establishes safety standards for those points.⁵³ It has been suggested that this system is intrinsically better than its predecessors.⁵⁴ Indeed, conventional inspection does not always identify products that are tainted because random sampling will not always detect a problem and dangerous pathogens can exist in small quantities that are difficult to find.⁵⁵ HACCP shifts the focus to the process of production and allows for solutions tailored to each manufacturer’s problem areas.⁵⁶

The tailored solutions that the HACCP provides are only made possible because the government is able to ensure that they are appropriately implemented.⁵⁷ Once a HACCP program is in place at a meatpacking facility, it is essential that a process known as “verification” take place.⁵⁸ The verification process involves the government’s use of studies and testing to determine whether the controls put in place at a plant are actually working.⁵⁹ Without verification, “controls may be instituted that do not have the desired effect of either eliminating or reducing the hazard, or alternatively, no controls are instituted where they are in fact needed.”⁶⁰

D. Construction of Regulation Under Supreme Court Jurisprudence

Government regulations, like the HACCP promulgated by the USDA, have been subject to judicial scrutiny. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court set forth a two-pronged test to determine whether the regulations

Health, Safety and Welfare?, 21 W. ST. U. L. REV. 563, 563 (1994).

⁵² *Supreme Beef I*, 113 F. Supp. 2d at 1049.

⁵³ *Id.*

⁵⁴ See Michael, *supra* note 6, at 569-70.

⁵⁵ *Id.* at 568-69.

⁵⁶ *Id.* at 569.

⁵⁷ DeWaal, *supra* note 7, at 332.

⁵⁸ *Id.*

⁵⁹ USDA Hazard Analysis and HACCP Plan, 9 C.F.R. § 417.2 (2003). See also DeWaal, *supra* note 7, at 332.

⁶⁰ DeWaal, *supra* note 7, at 332-33.

outlined by a federal agency are within that agency's authority.⁶¹ First, the court looks to the plain language of the legislation to determine whether the construction of the regulations conflicts directly with the statute.⁶² Second, if the construction is not in conflict, deference is due to the agency's regulations.⁶³ This section will consider a recent application of the *Chevron* test to the USDA's HACCP program and the possible ramifications of that decision for federal food safety enforcement.

III. The *Supreme Beef* Case

In *Supreme Beef Processors, Inc. v. United States Department of Agriculture*, the United States District Court for the Northern District of Texas held that the USDA's implementation of Salmonella control guidelines was beyond the limits of the USDA's congressional mandate for food safety.⁶⁴ Supreme Beef Processors, Inc. ("Supreme Beef") implemented protocols under the HACCP program.⁶⁵ To evaluate the success of Supreme Beef's protocols, the FSIS tested the level of Salmonella bacteria in samples of Supreme Beef's finished product.⁶⁶ The FSIS used Salmonella as an "indicator organism," a plant's failure to control the levels of Salmonella in its product was considered a failure to control food-borne pathogens.⁶⁷ The FSIS developed a three-step procedure to determine whether a plant was meeting the established standards.⁶⁸ First, the FSIS would take samples from the plant for 53 consecutive days.⁶⁹ If more than five of these samples tested positive for Salmonella, FSIS would notify the plant of its need to take immediate action to correct the

⁶¹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁶² *Id.* at 843-44.

⁶³ *Id.*; see also *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) (applying the *Chevron* test).

⁶⁴ *Supreme Beef Processors, Inc. v. USDA*, 113 F. Supp. 2d 1048, 1054 (N.D. Tex. 2000).

⁶⁵ *Id.* at 1050.

⁶⁶ *Id.* at 1049.

⁶⁷ *Id.* at 1049-50.

⁶⁸ *Id.* at 1050.

⁶⁹ *Id.*

failure.⁷⁰ Following a second round of tests, if more than five samples tested positive, the plant would be required to reevaluate its protocols and “take appropriate corrective action.”⁷¹ Failing a third round of tests constitutes a “failure to maintain sanitary conditions and failure to maintain an adequate HACCP [sic] plan,”⁷² causing FSIS to suspend its inspections.⁷³ Such action causes an immediate shutdown of the plant, because any product that is produced without inspection is considered adulterated and cannot be sold.⁷⁴

Following Supreme Beef’s implementation of a HACCP plan, the USDA began testing for Salmonella in Supreme Beef’s finished product on November 2, 1998.⁷⁵ By the end of the first round of tests, 47 percent of the samples that the USDA examined had tested positive for Salmonella.⁷⁶ A second round of tests found 20.8 percent contamination.⁷⁷ Following five weeks of a third round of testing, The USDA notified Supreme Beef that it would fail the third round of tests and that the USDA intended to withdraw its inspectors.⁷⁸ On the day that the USDA was to remove the inspectors, Supreme Beef filed suit in the United States District Court.⁷⁹

A. Supreme Beef Before the District Court

Before the Texas District Court, Supreme Beef argued that the Salmonella tests that the USDA required were not within the department’s authority under the FMIA.⁸⁰ The court granted a temporary restraining order and eventually a preliminary injunction

⁷⁰ *Supreme Beef I*, 113 F. Supp. 2d at 1050.

⁷¹ *Id.*; FSIS contamination with microorganisms; process control verification criteria and testing; pathogen reduction standards, 9 C.F.R. § 310.25(b)(3)(ii) (2003).

⁷² *Supreme Beef I*, 113 F. Supp. 2d at 1050; 9 C.F.R. § 310.25(b)(3)(iii).

⁷³ *Supreme Beef I*, 113 F. Supp. 2d at 1050.

⁷⁴ Federal Meat Inspection Act, 21 U.S.C. § 604 (1994); *see also* Merrill & Francer, *supra* note 1, at 100.

⁷⁵ *Supreme Beef I*, 113 F. Supp. 2d at 1050.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1051.

⁷⁹ *Id.*

⁸⁰ *Id.*

in favor of Supreme Beef, preventing the USDA from withdrawing its inspectors from the Supreme Beef plant.⁸¹ The court subsequently granted Supreme Beef's motion for summary judgment.⁸²

While noting that federal administrative agencies are given substantial discretion in creating regulations,⁸³ the district court held that the USDA was not working within the statute that authorized it to evaluate the conditions of a meatpacking plant.⁸⁴ Specifically, the court noted that the statute only allows the USDA to determine that meat is adulterated when the processor's factory is found to be unsanitary.⁸⁵ At the Supreme Beef plant the USDA had relied on tests of the packer's final product, which the court held was different from testing factory conditions.⁸⁶

B. Supreme Beef Before the Fifth Circuit Court of Appeals

On appeal to the Fifth Circuit, the USDA relied on the language of the FMIA defining the word "adulterated,"⁸⁷ arguing that it has the authority to regulate Salmonella levels in shipments of meat that meat processors receive.⁸⁸ The Fifth Circuit, applying the *Chevron* test, found that the USDA's construction of the word "adulterated" did not conform to the statutory definition of "adulterated" under Section 601(m)(4) of the FMIA and affirmed the trial court's decision.⁸⁹ As a result, the Fifth Circuit held that the USDA's construction conflicted with the plain meaning of the statute and thus violated the *Chevron* test because of the USDA's invalid exercise of rulemaking authority.⁹⁰

The FMIA provides that, for a product to be found

⁸¹ *Supreme Beef I*, 113 F. Supp. 2d at 1051.

⁸² *Id.* at 1055.

⁸³ *Id.* at 1054.

⁸⁴ *Id.* at 1053.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Supreme Beef Processors, Inc. v. USDA*, 275 F.3d 432, 440 (5th Cir. 2001). *See also* Federal Meat Inspection Act, 21 U.S.C. § 601(m)(4) (1994) (definition of "adulterated").

⁸⁸ *Supreme Beef II*, 275 F.3d at 441 n.33.

⁸⁹ *Id.* at 443; 21 U.S.C. § 601(m)(4).

⁹⁰ *Supreme Beef II*, 275 F.3d at 443.

adulterated, it must be “prepared, packed or held under unsanitary conditions. . .whereby it may have been *rendered* injurious to health.”⁹¹ The court focused on the use of the word “rendered,” finding that the statute requires that a harmful change must have occurred in the meat while it was being “prepared, packed, or held” in the plant.⁹² Because Salmonella is initially present in many meat and poultry products, even before they are sent to a packing plant in the first place,⁹³ the court ruled that Salmonella contamination itself is not actually occurring while it is “prepared, packed, or held.”⁹⁴ Rather, it occurs before the meat even reaches the meatpacker.⁹⁵ Thus, the court found, Congress did not authorize the USDA to regulate Salmonella, a pathogen that may already be on the meat when it is initially received by a meat packing plant.⁹⁶

Supreme Beef left policy makers concerned. In response to the Fifth Circuit’s decision, Senator Tom Harkin of Iowa introduced legislation to ensure the power of the USDA to regulate meat safety.⁹⁷ Dan Glickman, the Secretary of Agriculture during the Clinton administration, said that *Supreme Beef* highlighted “a serious gap in the law. . .[n]ow it is up to Congress to correct it and see it as a matter of high priority for public health.”⁹⁸

IV. Analysis

Despite legislative measures, the Fifth Circuit correctly applied existing regulation construction precedent in holding that the USDA overstepped its statutory authority. This is not to suggest that the decision in *Supreme Beef Processors, Inc. v. United States Department of Agriculture* is beneficial for the American consumer. In fact, while *Supreme Beef* ruled out Salmonella testing as a

⁹¹ *Id.* at 440 (quoting 21 U.S.C. § 601(m)(4) (emphasis added by the court)).

⁹² *Supreme Beef II*, 275 F.3d at 440.

⁹³ *Id.* at 438.

⁹⁴ *Id.* at 440.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ S. 2760, 106th Cong. (2000) (unenacted); 146 CONG. REC. S5556 (daily ed. June 21, 2000) (statement of Sen. Harkin). *See also* Elizabeth Becker, *Government in Showdown in Bid to Shut Beef Processor*, N.Y. TIMES, Jan. 23, 2003, at A16.

⁹⁸ Becker, *supra* note 97, at A16.

verification procedure for the HACCP program,⁹⁹ it may have been the wake-up call that American food safety policy needed.

The essence of the *Chevron* analysis is that a regulation adopted by a regulatory body must find some basis in the statute that gives that body its authority.¹⁰⁰ But what is a government agency to do when faced with a statute that does not clearly give it power? The USDA did what it could given the circumstances; it promulgated a plan designed to protect the consumer, while allowing the meatpacking industry to have a hand in the regulations to which it was subject.¹⁰¹ Surely, this is what Congress wanted the USDA to do when it authorized the department to take charge of meat and poultry safety in the United States. Of course, given that there was no specific mandate from Congress, the meatpacking industry was free to backpedal and claim that the regulations it originally submitted to were unfair.

In fact, the USDA argued that it was acting within its authority when it construed the definition of “adulterated” under the FMIA.¹⁰² The argument is structured like this: the USDA must prevent meat from being “prepared, packed, or held under unsanitary conditions.”¹⁰³ In an *amicus curiae* brief, consumer groups argued that, under the FMIA, the USDA is required to prevent plants from accepting “excessively contaminated meat” and thus allow otherwise pathogen-free meat from becoming contaminated by pathogens from other meat and preparation surfaces on which contaminated meat is processed.¹⁰⁴ The Fifth Circuit rejected this argument, noting that the Salmonella tests only took place at the end of the production process, not at the beginning.¹⁰⁵ As a result, there was no baseline against which to determine whether meat was being contaminated during the production process.¹⁰⁶

Federal law regarding the regulation of food-borne pathogens

⁹⁹ *Supreme Beef II*, 275 F.3d at 440.

¹⁰⁰ *Id.*

¹⁰¹ See DeWaal, *supra* note 7, at 332.

¹⁰² Amicus Brief for Appellant at 6, *Supreme Beef Processors, Inc. v. USDA*, 275 F.3d 432, 442 (5th Cir. 2001) (No. 00-11008).

¹⁰³ See 21 U.S.C. § 601(m)(4) (2003).

¹⁰⁴ Amicus Brief for Appellant at 6, *Supreme Beef II* (No. 00-11008).

¹⁰⁵ *Supreme Beef II*, 275 F.3d at 442.

¹⁰⁶ *Id.*

are not always as specific as they could be.¹⁰⁷ Even members of Congress have expressed concern that the court's finding in *Supreme Beef* prevents the USDA from acting appropriately.¹⁰⁸ If any good is to come from the case, it will be from the recognition of Congress that current statutory authorization for USDA food safety regulations is either too weak or too vague and that Section 601(m)(4) of the FMIA needs to be amended to address the problem.

V. Impact of *Supreme Beef*

The meat on America's dinner tables is probably not tangibly less safe because of *Supreme Beef*. However, there is still cause for concern. Today, there is still no specific congressional mandate for the USDA to have pathogen standards, only the general statutory language that the Texas District Court and Fifth Circuit held insufficient.¹⁰⁹ Worse, there are signs that the meat packing industry may have been emboldened by the ruling in *Supreme Beef*.¹¹⁰

The HACCP was designed to allow the meatpacking industry to regulate itself with some governmental oversight.¹¹¹ However, this system is futile if government oversight through frequent inspection and laboratory testing is not available to the USDA.¹¹² At worst, without some verification system at the back end of the HACCP, meatpackers are free to claim that they are doing their job just by

¹⁰⁷ See generally FSIS Post—Mortem Inspection, 9 C.F.R. § 310 (2003); USDA Hazard Analysis and HACCP Plan, 9 C.F.R. § 417.2 (2003).

¹⁰⁸ 149 CONG. REC. S6981 (daily ed. May 22, 2003) (statement of Sen. Harkin).

¹⁰⁹ See Allison Beers, *USDA shows little interest in expanded powers*, FOOD CHEMICAL NEWS, Mar. 18, 2002, Vol. 44, Issue 5, at 15 (quoting congressional testimony by USDA Undersecretary for Food Safety Elsa Murano, who suggested the USDA is not interested in seeking further congressional authority), available at 2002 WL 11878873.

¹¹⁰ See generally Mark Kavar, 'Restated' Regulations Keep Beef Plant Open, OMAHA WORLD-HERALD, Jan. 28, 2003, at 1D. See also Peterson & Drew, *supra* note 8, at A1.

¹¹¹ Michael, *supra* note 6, at 569.

¹¹² Merrill & Francer, *supra* note 1, at 131 (suggesting that HACCP without rigorous oversight is "little more than an industry honor system"). See also *Hearing Before the Subcommittee on Government Management, Restructuring and the District of Columbia, Senate Committee on Governmental Affairs*, 106th Cong. 96, 104 (1999) (statement of Caroline Smith DeWaal, Director, Food Safety Program, Center for Science in the Public Interest).

monitoring the critical points they have found in their factories, even if contaminated meat is still working its way through their system.

A. Post *Supreme Beef*: Nebraska Beef, Ltd. v. United States Department of Agriculture

Along with *Supreme Beef*, another case has raised concern about the USDA's ability to enforce its food safety regulations. In *Nebraska Beef, Ltd. v. United States Department of Agriculture*, Nebraska Beef, Ltd. ("Nebraska Beef") sought and won a restraining order preventing the USDA from withdrawing its inspectors from a Nebraska Beef plant.¹¹³ Nebraska Beef had argued that the economic difficulties that surround a shutdown outweighed the "accusations and authority" cited by the USDA.¹¹⁴ United States District Court Judge Joseph Bataillon said that if he did not issue the temporary restraining order, the subsequent economic harm to Nebraska Beef would be "far greater than any injury" to the USDA.¹¹⁵ Following the restraining order, the USDA settled with Nebraska Beef and implemented a "restatement" of USDA regulations at the Nebraska Beef plant in question.¹¹⁶ The restatement required Nebraska Beef to appoint a full time employee to oversee food safety regulation implementation, educate employees about food safety, hire an independent third party to audit food safety protocols in the plant, and periodically report back to the USDA.¹¹⁷ The USDA's actions elicited an immediate response from consumer groups who feared that Nebraska Beef's settlement could be replicated by other companies who would be emboldened by the *Supreme Beef* and *Nebraska Beef* successes.¹¹⁸

More than a month after the settlement, Department of Agriculture Secretary Ann Veneman defended the *Nebraska Beef* settlement before the House Appropriations Subcommittee on

¹¹³ *Nebraska Beef, Ltd. v. USDA*, No. 8:03CV16 (D. Neb. Jan. 14, 2003) (order granting preliminary injunction); see also John Taylor, *Judge Halts Closing of Nebraska Beef*, OMAHA WORLD-HERALD, Jan. 17, 2003, at 1D, available at 2003 WL 5261116.

¹¹⁴ See Becker, *supra* note 97, at A16.

¹¹⁵ *Nebraska Beef, Ltd. v. USDA*, No. 8:03CV16 (D. Neb. Jan. 14, 2003) (order granting preliminary injunction). Taylor, *supra* note 113, at 1D.

¹¹⁶ See Becker, *supra* note 97, at A16.

¹¹⁷ See Kawar, *supra* note 110, at 1D.

¹¹⁸ *Id.*

Agriculture, stating that the settlement gave the Department of Agriculture more control within the plant.¹¹⁹ Veneman also told the committee that the USDA would not be reluctant to withdraw inspectors from unsanitary plants.¹²⁰ Even so, the “most important tool”¹²¹ of the USDA had been thwarted by a restraining order from a federal judge in the very case Veneman was discussing at the hearing.¹²²

In response to a subsequent Nebraska Beef lawsuit against the USDA, Carol Tucker Foreman, director of the Food Policy Institute,¹²³ suggested that such lawsuits indicate a new pattern of litigation by meatpackers.¹²⁴ According to Foreman, “[t]hey’re trying to send a message to the USDA that some people will fight them every step of the way if they try to enforce the law.”¹²⁵

B. Potential Food Safety Legislation

Recently, citing the *Supreme Beef* and *Nebraska Beef* cases, Senator Harkin reintroduced legislation designed to broaden the USDA’s powers, specifically granting it authority to enforce food-borne pathogen standards and to enforce HACCP plans.¹²⁶ Senator Harkin sees *Supreme Beef* and *Nebraska Beef* as indications that “today, there is nothing USDA could do to shut down a meat grinding plant that insists on using low-quality, potentially contaminated trimmings.”¹²⁷

Legislation specifically authorizing the Department of

¹¹⁹ *DeLauro pushing for stricter food-safety laws*, CONNECTICUT POST, Mar. 2, 2003.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ The Food Policy Institute is a division of the Consumer Federation of America, a consumer advocacy group. See Consumer Federation of America, Food Policy Institute, at <http://www.consumerfed.org/backpage/fpi.html> (last visited Dec. 10, 2003).

¹²⁴ *Nebraska Beef Sues USDA, Inspectors*, FOOD INSTITUTE REPORT, May 12, 2003, at 10.

¹²⁵ *Id.*

¹²⁶ See 149 CONG. REC. S6981-01 (daily ed. May 22, 2003) (statement of Sen. Harkin). See also *Beefing up food safety*, *supra* note 2, at 6B.

¹²⁷ 149 CONG. REC. S6981-01.

Agriculture to enforce its pathogen standards and the HACCP protocols is critical. The behavior of meat packing plants like Supreme Beef and Nebraska Beef is not isolated.¹²⁸ Indeed, there is evidence that HACCP is not working as well as it should.¹²⁹ For example, since the implementation of a HACCP system at the Shapiro Packing plant in Augusta, Georgia, federal inspectors have repeatedly discovered meat tainted with fecal matter.¹³⁰ Worse, inspectors also found a shipment of hamburger from the plant to be infected with E. coli, but were able to intervene in time to prevent its shipment to public schools.¹³¹ Nevertheless, the USDA delayed action and did nothing more than threaten to close the plant.¹³²

VI. Conclusion

The Fifth Circuit issued its ruling in *Supreme Beef* more than two years ago.¹³³ In the interim, there has been no significant action on the part of the federal government to redouble its food safety efforts, save some proposed legislation. If commentators, looking at cases like *Supreme Beef* and *Nebraska Beef*, are correct in finding a movement by meat packers toward more litigation in an attempt to lessen government regulatory interest, consumers may be in danger. It would appear that meat packing associations and their contingent interest groups are willing to fight against regulation designed to protect the public. Under *Supreme Beef* those interests may be protected only because of Congress' failure to act, which can only continue to be detrimental to the consumer.

¹²⁸ See Peterson & Drew, *supra* note 8, at A1.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ See generally *Supreme Beef Processors, Inc. v. USDA*, 275 F.3d 432 (5th Cir. 2001).