A History of Attempts by the Department of Agriculture to Reduce Federal Inspection of Poultry Processing Plants - A Return to the Jungle

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I. INTRODUCTION

The Focus of This Article

This article analyzes recent decisions of the U.S. Department of Agriculture (USDA) and its Food Safety and Inspection Service (FSIS) which abandon their statutory responsibility to inspect all poultry processing plants in the country for safety and for wholesomeness of the food produced there. It is a study of the flagrant disregard of the Administrative Procedure Act, agency insulation and arrogance, and bureaucratic deviousness which violate not only the rules of law but the public trust. The inquiry is serious because the impact of the agency blundering exposed here reaches into every box of McNuggets sold and each chicken breast grilled at home by today's health-conscious consumers.

This article will first address the history of meat inspection in the United States, the emergence of chicken as the food of choice of Americans, and the health risks which have resulted from increased mechanization in plants—ironically caused by the increased demand for chicken. An overview of the USDA's response to these changes follows, including the argument that the USDA, in response to industry pressure, has sought a path of quiet retreat and deregulation.

To provide evidence of this pattern, the article will analyze a Notice of Proposed Rulemaking put forth by the USDA and why it would be insufficient under the Administrative Procedure Act (APA). This issue is addressed in terms of the USDA's own attorneys' opinions, prior case law concerning the USDA and other agencies regarding the APA,

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and arguments proposed by industry, labor, public interest groups, and the media.

Further evidence of agency disregard for public health in response to industry mechanization will be shown in the agency's adoption of another rule which is still in effect today.

Examined throughout the article, for legal sufficiency and public policy correctness, is USDA decision-making during the years 1977-1990. Unfortunately, what is exposed is an agency out of control and out of touch with the public which the agency exists to protect.

**The Federal Government's Role in Ensuring Food Safety**

In response to the public outrage at Upton Sinclair's grisly account of unsanitary Chicago meatpacking plants in his turn-of-the-century book, *The Jungle*, President Theodore Roosevelt ordered an investigation which led to the enactment by Congress of the Meat Inspection Act of 1906. Still the law today, that statute requires that cattle and hogs sold in interstate commerce be federally inspected for disease at the time of slaughter and for wholesomeness when they are processed. Meat processing involves either cutting up the meat into parts and packaging it for sale or making other products out of it, such as soups or frozen dinners. Typically, both slaughtering and processing are performed at the same plant. The Act also imposes strict sanitation standards for plants and guidelines for proper labeling of meats. Significant historically, this law has been hailed for decades as one of the nation's first consumer protection measures.

Poultry was not included in the 1906 statute because that industry was then quite small and localized. When poultry consumption increased dramatically in the 1950s, however, Congress imposed similar federal inspection and sanitation requirements on poultry slaughter and processing with the passage of the Poultry Products Inspection Act of 1957.

**The Emergence of Chicken in the Diets of Most Americans**

Throughout the 1960s, 1970s and 1980s, increasingly health-conscious Americans included more chicken in their diets because it was lower in fat and calories than beef and cheaper to buy. In 1990, Americans ate

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3. Id. at §§ 604-06.
4. Id. at § 608.
5. Id. at §§ 606(b), 607.
more chicken than any other meat for the first time in history.\footnote{Key, Chicken Consumption Up, But So is Salmonella; So Where's the Health Gain?, Chicago Tribune, Feb. 4, 1990, \S 7, at 1, col. 1.} The trend has been remarkable. For the entire 1940 calendar year, 143 million chickens were slaughtered in this country.\footnote{"Ruling the Roost—Findings and Fact Sheet", Institute for Southern Studies, Durham, N.C., Summer 1989 (accompanying Ruling the Roost, Southern Exposure, Vol. XVII, No. 2, Summer 1989) (hereinafter Southern Exposure).} By contrast, in 1989, it is estimated that 106 million birds were slaughtered each and every week.\footnote{Id. at 8, col. 2.} The majority of those were cut up and sold as parts, legs and breasts for instance, while increasing percentages were further processed into McNuggets, chicken hot dogs and frozen dinners.\footnote{Id. at 8, col. 3-4.}

Thirty-two percent of all chicken processed goes to McDonald's, Kentucky Fried Chicken, Wendy's and other fast food chains.\footnote{Id. at 8, col. 4.} The 10,000-unit McDonald's chain has been "bullish" on chicken, introducing Chicken McNuggets in 1982, a chicken salad in 1987 and the McChicken sandwich in 1989. Burger King, Wendy's and Arby's all now sport menu selections featuring chicken. In fact, of the $18 billion the American public spent on chicken in 1989, half of it was spent at fast food restaurants.\footnote{Key, Chicken's Salad Days in Fast Food, Chicago Tribune, Sept. 3, 1989, \S 7, at 1, col. 4.} The Colonel is still the king, though, controlling fifty percent of the fast food chicken market.\footnote{Id. at 8, col. 2.}

The remainder of the chicken processed is sold through grocery stores under such familiar brand names as Holly Farms, Tyson, Perdue and Con Agra. Even former Miss America Phyllis George has entered the market with a new Hormel chicken breast fillet product, "Chicken, by George."

To keep pace with this phenomenal demand, the chicken industry became automated and mechanized to make processing more productive. In the early 1970s, new technologies of mass production were developed to speed poultry carcasses along plant lines at forty birds per minute. Today the speed is seventy to ninety birds per minute. Additionally, the substantial investment capital needed to build and equip new, larger plants has forced the small, local operators out. Today, chicken is big business, and fifty percent of the industry's output is controlled by eight large companies.\footnote{Key, supra note 7, at 4, col. 1.} The industry is a model of vertical integration, with most major companies directing and managing every step in the life
cycle of a chicken—from fertilization of the egg to its incorporation into a chicken pot pie.\textsuperscript{15}

This industrial revolution in poultry processing has paid dividends for consumers. Chicken costs only one-third of what it did thirty years ago, inflation considered.\textsuperscript{16} And by all accounts, it's a healthy food choice for those people reducing their consumption of red meat. Consumers also take comfort in the USDA's assurances that no nation has a better poultry inspection system and that we have the safest and most wholesome food supply in the world.\textsuperscript{17}

\textit{Adjustment of the Government's Role}

The federal government's regulation and inspection of poultry processing plants had to be modified (critics would say it was "lessened") in the 1970s and 1980s in response to the industry's mechanization. In 1977, the Department, upon the recommendation of the FSIS and the poultry industry, changed a regulation that required the automatic con-

\textsuperscript{15} The raising, slaughtering, and processing of poultry involve the following steps: 1. Fertilized eggs are produced in environmentally controlled breeder houses (one rooster per ten hens). Several breeders force their chickens to wear opaque contact lenses to make them more passive because of the aggressive and cannibalistic nature of chickens when crowded together with little space to move about. 2. Eggs are stacked in trays and rotated automatically every 15 minutes for 18 days until they hatch. The new-born chicks are given antibiotics and debeaked. 3. The chicks are taken to growout houses, twice as long as a football field, each housing 26,000 chicks. They grow for 42 days and are then crated onto flatbed trucks for transport to the slaughterhouse. 4. The crates are opened at the poultry plants and the live birds are hung by their feet on hooks attached to the processing line. 5. An electric shock stuns the bird, and a machine cuts its throat. Its blood drains for two minutes. 6. Carcasses are dipped in hot water tanks and machinery with rubber fingers removes their feathers. 7. The feet are cut off automatically and workers re-hang the carcasses on another processing conveyor line. 8. At the next station, federal inspectors glance at the exteriors of carcasses and, if necessary, order workers to trim or discard unwholesome meat. 9. Workers squeeze out the intestines by hand or tool. Hearts and livers are cut out with scissors. Lungs are sucked out with a mechanical suction gun. 10. Company employees randomly examine carcasses. 11. The birds are dumped into tanks of cold, chlorinated water where they soak for up to one hour. 12. Workers either package the birds whole or use saws and knives to cut the birds into different parts. Other carcasses are deboned and used to make a variety of products including McNuggets. 13. The products are shipped to supermarkets and restaurants.

One hundred and ten million chickens are processed in this manner each week in the United States. From Egg to Table, Southern Exposure, supra note 8 at 18-19.

\textsuperscript{16} Key, supra note 7, at 4, col. 3-4.

\textsuperscript{17} Washington Dateline, Reuters Wire Service Dispatch, April 3, 1987, AM cycle, quoting Agriculture Secretary Richard Lyng: "I know we have the finest meat and poultry inspection system in the world." The statement of former Assistant Secretary of Agriculture Carol Tucker Foreman is also representative. She notes, "we have the cleanest, safest food supply in the world." Stevens, "One more food worry: Microbes pose bigger threat than pesticides." Des Moines Register, March 28, 1989, § A, at 4, col. 4.
demnation of any chicken parts visibly contaminated by fecal matter. The law up until that time was that such meat had to be trimmed from the carcass. If the feces were extensive, the whole bird was condemned and not allowed in commerce. The new rule, however, allowed the poultry companies instead to wash those birds dripping with feces in a huge vat of chlorinated water with dozens of other carcasses and then send them on their way to the grocery store freezer case.18

While "60 Minutes" would later expose that decision as one permitting the use of tanks of "fecal soup"19 at those plants, it was required because of the new technology which sped up production lines. New machinery developed to handle ninety birds a minute which de-feathered and eviscerated the poultry with mechanical fingers often ripped open the birds' intestines, scattering feces over other carcasses, and then pounding the feces into the birds' tissues.20

Although feces in and of itself is not a desirable addition to chicken meat, there is a much more serious health risk posed by the new technology—salmonella, a bacteria which resides in chicken feces.

By the USDA's own calculations, thirty-seven percent of the chicken leaving this country's processing plants is contaminated with salmonella.21 That is nearly four out of every ten birds which have been sped through the processing gauntlet. Although all salmonella bacteria can be killed if the chicken is completely cooked at temperatures of one-hundred sixty-five degrees fahrenheit and most instances of illness and death from it can be traced to improper preparation of the chicken at home or in a restaurant, salmonella remains a health risk.

The government's Centers for Disease Control estimate that up to four million people each year will become ill from salmonella.22 Most of them never realize it, believing instead that the painful gastrointestinal distress is caused by the twenty-four hour stomach flu. That is not surprising because salmonella's symptoms are the same as those of influenza—chills, diarrhea, vomiting, fever and stomach cramps.23 However, there may be more serious complications. The Food and Drug Administration estimates that 120,000 people exposed to salmonella in a typical year will develop chronic arthritis because of it.24 There is
incredible irony, of course, in the fact that a healthy food like chicken has become a health threat as a result of the mechanization necessitated by increased consumer demand for the product.

Because of increased health risks, many became unconvinced over the years that the traditional organoleptic procedures of sight, smell and touch used by inspectors to identify unwholesome or diseased carcasses were appropriate to the task of protecting the public from salmonella bacteria. The FSIS commissioned a National Academy of Sciences (NAS) study, to be conducted by its National Research Council arm, to examine the poultry inspection system in place in the early 1980s and to recommend any necessary changes. The Academy's final report, released in 1985, confirmed that pathogenic microorganisms like salmonella simply could not be seen by the naked eye or detected by traditional methods. The NAS recommended instead a risk-based system in which processing plants would be inspected disparately and that such inspections would be supplemented by new technologies.

Envisioned was a retreat from the traditional continuous bird-by-bird organoleptic federal inspection to a system in which those plants which the government determined could be entrusted to police themselves would be subjected to less than daily federal inspection. Other plants, where health risks were greater, would be placed on increased federal inspection. In both scenarios, the Academy predicated its recommendations on the utilization of modern technology, including rapid on-site screening tests for salmonella.

Bolstered by the Academy's study, the USDA approached Congress and requested authority to revamp the traditional inspection system under the 1957 Poultry Products Inspection Act and 1968 Wholesome Poultry Products Act. Attractive to many members of both the House and Senate as one more move toward deregulation, a theory enjoying great political currency at the time, the Processed Products Inspection Improvement Act of 1986 sailed through the Congress, granting the agency the inspection flexibility it sought.

By its terms, the statute permitted the FSIS to adopt by rule-making a new inspection system which would eliminate the daily federal inspection of all plants and permit the FSIS to vary the manner in which plants were inspected.

26. Id. at 3.
27. Id.
29. Id.
Technically, the 1986 Act amended the 1906 Federal Meat Inspection Act and therefore applied only to beef processing plants. However, the FSIS did not need to request specific congressional authority to pull back its inspectors from poultry plants at the same time because it had always interpreted the 1957 Poultry Products Inspection Act as allowing it.30

Although a case could be made that such an interpretation of the 1957 Act is incorrect and that daily inspection is required, it is unnecessary to so argue because the FSIS continued to inspect both beef and poultry processing plants daily over the years since the 1957 Act.31

The 1986 amendments were also sold to Congress as a means to cut federal government spending by $27 million by reducing the number of federal inspectors needed since primary responsibility for inspection would fall to the processors themselves. Under the plan, the Agency would not replace inspectors who quit or retired, and over seven years time its workforce would decrease dramatically.32 Congress simply could not resist it.

As a concession to consumer groups, a “sunset” provision was inserted which conferred these new powers to the Agency for only six years,33 such that in 1992, the agency’s operation under the Act will be reviewed by Congress and a decision made as to whether it should be extended.

On November 4, 1988, two years after Congress acted, the USDA and the FSIS published a formal notice in the Federal Register that they intended to amend their inspection rules to provide for less than daily federal inspection of processing plants and to turn much of that work over to the processors.34 While that particular Notice of Proposed Rulemaking (NPR) provides the point of departure for this article’s analysis of USDA decision-making, this did not mark the first time the agency had acted to reduce its inspection of poultry processing plants.

An Agency Quietly Retreating

It is my contention that the USDA violated the express mandates of the Administrative Procedure Act (APA) by withholding from its published notice of rulemaking the documents and information which explained the way in which the new discretionary inspection system

31. Id.
would actually work. Such is consistent with agency habit. The fact is the FSIS has been loose with the APA for years as it has dramatically deregulated the poultry industry.

Concealment of decision-making from the public has been a constant at the FSIS for more than a decade. The Agency has shown a preference for acting in the shadows, in the backrooms, and outside the APA while changing its rules and procedures lessening its inspection of processing plants over the years, thus leaving the public unaware of its moves. Many of the FSIS's policies in this area are not announced at all and the effect of announced policy is at times not accurately portrayed by the agency.

Examples of this behavior follow, starting in 1977 when traditional bird-by-bird federal organoleptic inspection procedures were imposed on processors:

1) the change to a Modified Traditional Inspection System in 1979 where one inspector no longer was required to check the whole carcass;\textsuperscript{35}

2) enactment in 1980 of a Total Quality Control program permitting plants with the best compliance histories to assume the primary responsibility for inspection under light FSIS monitoring, thus turning over to company employees at approximately 475 plants the inspection duties formerly performed by the federal inspectors;\textsuperscript{36}

3) the adoption in 1983 of a New Efficient Line Speed ("NELS") plan which reduced bird-by-bird inspection, allowing plants to speed up lines, and the institution of a modified honor system for self-inspection;\textsuperscript{37}

4) reduction of scrutiny in most plants pursuant to a Streamlined Inspection System in 1984 which permitted processors to increase the speed of their lines to ninety or 120 birds per minute, and delegated more inspection decisions to plant employees.\textsuperscript{38} At ninety birds per minute, an inspector would have .66 of a second to examine each carcass. Obviously, allowing processors to run their lines at mach speed constitutes a most significant lessening or, it might be argued, destruction of the opportunity to organoleptically inspect;

5) the reduction in the total number of federal inspectors

\textsuperscript{35} National Research Council, supra note 25, at 7.

\textsuperscript{36} National Research Council, supra note 25, at 8.

\textsuperscript{37} Id. Also, interview with Thomas Devine, Legal Director, Government Accountability Project, in Washington, D.C. (June 6, 1989).

\textsuperscript{38} Interview with Thomas Devine, supra note 37.
from 10,000 in 1981 to 7,100 in 1989. Of this field inspection force responsible for all 6,600 meat and poultry slaughtering and processing plants in the country, the FSIS assigns 2,100 inspectors to the 6,200 plants which engage in processing. The remainder supervise slaughter operations.

In considering this track record of retrenchment, it is telling that the 1968 Wholesome Poultry Products Act, still the law at all times relevant to these examples, expressly required daily, continuous, bird-by-bird federal inspection of chicken carcasses.

One senior member of Congress, Representative Neal Smith of Iowa, author of the 1968 Act, was so outraged by these instances of agency arrogance and blatant disregard of the 1968 law that he proposed the USDA should be banned from changing its rules without congressional approval. In Smith's view, the FSIS was out of control and acting in flagrant violation of the law.

Nevertheless, the agency's motives may be easily explained. Consumer confidence is absolutely essential to the food processing industry. If the public loses confidence in the wholesomeness of certain food, it will refuse to buy that food. Nobody is going to buy or eat any food they fear is unsafe or improperly inspected by the government. The USDA label on poultry products signifies to the public that the food has been prepared in a sanitary plant under federal government inspection, that it meets government standards for wholesomeness, and that it is safe to eat. If a food scare was to sweep the country because of publicity about the government's reduction of its inspection, the poultry industry would be devastated financially, if not destroyed.

I have no doubt that the FSIS officials who engineered these cutbacks believed in their hearts and minds that they were only modernizing and improving the decades-old system of inspection and that such modifications fully protected and even enhanced the public health. Additionally, the FSIS probably justified low-profile deregulation on the grounds that it was necessary to avoid a food panic. However, even such elevated intentions never justify agency lawlessness. Without question, the public

40. Id.
should have been apprised of the systematic and continuous reduction in FSIS inspection throughout the late 1970s and 1980s. The APA requires nothing less.

Despite its history of retrenchment, however, in 1988, the FSIS went public and published its intentions in the Federal Register. Whether it had become a born-again believer in the APA is debatable—after all, the Processed Products Improvement Act required them to make the change to discretionary inspection "in rules and regulations issued by the Secretary." Considering such a mandate and the press attention given the legislation when it was originally enacted by the Congress, the agency had no choice but to comply with the APA's rule-making provisions requiring notice and the receipt of public comment.

It is my studied conviction that this agency's consistent pattern and history over the years of deregulating this industry behind closed doors and its refusal to expose its own actions to the light of public scrutiny impacted on its November 4, 1988 rule-making in several ways. First, the FSIS was emboldened to disregard the legal niceties of the APA, having never been challenged specifically on it and having gotten away with it for so long. Second, FSIS officials had become truly arrogant, believing their own internal thinking on the inspection issues was infallible, and thus the FSIS could not benefit from comment from outside the Agency. Finally, insulated decision-making was plainly institutionalized by then and had become standard agency operating procedure. It was precisely under this historical context that the FSIS prepared its Notice of Proposed Rule-Making in this case.

II. THE NOVEMBER 4, 1988 NOTICE OF PROPOSED RULE-MAKING

What the APA Requires

A federal agency's exercise of its rule-making authority, actually a power to legislate by enacting rules and regulations having the force of law, is strictly governed by section 553(b) of the Administrative Procedure Act. That section requires, in pertinent part, that notice of the proposed rule be published in the Federal Register including "either the terms or substance of the proposed rule or a description of the

44. The U.S.D.A. was not required by the 1986 Act to employ formal, on the record rule-making in this case; and, indeed, the agency pursued the more common informal, notice and comment rule-making procedure.
46. Id.
subjects and issues involved." Additionally, after the required notice, "the agency shall give interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments." The section further obligates the agency to consider the comments received in making its final decision.

Explicitly, this provision recognizes that people affected by proposed rules have a legitimate right to be heard in such agency decisions. Also, it enhances public input by requiring that notices of proposed rule-makings be sufficiently complete.

What the Agency Stated in its NPR

In its November 4, 1988 Notice of Proposed Rule-Making, the FSIS offered new rules governing inspection of both poultry and red meat processing plants which would provide for less than daily federal inspection of plants the agency considered to present less of a health risk than others. To qualify for such a reduction in inspection, a plant's past performance must reveal a solid compliance history and its own internal control procedures would have to be adequate to ensure sanitary conditions and wholesome food without daily federal supervision.

It was explained in the notice that "substantial and recent noncompliance would preclude any significant reduction in the frequency of inspection activities in an establishment," implying that a plant could fail to comply with sanitation or wholesomeness requirements somehow less than substantially (presumably quantitatively or qualitatively) and still be eligible for less than daily federal inspection.

The notice presaged that those qualifying plants "would no longer be able to rely on program [FSIS] employees continuously being in the plant, and must on their own volition identify and correct potential sanitation problems to prevent the production of adulterated product."

With repeated references, the notice made it perfectly clear that the new rules would allow the USDA to reallocate its inspection workforce on the basis of risk posed by each plant.

The agency not only proposed the new rules, but argued vigorously throughout the document for their acceptance, submitting that they were absolutely necessary "to accommodate improvements planned for its [the agency's] system of inspection."

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47. Id. at § 553(b)(3).
48. Id. at § 553(b).
49. Id. at § 553(c).
51. Id. at 44,829.
52. Id. at 44,829, 44,821, 44,822.
53. Id. at 44,818, 44,821, 44,822.
54. Id. at 44,818.
What the Agency Shaded in its NPR

First, the FSIS represented to the public in its published notice that these rule changes were "mandated by the 1986 amendments."55 In addition, in an October 6, 1988 memo to all agency employees distributed to persuade them to accept this deregulation, Dr. Lester Crawford, FSIS Administrator, wrote: "The law requires us to vary the frequency and manner of inspection ... ."56 Frankly, neither was truthful. The 1986 Act permitted the USDA, after a full rule-making proceeding, to adopt such rules. It in no way required that they be enacted.57

However, in its notice the Agency presented the rule changes to the public as a fait accompli. I submit that doing so was misleading and diverted the public's attention and scrutiny away from the propriety of scrapping the traditional inspection system, the area in which the Agency was most vulnerable to criticism.

Second, in a last-minute move before the publication of the notice, the FSIS abruptly changed the name of the new system from "Discretionary Inspection" to "Improved Processing Inspection." Such cosmetics were applied so late in the agency's two-year effort of deregulation that throughout the June 1, 1988 working draft of the notice, the words "discretionary inspection" were deleted and the new name substituted in pen.58

Indeed, in the very first paragraph of the published notice purporting to summarize the new changes being proposed, the Agency explained that the modifications were necessary to improve its inspection system.59 Moreover, throughout the lengthy notice, stated repeatedly was the assurance that risk-based assignment of federal inspectors would improve inspection goals and facilitate, rather than thwart, the federal government's duty to protect the public.60

The entire notice reads as might a high school cheerleader's speech to the student body before a big game—there is not one negative word in it about the team's new game plan. Not only does the language drip with the buzz words necessary to calm readers, for example, "improve" and "intensify," but also the substance of the notice makes the case for the new system without any recognition whatsoever of the downside. Concealed from the public was the fact that it was not at all certain or even generally agreed that the new system was an improvement over the old one. Indeed, as the FSIS knew at the time, large numbers of

55. Id. at 44,820.
57. Processed Products Inspection Improvement Act, supra note 43.
60. Id. at 44,821, 44,822, 44,824.
its own inspectors in the field were outraged that Improved Processing Inspection would subject the public to enormous health risks and found it absurd to believe the plants could be trusted to inspect themselves. Instead, by cheering IPI and slathering the right adjectives on it rather than even-handedly and honestly noting that a legitimate difference of opinion existed as to the plan's efficacy, the FSIS focused public comments and scrutiny elsewhere.

Also, it is my contention that the agency's total packaging of this rule change, as discussed here, was misleading because it did not honestly describe the impact of the proposed rules. The whole point of IPI was its reduction of the role of the federal inspector at processing plants and the substitution of the plants' own employees, involving less federal spending than the existing system of inspection. Indeed, this entire plan was originally sold to Congress in 1986 as a means of cutting $27 million in inspection expenses from the USDA's budget. To repeatedly portray such undeniable reallocation, retrenchment and reduction as "improved" and "intensified" federal inspection is, in my opinion, categorically deceptive.

A third problem with the NPR was the misrepresentation of successful field testing of the program. On the third page of its notice, the FSIS reported that IPI had been pilot tested at several poultry plants and that, as a result, "the Administrator has determined that FSIS now has sufficient information to propose regulations that will permit implementation of its improved processing inspection." That statement implied that either the implementation of IPI in the pilot program had been successful or that, if unsuccessful, adjustments had been made in the rules finally proposed to correct shortcomings discovered in the field. Neither was the case.

In fact, IPI's mammoth computer, responsible for preparing each federal inspector's daily schedule, sending him to certain plants, and listing the duties to be performed there, so misfired in pilot II in Chicago that thirty-one percent of the inspection tasks "could not be performed because plants were closed or the particular process was not being conducted." Not only was that problem, key to the entire new assignment system, not rectified in the third and last full pilot in North

63. 53 Fed. Reg. at 44,820.
64. House Subcommittee Hearing Report, supra note 39, at 206.
Carolina, but also the computer continued to waste inspection resources after that.

The field test in pilot III has been widely criticized as actually reducing and not intensifying the inspection of plants with the poorest sanitation and wholesomeness in North Carolina. Congressman Theodore Weiss of New York disclosed in a subcommittee hearing of the House Committee on Government Operations that during internal monitoring of pilot III, the computer had not assigned even one inspector to examine a chicken carcass to sample the food produced. Instead, inspectors were assigned such tasks as "checking locker rooms, lunchrooms, and parking lots." Mitchell Zeller, the congressional counsel Representative Weiss assigned to investigate this case, reported that from day one of its first pilot, the Agency documented problems with the computer, and as it went from pilot to pilot, more problems developed. However, the FSIS never took the time to solve any problem that surfaced and simply refused to change the plan with which it had started.

The field testing of IPI had been so disastrous that many outraged federal inspectors approached Thomas Devine, the Legal Director of Washington’s Government Accountability Project (GAP), an organization chartered to protect government employees who expose wrongdoing by their agencies. Of the fifty-three inspectors he interviewed, Devine told Congress: "I don't think there is a single inspector who thought that this plan as it is being implemented was going to do anything but greatly decrease the safety of our food supply."

Yet, in its notice the agency represented that the system had been successfully field tested and proved itself ready for national implementation. Not only was the representation in the notice of successful field testing of IPI at a minimum, misleading; it was also, arguably, deceitful.

It has now been established that at the time the FSIS published its notice clearly implying successful pilot testing of IPI, the Agency had in its possession an internal memorandum from a USDA microbiologist which revealed that a supplemental field test of IPI in Puerto Rico documented an increase in salmonella contaminated chicken carcasses to seventy-six percent of total production. That is, of course, three-fourths

65. Id.
66. Id. at 225.
67. Id. at 207.
68. Id.
69. Interview with Mitchell Zeller, supra note 62.
70. Interview with Thomas Devine, supra note 37.
of all chickens leaving that plant and twice the thirty-seven percent contamination rate which the USDA admitted existed before IPI. George Kuester, the author of the memo, soon resigned his post, claiming he was subjected to "steady harassment" by the agency for his criticism of the new inspection system.\(^7\)

The FSIS successfully concealed this information from the public however, until George Anthan, Washington Bureau Chief of the Des Moines Register and historical foe of USDA action impacting on inspections, unearthed it in August, 1989, nine months after the notice of proposed rule-making was published and six months after the deadline for public comments on IPI.

The fourth aspect of the notice which deserves criticism is the manner in which it was written. The final document consumed thirty-five published pages of fine print, in nine-point type, jammed three columns to a page and continued for approximately 32,000 words in that particular day's Federal Register.\(^7\)

Hidden in crevices amid all that verbiage were startling proposals for the major reduction of the federal government's role in poultry inspection. An average consumer would had to have run the gauntlet of all that bureaucratic blubber to uncover the most frightening plans and premises, provided that such a reader could be expected to appreciate the significance of any of it given the calming code words the agency used to describe its proposals.

If it had not been for food safety advocates, Washington, D.C. public interest lawyers like Thomas Devine of the GAP, union groups including Arnold Mayer's United Food & Commercial Workers Union, and the consumer lobby of such organizations as Public Voice for Food and Health Policy and the National Consumers League, who all watch the USDA and FSIS like hawks, and who cut through this notice and immediately sent out the alarm, it is doubtful an average consumer would have been able to divine what was actually being proposed.

An additional problem with the NPR was the FSIS's refusal to see the proposal for what it was—deregulational. FSIS Administrator Crawford even testified to the Congress during the pendency of this rule-making that his agency's "intention is to use the new [legislative] authority [to eliminate daily federal inspection] to increase the effectiveness of inspection, not to reduce it. In no way do we view the [IPI] program as industry self-policing nor as an effort to deregulate."\(^7\)

Those assurances were astonishingly myopic. To deny that IPI was either industry self-policing or deregulation was absurdly inconsonant with the reality of the impact of the program.

\(^{73}\) Id. at 2, col. 1.
\(^{75}\) House Subcommittee Hearing Report, supra note 39, at 161.
In sum, the above aspects of the NPR reveal a basic dishonest attempt by the FSIS. Former Assistant Secretary for Food and Consumer Services of the USDA Foreman observed that the cumulative effect of the efforts of the FSIS to shade certain aspects of IPI in its notice revealed "a basic lack of honesty with regard to its approach to the public." \(^{76}\) Similar frustration was voiced by Thomas Devine, when he told Rep. Weiss: "if the Department of Agriculture wants to withdraw its Federal food safety program from the previous traditions of the last eight decades, they should come out and say so and we should have a real public debate." \(^{77}\)

The Agency, however, did not stop at mere distortion.

\textit{What the Agency Omitted in its NPR}

\textbf{The Bimetallic Brains of the New System Were Withheld}

The USDA's Performance Based Inspection System (PBIS) is a giant computer system that generates inspectors' work schedules, decides how frequently they should visit each plant, lists those tasks they are permitted to perform once there and actually dictates to them the minutes or hours they are to spend on each task before moving on to the next plant or task. \(^{78}\)

No contention is made here that the Agency was required to adopt a rule pursuant to the \textit{APA} before it computerized its operations. Management decisions of that type fall outside such requirements.

However, the immense computer was the brain of IPI. When the Agency omitted from its notice the major components of PBIS which actually controlled IPI, the public was deprived of the opportunity to scrutinize the most important element of the proposed rule, for the guts of IPI was the reallocation of federal inspectors to plants on the basis of health risks posed, and it was the PBIS computer which made those assignments.

First, an attempt was made to conceal the presence and decision-making role of the computer. At one point in the notice, it was stated that "assigned inspection tasks and activities will be conducted by individual program employees [inspectors] as directed by the inspection program." \(^{79}\) To have been forthright about it, specific reference should have been made to the computer which would assign those tasks.

The notice also contained the assurance that "FSIS is not planning at this time to change the manner in which inspection is performed

\begin{flushleft}
76. Id. at 44. \\
77. Id. at 225. \\
78. Id. at 659, 666. \\
\end{flushleft}
(that is, the nature of the in-plant inspection-related tasks performed by FSIS personnel)." Such a statement certainly masks the very dramatic changes in the way the new computer would assign inspectors and limit their time in certain plants to the performance of only those tasks listed on the print-out of that day's schedule.

There's no mystery why the FSIS did not showcase its PBIS hardware—for months since its placement at pilot test sites and elsewhere, it had been a $13 million howling failure.

Before the notice in this rule-making was published, the computer had already repeatedly malfunctioned, assigning inspectors to plants at 3:00 a.m. that had been opening at 7:00 a.m. or later for years. Additionally, it frequently ordered inspectors to check products not made at particular plants, for instance sending someone to inspect sausage at a facility that produced only hamburger; it would assign one inspector to three different plants at the same time, thus leaving two plants uncovered; and it even assigned another inspector forty-two hours of duties to perform in one day while others were scheduled for only twenty-four minutes of assignments out of a full eight-hour schedule.

The computer skipped some plants altogether. If it sent an inspector to a plant that was processing something other than what the print-out assigned him or her to inspect, the inspector was not permitted to deviate from the computer's orders and examine what the plant was doing. It also frequently allowed inspectors to check only the cleanliness of ceilings in plants and not the food products being processed right under their noses. As one inspector testified: "As a result, the ceilings never have been cleaner, but the products may never have been dirtier."

That same inspector told Congress that for five weeks in 1988 he was assigned to twelve plants a day, but that the only meaningful food safety tasks the computer permitted him to perform were to check plant temperatures three different times and to inspect for rodents at three plants. That inspector also testified that for one solid month in 1988, he did not receive a single assignment from the computer to inspect a food product at any of the plants to which he was dispatched.

80. Id. at 44,821.
82. Id. at 74.
83. Id.
84. Id. at 75.
85. Id. at 33.
86. Id. at 33-34.
87. Id. at 34.
88. Id.
89. Id.
90. Id. at 43.
Other horror stories abound.

Delmer Jones, a veteran federal inspector with thirty years experience and president of the union representing inspectors nationally, testified that computerization in practice had resulted in a dramatic reduction in inspection coverage across the board, even in the plants which had the worst sanitation and compliance records. He reported:

Inspectors told me they were assigned to the good facilities more often than the problem plants. One plant had 17 reported critical deficiencies—violations certain to cause contamination—including rats, contaminated ingredients, dead flies on products, residue on equipment, dirty equipment and plugged floor drains. But the frequency of inspection steadily decreased during Phase III.

[The third pilot] Another plant went four days without any inspection even though it had around 80 reports of violations . . . . [during the pilot].

Further, Jones recounted that the computer often assigned inspectors unimportant busywork in the plants, citing as an example that “inspectors would verify week after week that the parking lot was still paved or that there were still six toilets in the bathroom.”

It was Jones’ conclusion, after listening to the war stories of his fellow inspectors in the field, that they could “no longer do their jobs protecting the public” with the PBIS computer controlling the national inspection program.

In the most compelling indictment of PBIS to date, the impartial Government Accounting Office, in response to a congressional directive, conducted a full investigation of the computer system in 1989 and found it plagued with “many problems and limitations.” While the GAO did not criticize the principles of modernization of the inspection system that underpinned the USDA’s new plan, it faulted PBIS and the agency decision-making that developed it.

Specifically, a GAO field investigation of two different FSIS regions uncovered the computer wildly assigning inspectors to check for things not even being done at the plants to which they were sent. This was widespread too, occurring twenty-nine percent and thirty-two percent of the time in each region, respectively.

Jarringly, the GAO reported that the computer only infrequently scheduled inspectors to perform plant and equipment sanitation checks.

92. Id. at 10.
93. Id. at 1.
95. Id. at 669.
96. Id. at 670.
The study focused closely on decision-making at the FSIS and berated the agency for implementing a system as complex as PBIS without testing it, adequately evaluating its capability, seeking the technical computer input of experts in the government, or comparing it to other state-of-the-art computer systems which were available and far superior.\(^9\) It was even noted that the software the FSIS chose was slower than four of the other six software packages on the market.\(^7\)

Not only did the GAO blast the lack of intelligent planning at the FSIS, but it also condemned the Agency for failing to provide for oversight of the computer system in order to sufficiently supervise and control its operation. In fact, the report concluded with a recommendation to the Secretary of Agriculture that “[b]efore FSIS invests additional resources in equipment and nonmaintenance-type software for PBIS, it should halt further enhancements and prepare a plan for how it will begin to implement management controls over PBIS.”\(^9\)

The GAO also suggested that the idea of letting a computer completely schedule every inspector’s workday should be rethought and consideration should be given to allowing inspectors to decide for themselves, based on their own experience and knowledge, what tasks to perform once they arrived at a plant.\(^10\)

After the FSIS was hit in the head by the GAO for insular decision-making, and the inefficiency of its computer brain center was exposed, the FSIS issued the following response to the GAO report, providing the strongest evidence imaginable of FSIS stubbornness: “The report will be helpful in producing a better inspection process. More importantly, it has solidified our confidence that we are moving in the right direction.”\(^11\)

The Major Operational Components of the New System Were Withheld

The FSIS also specifically withheld from the notice several agency documents which comprised the major operational components of the proposed inspection system. Among those was the Inspection System Guide which defined compliance standards and enumerated the specific in-plant tasks the computer would assign to inspectors in the field.

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97. Id. at 671-80.
98. Id. at 674.
99. Id. at 679.
100. Id. at 680. It is noted that in its formal response to the GAO report, the USDA promised to make certain adjustments in the PBIS system, including encouraging inspectors in the field “to use their best judgment, based on their experience and knowledge, to determine when they should substitute unscheduled tasks for [computer]-scheduled tasks and when they should perform specific unscheduled tasks.” Id. at 693.
101. Id. at 694.
Additionally, the Deficiency Classification Guide, screening standards, and switching rules, as well as the agency's directives on the new inspection tasks and procedures were also withheld.\textsuperscript{102}

Together, those documents governed how often each plant would be inspected, what each inspection would include, and what plant conditions would be regarded as satisfactory under the new system.

The agency's decision to withhold those parts of the system was intentional and in deliberate defiance of the legal advice offered by the department's own attorneys. Congressman Weiss, whose investigation of this entire debacle culminated in an April 11, 1989 hearing of the House Human Resources and Intergovernmental Relations Subcommittee, exposed this FSIS stonewalling.

Representative Weiss, referring to the operational documents which were withheld, had the following exchanges at that hearing with attorney Ronald Cipolla of the USDA's Office of General Counsel:

Mr. Weiss: Was it your opinion that, as a matter of law, if these items were not included in the proposal, then the public would be deprived of its legal right to make meaningful and informed comments on the program?

Mr. Cipolla: It was our position that it would be difficult to enforce the regulations, to have enforceable regulations, without those details placed in the regulations . . . .

Mr. Weiss: Were any of the items that you said had to be incorporated included in the proposed rule published by USDA in November 1988? . . .

Mr. Cipolla: They weren't specifically included, no.\textsuperscript{103}

Congressman Weiss entered the June 1, 1988 agency draft of the notice into the record, which contained pencil notes in the margins of its pages made by attorney Cipolla critiquing the document for compliance with the rule-making provisions of the APA. On page two of that draft, Cipolla warned: "[p]rovisions of the ISG [Inspection System Guide] must be set forth in the regs or incorporated by reference in order to be enforceable under the requirements of the APA, 5 U.S.C. 552 & 553."\textsuperscript{104} Later, on page twelve, these recommendations appeared: "[t]he ISG should be incorporated into the regs since it impacts upon the frequency of inspection that will be conducted at each of the plants."\textsuperscript{105} On page thirteen, he wrote: "[o]ther guides must be incorporated into regs"\textsuperscript{106} and at page fourteen the admonition: "not sufficient under

\begin{itemize}
  \item \textsuperscript{102} Id. at 186.
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} Id. at 234.
  \item \textsuperscript{105} Id. at 245.
  \item \textsuperscript{106} Id. at 246.
\end{itemize}
Similar warnings were repeated in the margins on pages seventeen\textsuperscript{108} and twenty-one.\textsuperscript{109}

The notice was incomplete in another major respect as well.

\textit{The Criteria for the Application of Risk-Based Assessment Were Withheld}

Increased inspection of problem plants and decreased inspection of qualifying plants, the so-called "risk-based" assignment of inspectors and tasks, was the very essence of IPI. However, the notice only listed factors the Agency would utilize in deciding which plants to designate for increased or decreased inspection—past compliance, size, volume of production, management competence and the availability of inspectors.\textsuperscript{110}

Withheld from the public was the manner in which the FSIS intended to define each of those criteria, to weigh them or to apply them in making its decision regarding the intensity of inspection for a particular plant. Standing alone, the criteria are harmless enough and essentially noncontroversial. In fact, their enumeration did not elicit any significant public comment primarily because there was nothing to criticize.\textsuperscript{111}

Their definition, weighing and application, on the other hand, is an entirely different matter. Public or industry commentators might well have objected to the FSIS assigning more weight to the inspector-availability criterion rather than the past compliance factor, for instance. Furthermore, no citizen reading the listing of criteria in the notice would really know how risk-based assignment would work. Both parts of the plan should have been provided to present the complete calculus.

Deciding which plants would be inspected less frequently was one of the agency's most significant responsibilities under the new system. It was one, also, in which the public health stakes were high and, correspondingly, would have been of vital interest to those scrutinizing the notice. By refusing to divulge the way it was going to decide the appropriate inspection intensity for each plant, the agency deprived the public of the opportunity to consider and debate the most important part of the new rule.

Such failure to disclose those key elements also alarmed counsel Cipolla, who penned cryptic notes in the margins of the draft notice reflecting his concerns. On page thirteen of the draft, he wrote "[i]dentify the 'other factors.'"\textsuperscript{112} On page sixteen, he advised the FSIS to "[i]dentify

\textsuperscript{107} Id. at 247.
\textsuperscript{108} Id. at 250.
\textsuperscript{109} Id. at 254.
\textsuperscript{111} House Subcommittee Hearing Report, supra note 39, at 72.
\textsuperscript{112} Id. at 246.
CCPs and SPLs and incorporate into regs so that the plants will be able to comment on criteria for the intensifying of inspection,""113 and instructed that "'[a]ll of the reasons for deciding frequency should be incorporated in regs under Sec 6(a)(2)""114 on page seventeen.

On page eighteen, Mr. Cipolla advised the Agency to "'[i]dentify the 'other characteristics' in the regs and how all factors are to be applied or weighed in determining frequency of inspection,""115 and on page twenty-seven he emphasized that "'[c]riteria must be specified to allow meaningful comments, must be incorporated into regulations to comply with 5 USC 552 & 553 to be enforceable.'"116

Cipolla was right.

III. ANALYSIS OF THE PROCEDURAL ISSUES

The Legal Opinion of the USDA Attorneys

The USDA attorneys were concerned enough about the flaws in the draft notice and the potential violation of the APA that they approved it only on the condition that the FSIS make the changes they recommended in their pencil notes. Their final transmittal of the draft back to the FSIS on August 22, 1988 contained this statement over the signature of Mr. John Golden, Associate General Counsel of the USDA: "'Approved for Legal Sufficiency Subject to Pencil Changes and Comments Noted Hereon, Attached Memoranda, and Our Conferences on This Docket.'"117

Golden was right.

The Response of the FSIS

The FSIS rejected the recommendations of the USDA's attorneys and refused to include the documents and criteria enumerated by counsel in the notice. Content that some of the documents at least were available for public inspection at its Washington offices, the Agency decided the public had access to more than enough information about the new inspection system to be able to adequately comment on it.

During the April, 1989, congressional hearing into this controversy, Rep. Weiss engaged Dr. Crawford in an exchange that well illuminates Crawford's obstinacy in the matter.

113. Id. at 249.
114. Id. at 250.
115. Id. at 251.
116. Id. at 260.
117. Id. at 399.
Mr. Weiss: I must tell you I find it rather strange to have an Office of General Counsel set up to not only give you legal advice, but to pass judgment on the legal sufficiency of a proposed set of regulations which you are going to publish for comment preparatory to adoption, and that you then take it upon yourself to ignore the legal recommendations of the people who are trained and qualified and charged with that responsibility. Why would you have done that?

Dr. Crawford: I didn't ignore their advice. I considered their advice and accepted some of it and rejected some of it. That's the usual way.

Mr. Weiss: I can only tell you that most people when they go to their lawyer for advice ignore that advice at their risk.118

Without Question, the Notice Violated the APA

An intractile wall of authority supports the position of the department's attorneys. Numerous seminal decisions have recoiled at agency conduct comparable to that of the FSIS here. In fact, the law on point could not be clearer or interpreted and explained more directly over the years.

The attorneys in the USDA's Office of General Counsel who faulted the agency's draft notice should be commended for heeding several lessons their predecessors were taught by the courts. On five separate occasions between 1975 and 1981, federal courts overturned USDA rules because the procedures employed by the Department in its rule-makings violated the APA.

USDA Precedent

In American Federation of Government Employees v. Block,119 the District of Columbia Circuit Court of Appeals in 1981 overturned permanent USDA rules concerning uniform poultry processing plant inspection rates and schedules because the agency enacted them without notice to the public. In its opinion, the court attempted to educate and sensitize the Department to the interests served by permitting public participation:

[The APA notice requirement] serves, however, the even more significant purpose of allowing interested parties the opportunity of responding to proposed rules and thus allowing them to participate in the formulation of the rules by which they are to

118. Id. at 188.
be regulated. The more expansive the regulatory reach of these rules, of course, the greater the necessity for public comment.\(^{120}\)

The reach of the FSIS rule proposed here is undeniably expansive, impacting as it did on the millions of Americans each week who eat chicken processed in the plants affected by the rule, thus, there was a great need for public input.

In a case strikingly on point, the District Court for the District of Columbia in its 1976 *Community Nutrition Institute v. Butz*\(^{121}\) decision, struck down rules promulgated by the USDA allowing mechanically deboned meat with bone fragments to be sold to the public. The court instructed the Department that when health-related rules are involved, it must not "circumvent the legal requirements designed to protect the public by ensuring that interested persons will have the opportunity to bring to the agency's attention all relevant aspects of the proposed action and thereby enhance the quality of agency decisions."\(^{122}\) In response to the USDA's argument that because deboning technology had not advanced to the point where the Agency could easily formulate policy, it should be allowed to adopt rules without providing the public notice or opportunity to be heard, the court noted with some sharpness, "[f]ar from being good cause for circumventing the normal rulemaking requirements [of the APA], this constitutes a compelling reason to utilize those procedures before subjecting the public to any possible hazard."\(^{123}\)

Applying this reasoning to the 1988 rule-making, both the technology fueling automated poultry processing and ninety-bird-a-minute lines and the public health hazards they pose cried out for a full public dialogue which could only have been realized by agency compliance with the APA.

In *Arlington Oil Mills, Inc. v. Knebel*\(^{124}\) the Fifth Circuit Court of Appeals invalidated rules adopted by the USDA in 1976 setting peanut price support differentials, holding that the department had failed to comply with the rule-making requirements of the APA. In that case, the USDA announced the new rule modifying an earlier peanut price support rule without providing the public with notice or an opportunity to comment. In its decision, the Fifth Circuit characterized informal rule-making under the APA as "a consultative process which permits a Government agency to educate itself . . . ."\(^{125}\)

But sometimes apparently, as the present case attests, the government is not always a willing student and instead sees itself as possessing all

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120. Id. at 1156.
122. Id. at 754.
123. Id.
124. 543 F.2d 1092 (5th Cir. 1976).
125. Id. at 1098.
the knowledge necessary to decide matters of policy without requiring help from the public.

In 1975, the Court of Appeals for the District of Columbia Circuit in Rodway v. United States Department of Agriculture, held the Department had violated the APA in its promulgation of certain food stamp allocation rules. The court faulted the notice of proposed rule-making published by the USDA as too evasively and generally worded to sufficiently alert the public to the specifics of the rule the Department was intending to enact. In voiding the rules the Department adopted, the court insisted that the APA's requirements regarding the notice be assiduously followed, thus, "the notice must include 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.'"127

In its notice published in November, 1988, the FSIS violated this stricture by withholding the risk-based criteria calculus and the PBIS operational components and by misrepresenting the actual impact of the proposed rules on plant inspection.128

Other Precedent Involving Food Processing

Cases involving agencies other than the USDA also provide support for the position taken by the USDA's attorneys. In United States v. Nova Scotia Food Products Corp., a 1977 decision of the Second Circuit Court of Appeals which dealt with the processing of fish, the Food and Drug Administration had employed informal rule-making in adopting a rule requiring all species of fish to be heated to a certain temperature for thirty minutes during processing to prevent botulism. A producer of hot smoked whitefish challenged the rule on the basis that the Agency had withheld from the public the scientific data and methodology upon which it relied, thereby preventing the presentation of relevant comment and counter-argument.

The Second Circuit agreed that the FDA's rule-making was flawed and struck down the rule. The court reasoned that an agency is not justified in withholding information during a rule-making simply because certain research or data relied upon by it is scientific or statistical. Indeed, as the court observed, such research or data can sometimes be exposed as unreliable and invalid if held to the light of public scrutiny.

126. 514 F.2d 809 (D.C. Cir. 1975).
127. Id. at 814 (quoting 5 U.S.C. § 553(b)(3) (1970)).
128. The fifth case in which a federal court invalidated USDA decision-making as violative of the APA was Carter v. Blum, 493 F. Supp. 368 (S.D.N.Y. 1980), where the department failed to employ rule-making procedures in developing a policy of general applicability concerning AFDC benefits.
129. 568 F.2d 240 (2d Cir. 1977).
The court found that "[t]o suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether,"\(^{130}\) and "[t]he inadequacy of comment in turn leads in the direction of arbitrary decision-making."\(^{131}\)

The *Nova Scotia Food Products* case speaks powerfully to the present one because each involves an agency withholding basic data and information of a scientific or technical nature from the public in adopting rules which impose certain requirements on food processors. While addressing the subject in general terms in its rule-making, the FDA withheld specific research data on the prevention of botulism. The FSIS, speaking generally about risk-based assignments and the new science of inspection permitting the reduction of the traditional organoleptic method, concealed significant scientific data relating to micro-biological contamination from the pilot tests (that contamination levels increased during IPI) and statistical information from early PBIS computer runs (that the computer was misfiring frequently and forfeiting twenty percent or more of some inspectors' time).

In addition, interestingly enough, the FSIS was unable to disclose the new science upon which the National Academy of Science in 1985 first justified reduced visual inspection. After all, it was that 1985 NAS study which the FSIS presented to Congress as evidence that it should be given authority to inspect processing plants on a less-than-daily basis.\(^{132}\)

Moreover, between the time of the 1985 NAS study recommending scientific procedures be used and the 1988 FSIS rule-making notice, the Agency did not develop or incorporate any new science: no new tests for detecting microbial poultry contamination, no new salmonella testing devices, nor any new technology.

As former Assistant Secretary of Agriculture Foreman explained in her testimony before the Weiss Committee: IPI utterly "fails to incorporate the new science recommended by the National Academy of Sciences."\(^{133}\) She went on to berate the FSIS on the point:

> With all due respect, what has it been doing down there since 1985?

> What strange process of reasoning made it decide to put science last in a program described as "science-based"? Put simply, the Food Safety and Inspection Service has not attempted to implement the NAS report. It has just appropriated the terminology and ignored the substance.\(^{134}\)

\(^{130}\) Id. at 252.

\(^{131}\) Id.

\(^{132}\) Id. at 48.

\(^{133}\) Id. at 51.

\(^{134}\) Id. at 54.
Foreman's position was that the FSIS had violated the APA in its rule-making notice and that it should "[l]eave daily inspection in place until the new science-based program is developed, tested adequately and put in place step by step as the science becomes available. To do otherwise amounts to treating American consumers as guinea pigs." 135

Even the National Academy of Sciences was critical of the way the FSIS had enacted science-related rules in the past. In its vaulted 1985 study, it observed disparagingly:

Historically, FSIS has published many policies only in its internal policy book, without giving the public or the scientific community a chance to comment or fully understand new policies in depth. Nor has the agency sponsored or encouraged active debate on the shape of its program. FSIS seldom describes to a scientific or broader public policy audience the underlying rationale for its decisions. In some cases, this low level of communication with communities outside industry can lead to inappropriate decisions that may affect public health. 136

It is quite apparent that the FSIS, hell bent to rush a rule through, simply did not take the time to develop or encourage new technology and science as a substitute for organoleptic bird-by-bird inspection.

In failing to submit the scientific basis for its new system to the public in its rule-making, it violated the teaching of the Nova Scotia case. More importantly, in failing to even develop new technologies before proposing to dismantle the old system, the FSIS built a regulation on empty semantics, rather than hard science.

Procedurally, of course, had the FSIS complied with the APA, as interpreted in Nova Scotia, it would have been forced to admit in the internal planning stage of its rule-making that there was no scientific research upon which it based its proposed rule. At that juncture, presumably, the Agency would have been forced to develop new technologies to support the rule change. In that way too, compliance with the APA's rule-making requirements would have ensured thoughtful, thorough and reasoned agency decision-making, and avoided the arbitrariness and capriciousness which characterized this premature agency action.

*By the Measure of any Precedent, This Rule-Making was Doomed*

Even had Congressman Weiss not been successful in exposing the FSIS and derailing its attempt to enact the IPI rules, the courts would have struck them down on judicial review.

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135. Id. at 61.
It is assumed for purposes of the following analysis of judicial review precedent that the FSIS would have enacted as the final rules those it proposed and defended in its published notice. This is a very safe assumption given the public statements made by Dr. Crawford at the close of the comment period as he peered across his desk upon which were stacked 1,817 comments opposing the rules and only twenty-eight supporting them. Crawford brushed aside the opposition with the statement that he was committed to implementing less-than-daily federal inspection and that some of the adverse consumer comments had resulted from a lack of understanding on the part of the commenters. As he explained it, "[t]hey also made comments about certain aspects that were not clear to them."\(^{137}\)

Such a "damn-the-torpedoes, full speed ahead" approach, refusing to entertain the validity of the objections raised, easily indicates a determination on the agency's part to enact the rules as proposed. In fact, Crawford was adamant in his testimony before the Weiss Subcommittee that despite substantial opposition he intended to adopt IP1.\(^{138}\)

The appropriate standard of review for rules promulgated under the notice and comment provisions of the APA is well settled: a reviewing court shall overturn agency action if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\(^{139}\)

The United States Supreme Court, in Citizens to Preserve Overton Park v. Volpe,\(^{140}\) amplified on that formulation by explaining that "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."\(^{141}\) In addition, it noted that "[t]he final inquiry is whether the . . . [agency's] action followed the necessary procedural requirements."\(^{142}\) A narrow, but at the same time searching and careful focus was to be employed by the reviewing court, but in the final analysis the court was not to substitute its judgment for that of the agency.

A court's utilization of the procedural basis alone articulated in Overton Park would have easily resulted in these rules being overturned. In all of the ways enumerated earlier in this article, the FSIS violated the procedural requirements imposed by the APA. The rule-making was

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141. Id. at 416, 91 S. Ct. at 823.
142. Id. at 417, 91 S. Ct. at 824.
procedurally flawed from the moment the misleading and inadequate notice was published.

This conclusion is consistent with the 1977 decision of the District of Columbia Circuit Court of Appeals in Home Box Office, Inc. v. F.C.C. 143 There, the court found that the APA's rule-making procedures required that "there must be an exchange of views, information, and criticism between interested persons and the agency." 144 In order to assure that such a dialogue occurred, the court imposed on agencies the obligations to disclose the data upon which they based proposed rules 145 and "to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." 146

The FSIS notice fails on all Home Box Office counts. Much of the data upon which the Agency based its new rule, including the results of pilot tests of IPI, was withheld. Too, the Agency did not explain its proposal or its effects in a concrete or focused way, instead misrepresenting the plan as "improved" rather than "diminished," concealing the role of the PBIS computer, and refusing to disclose how exactly it would select plants for reduced federal inspection.

Rather than frame its discussion of the proposed rule to make criticism and alternatives possible, the Agency actually attempted to foreclose criticism and divert the presentation of alternatives by misrepresenting the new rule as being forced on it by Congress and by understating the rule's effect on plant inspections.

As explained by the Third Circuit Court of Appeals in its 1977 American Iron & Steel Institute v. Enviromental Protection Agency 147 decision, the standard which reviewing courts are to employ in determining the sufficiency of an agency's notice of proposed rule-making is "whether the notice given was 'sufficient to fairly apprise interested parties' of all significant subjects and issues involved." 148

Application of this standard to the FSIS notice of November, 1988 would compel a finding of insufficiency justifying invalidation of the rules, just as the Third Circuit voided the EPA's rules in American Iron. The FSIS refused to apprise the public, over the objections of its own attorneys, of several subjects and issues, including the computer's overarching role, the effects of the proposed rule and the risk-based assessment calculus, all extremely significant.

The withholding of test data by an agency during a rule-making is anathema to the APA and provides additional grounds for reversal. In

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144. Id. at 35.
145. Id.
146. Id. at 36.
148. Id. at 291 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 16 (1945)).
*Portland Cement Association v. Ruckelshaus,* the D.C. Circuit remanded to the EPA its rules setting emission standards for cement plants because the Agency withheld the results of its cement plant pollution emission tests. The court concluded that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency."

That right of the public to know the test data relevant to a rule and particularly that upon which an agency relies was plainly violated by the FSIS when it concealed the actual results of its pilot testing of IPI. Of course, even more culpably, the FSIS in its notice referred to the pilot tests in positive terms and in so doing misrepresented the truth that contamination levels actually increased during IPI and the computer failed to function properly.

The benefits to informed agency decision making which derive from strict compliance with the APA were recognized by the Third Circuit Court of Appeals in its 1969 decision in *Texaco, Inc. v. Federal Power Commission.* There, the court invalidated a Federal Power Commission order relating to natural gas refunds because of the failure of the Agency to comply with the APA's rule-making requirements. In analyzing the reasons Congress enacted the APA and subjected all federal agencies to its mandates, the court noted that the rule-making provision "also enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated."

The earlier statement of Dr. Crawford, cavalierly rejecting ninety-eight percent of the comments received as essentially ignorant, reveals that the FSIS refused to accept proffered education from the public on the wisdom of its proposed rule. Such a mindset permeated the original notice as well, and was manifested in all the techniques by which the Agency misled the public and diverted its attention. In those ways, the FSIS contravened not only the teaching of *Texaco,* but the vision of Congress in enacting the APA.

That same legislative intent was recognized by the Supreme Court in its 1969 plurality opinion in *NLRB v. Wyman-Gordon Co.* In that decision, the NLRB's promulgation of a rule in an adjudication rather than a rule-making proceeding was faulted by the plurality. In its discussion, the opinion spoke to the *raison d'etre* of the rule-making

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150. 486 F.2d at 393.
151. 412 F.2d 740 (3d Cir. 1969).
152. Id. at 744.
provisions of the APA, noting they "were designed to assure fairness and mature consideration of rules of general application."  

In this rule-making, the FSIS refused to give the mountain of negative comments mature consideration. Instead, it berated the commenters. Too, the Agency's notice unfairly deterred the formulation of valid perspectives on the public's part and, in that way, denied itself the opportunity to receive accurate input. By withholding so much from the public in the notice, the Agency sabotaged the quality of comment received.

IV. ANALYSIS OF THE SUBSTANCE OF THE PROPOSED RULE

The Case for Reversal on Substantive Grounds

I submit that a reviewing court would have found this FSIS action arbitrary and capricious and an abuse of its discretion on substantive grounds in addition to those procedural in nature analyzed above.

In its 1983 decision in Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co., the Supreme Court explained that "[n]ormally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."  

That test was amplified upon in Greater Boston Television Corp. v. F.C.C., a 1970 decision of the D.C. Circuit Court of Appeals. There, the court recognized that a reviewing court is duty bound to intervene in an agency decision if it becomes clear the agency "has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." That type of decision-making, other courts have recognized, can obtain only if there is a "rational connection between the facts found and the choice made," and if a rule enjoys "rational support in the record."

154. Id. at 764, 89 S. Ct. at 1429.
156. Id. at 43, 103 S. Ct. at 2867.
158. Id. at 851 (footnote omitted).
On a horizontal continuum of agency decision making, at one pole is rule-making based on reasoned analysis and "reflective findings." At the opposite pole is the promulgation of rules which are the product of "misplaced [agency] zeal." The exposure of agencies is that their rule-makings weighing in on the latter end of the spectrum are subject to rejection by the courts.

The proposed FSIS rule and the policy-making predispositions and blundering of the agency which concocted it could easily be categorized as arbitrary and capricious on the basis of virtually any of the standards articulated by the courts in the cases cited above.

First, the FSIS refused to consider several important aspects of inspection when proposing its IPI rule: the absence of new scientific or technological developments to replace organoleptic inspection, the fact that, in operation, the PBIS computer created more new problems and exacerbated more old ones than it solved, and the fact that public confidence in the safety of its food supply would be shaken by the new system to the detriment of both the industry and the public.

Second, the agency's repeated explanation that IPI would improve inspection quality plainly ran counter to the evidence it possessed from its own pilot studies, which showed IPI was a howling disaster because it relinquished necessary inspection and actually permitted increases in contamination. In addition, the agency's justification in relying on processing plants to inspect themselves ran counter to the evidence the Agency possessed that its Total Quality Control (TQC) program, an honor system it implemented at selected plants, had not resulted in self-policing comparable to outside, federal inspection of plants.

Third, the Agency's proposed IPI system to eliminate daily inspection was glaringly implausible to the extent that a reviewing court could not in good conscience defer to the Agency's expertise on it. First, common sense tells anyone that inspection at these plants cannot be improved, in the absence of some new technology, by reducing outside, impartial inspection. Additionally, it is absurd to posit an argument that a computer, assigning inspectors to plants, telling them exactly what to do, and not letting them do anything more, can improve upon the traditional system where a qualified federal inspector is able to use his judgment and experience to sniff out violations wherever they may be found. The FSIS here resisted taking a hard and honest look at the problems its new system and new computer would cause and instead ignored them, attempting to conceal them from the public.

Fourth, the Agency refused to engage in reasoned decision-making as evidenced by its rejection and beratement of the 1,817 comments it

162. Id.
received opposing the rule. Although the failure to accede to public sentiment does not necessarily signify unreasonableness, it may sometimes reveal unyielding predetermination of the outcome and a refusal to consider potential flaws in a rule when ninety-eight percent of the commentors are against the proposed rule. When faced with such a tidal wave of angry and often well placed criticism from such quarters as the union representing the federal inspectors themselves, the former assistant secretary of the USDA and a large consortium of public interest, food safety and consumer advocates who are all themselves experts in the field, a reasonable decision-maker would not have so precipitously refused to reconsider aspects of the rule.

Further, an agency which misrepresents the true impact of a rule, withholds its major operational components, and conceals its workings does not position itself to engage in reasoned decision-making because it forecloses public comment and denies itself the value of informed criticism. Rather, an agency which embarks on a rule-making in the suspicious way the FSIS did here appears to be trying to evade the responsibility of reasoned decision-making as required by the courts and the APA.

Fifth, the connection between the facts found by the NAS in its 1985 study finding organoleptic inspection ineffective in identifying microbial contamination of poultry carcasses and the choice made by the Agency in this rule-making—to eliminate daily federal inspection of plants, to vary inspection intensity for plants, to rely more on the plants to inspect themselves, and to allow a computer to assign specific tasks to inspectors—was irrational. The most prominent gap between the NAS findings and the agency’s new inspection plan was the failure to develop and incorporate in the plants the new technologies which would identify salmonella and other contaminants without bird-by-bird organoleptic inspection. If those had been in place, they would have constituted the link between the NAS conclusions and the agency’s proposal to cut back on daily federal inspection of all plants. New rapid chemical tests for contamination would have justified the agency’s IPI system. But, without such new technologies, the proposal amounted to the FSIS substituting for daily federal inspection only the organoleptic inspection of plant employees, a system of dubious credibility.

Finally, the system simply did not enjoy rational support in the record. Because of that fact, of course, the FSIS concealed the repeated failures of IPI in all of the pilot tests, the unsettling record of those plants already on the TQC program, the fact that some plant-employed inspectors themselves admitted inability to police their own bosses, and the PBIS computer’s embarrassing record of consistent malfunc-
tioning and misfiring which had already exposed the public to risk in locations where it was implemented.

An agency's rule-making record also includes those comments received from the public, and ninety-eight percent of the 1,845 people who had something to say about it opposed this new rule for a variety of reasons. Many of those reasons have already been noted. Others are discussed below and involve the concern that IPI, in application, would pose a real threat to the public health of this country.

Other than the agency's own self-serving statements in support of the new system, which themselves often misrepresent, conceal or vary the actual facts, there is simply not much in the record to support the rule. Instead, the political context unearthed at the Weiss congressional hearing reveals agency action propelled by bureaucratic zeal and proposed prematurely before a record to support it had been built.

In the final analysis, this rule was the product of insulated, internal decision-making behind closed doors at the USDA. The Agency did not consult with its own veteran inspectors in the field, nor did it consult with public interest groups with expertise in food safety or the industry affected by the rule. As a result, the rule was seriously flawed and satisfied no one but the Agency.

This was also a classic example of an agency rushing to judgment. In its haste to implement a new system before its authority from Congress expired, the Agency plainly refused to wait for the new science, failed to wait for the bugs to be worked out of its computer, and failed to wait for a successful pilot implementation of IPI. Those are facts.

As a result, a record supporting the rule was never sufficiently developed.

The Deeper Inquiry

Courts use the arbitrary, capricious, abuse of discretion calculus as a standard of review when taking a searching and careful look at agency action. Of course, where rules affect the public health and safety of food, they should be subjected to even more careful scrutiny on judicial review. Such an examination in this case would expose the USDA's new IPI system as one of the most colossal bureaucratic bunglings of all time.

There were many compelling reasons the rule should never have been implemented, and by the time of the Weiss hearing, they formed the basis for opposition by every party, every side, and every interest to the controversy other than the USDA—industry, labor, public interest advocates, inspectors, homemakers, the media and citizens.

Breach of Duty

The overarching criticism of IPI was that it constituted an abdication of the USDA's duty to protect the public by ensuring that poultry products are wholesome and safe. Eliminating daily federal inspection and deputizing the plants themselves to assume primary responsibility for inspection was regarded as returning food safety to the days before Teddy Roosevelt and the Congress ordered daily federal inspection of meat plants in 1906. As Joseph R. Ticia, Jr. wrote in his comment in response to the NPR "'[the 1906 Act was intended] to protect the consumers of this country. Your new proposal is a betrayal of this mandate and trust.'"166

Frank Chimenti, an FSIS inspector with 16 years experience, commented that "'[d]uring a recent pilot test of exported products it is no surprise that foreign countries such as Canada had refused export of American meat and poultry products due to no direct inspection supervision [by the government].'"167 Merle McClintock wrote: "'We will be eating rotten meat and filth.'"168 Garnet Wait put it this way to the USDA: "'Maybe if enough people get ill, including you, you'll change your mind.'"169

Additionally fifty-three federal inspectors were so alarmed that they went public with their concern that IPI would diminish the safety and wholesomeness of products produced in plants freed from daily federal supervision.170

Misplaced Trust

Since 1980, the most reliable processing plants have been able to voluntarily participate in the government's Total Quality Control program where they assume primary responsibility for inspections under loose USDA supervision. Many critics simply do not believe the plants can be trusted to police themselves or to tolerate their own employees criticizing them in terms of sanitation or wholesomeness. The idea of an employee assigned to inspection duty, citing his boss for a USDA violation, was regarded as absurd. Every worker knows who signs his paycheck.

The track record compiled by some of the best companies under the TQC program justified such cynicism. Donald Henley's pink slip is one example. He was a processing plant employee responsible for the

167. Id.
168. Id.
169. Id.
170. Id. at 224-25.
TQC inspection at the southern ham plant. He was fired on the spot when he reported his employer to the USDA for trying to ship 3,000 pounds of undercured hams to supermarkets. As Henley testified to Congress: "As one of my colleagues told me, the way it's set up, QC is a joke. Anyone who sticks his neck out will get fired." Also, the Simmons Industries employees who alerted "60 Minutes" to the wrenching conditions in Simmons' Missouri plant, forming the storyline for the infamous fecal soup exposé, were all fired. One point indelibly etched in viewers' minds by that "60 Minutes" report was film footage revealing chicken carcasses lying on dirty floors in the plant before they were retrieved by workers and returned to the processing line. Again, the employer rewarded his employees who reported those conditions with termination.

It must be noted that our nation's food supply is the safest in the world because most processors set for themselves and meet the highest sanitation and wholesomeness standards. However, as in any industry, there are some who would cut corners to maximize their profits. Thomas Devine reported the results of his investigation of the industry's "bad apples" at the Weiss hearing:

[Industry trade groups] have stressed that the industry does not condone the practices of greedy members who compromise the high standards respected by most plant owners.

Unfortunately, DI as implemented to date does not protect consumers from the industry's weak links. To the contrary, the new plan leaves the public vulnerable to the industry's worst abuses. GAP's investigation has uncovered dozens of instances where unscrupulous owners tried to ship out products despite nauseating violations of minimum public health standards.

Donald Henley graphically described TQC as it plays out in the plants: "[I]t's funny how the company QC staff does processing checks and consistently does not find any problems. But USDA inspectors come behind and consistently find tumors, fecal contamination, busted gall, hairs, feathers and bruises."

An additional reason for criticizing the reliance on plant employees for inspections was that those employees, unlike their federal professional counterparts, need not meet a minimum education standard or training

171. Id. at 114-22.
172. Id. at 121.
173. Id. at 81.
174. 60 Minutes transcript, supra note 19, at 12.
176. Id.
177. Id. at 122.
requirements.\textsuperscript{178} Even the National Academy of Sciences acknowledged the problem and recommended training for plant TQC inspector employees in its 1985 study.\textsuperscript{179} In the comment she submitted to the USDA, Ruth Shell of Albertville, Alabama, wrote: “I feel as though plants cannot be trusted to do what is right for the public.”\textsuperscript{180} A trade union president from Scranton, Pennsylvania, compared food processors inspecting themselves to letting construction contractors conduct their own safety inspections,\textsuperscript{181} which out of concern for public safety, of course, the government does not permit.

\textit{Precisely the Wrong Direction}

The IPI proposal was also criticized by some as being exactly the opposite action from that which should have been taken by increasing levels of poultry contamination in response to the health risk posed. These critics contended that rather than eliminating daily federal inspection, the Agency should have intensified it.

The action was seen as one more FSIS sell-out to the industry it was chartered to regulate. It was assailed as the latest in a series of moves dating back to the 1977 decision allowing processors to wash rather than destroy fecally contaminated carcasses. The contention was that the agency had lost its will and “sold the farm.”

The criticism, shared by several senior federal inspectors, was based on the FSIS’s desire to accommodate the poultry industry’s push to automate and increase line speeds by loosening its regulations and relaxing its oversight.\textsuperscript{182}

The problem is exacerbated, of course, by the new rapid line speeds which rush birds by inspectors at the rate of 90 and up to 180 a minute. Congressman Smith was outraged. “That’s really stretching it, to call it bird-by-bird inspection when they’re going by at 180 a minute,”\textsuperscript{183} he argued.

Although daily inspection itself is not perfect because of the large number of processing plants as compared to inspectors (6,200 plants per 2,200 inspectors), it is still better than the IPI proposal here which would have reduced it even more to a less-than-daily, often weekly,

\textsuperscript{178} Id. at 81.
\textsuperscript{179} National Research Council, supra note 25, at 8.
\textsuperscript{181} Brewer, Don’t Cut Meat Inspections, Consumers Say, Des Moines Register, February 18, 1989, § A, at 14, col. 4.
\textsuperscript{182} Anthan, Inspectors Cite Drop in Poultry Standards, Des Moines Register, September 6, 1987, § J, at 1, col. 5.
\textsuperscript{183} Anthan, USDA to Alter Poultry Plant Inspections, Des Moines Register, April 23, 1987, § A, at 1, col. 6.
basis. The prospect of abandoning what little protection there was already ignited several commenters.

There remains agreement among all concerned that the nation's eighty-year-old inspection system should be modernized, but critics differ on whether organoleptic procedures should be replaced by new scientific tests. Some identify several advantages to organoleptic inspection which even new in-plant tests and the new science could never replace. The purpose of bird-by-bird organoleptic inspection was never to detect salmonella—everybody knew those bacteria could not be seen. Rather, the reason the law required continuous inspection was to identify unwholesome, adulterated carcasses and to ensure that plant premises were sanitary, and it is undeniably effective in so doing.

Certain aspects of plant performance including cleanliness of equipment and sanitation of plant premises can cause the contamination of poultry. Organoleptic inspection can uncover those conditions and act as a deterrent to their recurrence. Also, as poultry moves along processing lines, organoleptic inspection can spot bruises, cancer, needle marks (revealing carcasses injected with drugs), pus pockets, and deformities in the carcasses which render them unwholesome.

In short, there are distinct public health advantages to the daily presence of a federal inspector who can scrutinize carcasses and the premises with his own two eyes.

As the Public Voice for Food and Health Policy, a consumer advocacy group, commented: "We firmly believe there should not be reduced human oversight before science can provide a superior replacement."

Inspectors in the field agreed. One, a veterinarian, told reporters: "As a consumer, maybe that bird with a tumor in it wouldn't have killed anybody or made them sick, but if I had the choice I sure wouldn't give a bird full of cancer to my kids for their supper."

Federal inspector H. Wagner Young resigned after fourteen years of service with these words: "Because of the continuous decline in the quality of meat and poultry inspection . . . I find that my position as an inspector is no longer tolerable."

William Detlefson of Fremont, Nebraska, a thirty-six-year veteran

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184. Smith, Regulations to Ensure the Fowl We Buy is Fair, Des Moines Register, June 14, 1987, § C, at 1, cols. 3-5.
185. Id.
187. Anthan, Inspectors Cite Drop in Poultry Standards, Des Moines Register, September 6, 1987, § J, at 1, col. 5.
inspector, wrote his USDA supervisors in 1987 that "... the standards have been let down so that all packers can cheat the public...." With reference to Upton Sinclair's book, Detlefson bemoaned: "we are rapidly returning to the same 'Jungle.'"

A Sellout Even the Industry Would Not Buy

At the conclusion of the comment period in the USDA's rule-making, after consumer groups had exposed IPI as a reduction in federal inspection, the role of the floundering computer had been revealed, and the results of the pilot studies unearthed, an official of the American Meat Institute (AMI), a major industry trade association, was asked who was still supporting the FSIS plan. "Absolutely nobody," was his reply.

The processing industry joined consumer and public interest groups in vigorously opposing IPI once it became clear that public confidence in the safety of its food supply might wane in light of the media attention opponents of IPI were generating. At the outset of the rule-making in November, the AMI had endorsed IPI in a news release with the statement that it "will bring consumers more protection by modernizing the nation's meat and poultry inspection system." But the organization's Vice President, James Hodges, acknowledged two months later the public's growing uneasiness with the plan: "Our members' businesses depend on maintaining consumer confidence in the nation's meat supply." To that end, AMI recommended more safeguards to guarantee that inspection is "comprehensive and foolproof."

The AMI's formal comment filed on January 19, 1989 in the rule-making blasted the agency's insular decision-making and its refusal to engage all interested parties in a dialogue which might have resulted in a workable plan. It criticized the regulations proposed as "vague and open-ended," and accused the FSIS of precluding informed industry comment by the way it wrote the notice. It faulted the computer system, the complexity of the plan and all the questions about its

189. Id.
190. Id.
194. Id.
196. Id. at 7.
197. Id.
implementation the Agency left unanswered. Its recommendation to the Agency: junk the new plan and start all over again.

The industry clamored to put as much distance as possible between it and IPI, realizing that the perception of tough federal inspection was essential to maintaining consumer confidence. The nation’s largest beef packer, IBP, Inc., filed a comment to express its “strong feelings” that IPI would not “enhance the protection of the public health.” Rather, in IBP’s view, the elimination of daily federal inspection in all plants would invite some irresponsible processors to neglect their duty to produce safe, wholesome products under sanitary conditions. IBP also warned that without the feds on site each day there would be no one with the power to order corrective action if any health problem developed.

In the end, it was virtually impossible to find anyone outside the USDA who had one good thing to say about the elimination of daily federal inspection.

In sum, agency implementation of IPI would not have been supported by substantial record evidence. To the contrary, virtually no justification which could withstand scrutiny had been established for the proposal. The record was replete, instead, with convincing evidence that IPI would be a mistake of major proportion which would place the public health at risk.

But despite overwhelming opposition to the proposal, the Agency remained determined to enact the rule and eliminate daily federal inspection whether anyone liked it or not. In fact, at the outset of his testimony before the Weiss subcommittee, Dr. Crawford reiterated his agency’s intention to adopt IPI.

V. THE TERMINATION OF THE RULE-MAKING

The Agency Was Forced to Withdraw its IPI Proposal

With his searing questioning of Dr. Crawford at the April 11, 1989 hearing, Congressman Weiss succeeded in exposing the wrongness of this agency action for the nation to see. If Dean Wigmore was right that cross-examination is the greatest legal engine ever developed for
the ascertainment of the truth, Lester Crawford had just been run over by the whole train.

The most significant aspect of the hearing was the national media attention it attracted. By the end of that night’s newscasts and the next morning’s newspaper coverage, the country knew of the FSIS plan to withdraw federal inspectors and the strong case Weiss had made against it. The immediate public outcry represented the collective common sense of the people, a voice the Agency had deliberately discounted for years.

That anger was fueled by intensifying media opposition to the plan, including an April 19, 1989 USA Today editorial, emblazoned with a prominent USDA inspection label right on the center of the page, which alerted its national readership to the dangers of the proposed rule. That newspaper protested: "[FSIS] Officials ... argue that relaxing daily inspections would increase, not reduce, the effectiveness of inspections. Do you really believe that? Nobody else does." A few paragraphs later, the editors argued that "[we] need inspectors in the plants to make sure that rodent droppings, cockroaches, unsanitary workers and improper sterilization procedures don’t contaminate our food." The editorial continued with the perspective from the grocer’s fresh and frozen food cases that if the FSIS was permitted to implement its plan, consumers would never again be able to rely on the assurance of the USDA inspection label that the meat is clean and safe. USA Today concluded: "[we] must be able to trust ... [the label]. Our health depends on it."

In response to the publicity, Rodney Leonard, a former FSIS administrator, acknowledged that "[i]t’s all been a fiasco, the DI, the Streamlined Inspection, the poultry inspection systems. They now recognize they’ve got a time bomb and if they continue to push this formally, it will explode." The “time bomb” to which he referred, of course, was the swelling fear within the American public over the wholesomeness of the poultry it was buying by the millions of pounds each year.

It does not take a Ph.D. in Economics to appreciate the dynamics of the equation that if someone is persuaded that a food product they have been buying is unhealthy, they will not buy it any more. As Kenny Monfort, president of one of the country’s largest beef processors who

205. 5 J. Wigmore, Evidence § 1367 (J. Chadbourne rev. ed. 1974).
207. Id.
208. Id.
209. Id.
once supported DI for beef packers, admitted: "I used to think it would work well, but the industry can't stand many of these things that raise public questions."211

Immediately, the rationale of the FSIS in packaging its rule-making so covertly and concealing its true effects from the public became clear: to avoid questions from an alerted public and to quietly implement this reduction in inspection without awakening the people who buy the fryers and Chicken Tenders. But the Agency got caught and its plan was exposed. The ante was immediately increased because the public's confidence in its poultry supply was now a topic in America's kitchens. Those stakes, however, were simply too high and the players quickly folded.

As noted, the industry wanted no part of it. Soon, the USDA's allies in Congress backed off in the wake of the public outrage. The administration of President George Bush eschewed the controversial proposal too, and some FSIS officials tried to distance themselves from IPI by explaining that it was their predecessors' idea.212 Incoming Agriculture Secretary Clayton Yeutter announced a new policy which acknowledged that while "[w]e do not live in a risk free world . . . we want to do all we can to reduce risk as much as we can in such an important area as food,"213

The only player still in the game was Dr. Crawford. But, sullied by Congressman Weiss' public attack, and recognizing that there was virtually no support left for IPI,214 Crawford folded on May 21, 1989. Telling reporters plainly that "[w]e've decided to cancel the whole thing,"215 the game which the agency began with its November 4, 1988 Notice of Proposed Rule-making was over.

Also, Crawford backed off his plan to cut dramatically the FSIS inspection force and assured Congressman Weiss that the number of federal inspectors would be maintained at current levels.216

By any measure, forcing the FSIS to withdraw its proposed rule was a stunning victory for those who mobilized to fight it.

Just Another Vat of Soup

The government's 1978 decision allowing processors to wash fecally contaminated carcasses in large vats went unnoticed by the public until

211. Id.
212. Id.
the 1987 "60 Minutes" report in which Diane Sawyer narrated the scene a hidden camera had captured inside the Simmons poultry plant in Southwest City, Missouri. It was then that millions of viewers saw poultry carcasses lying on the floors, gathering dirt and bacteria. They heard plant employees confide: "They're always dropped on the floor, and if they don't see anybody standing around they pick them up and throw them back in the tanks." The tanks containing chickens were shown as Sawyer explained that several chickens had been coated with feces only moments before. She told viewers that "the chickens soak in that 'fecal soup,'" and, in that instant, the nation's vocabulary was enlarged by one new term and its consciousness awakened to the issue.

Dr. Carl Telleen, a seventy-one-year-old USDA veterinarian, publicly criticized the new washing policy as an "unsanitary practice" probably responsible for the subsequent increased salmonella contamination of poultry. Other federal inspectors were similarly outraged. One of them, Albert Midoux of Missouri, argued: "It's definitely not right. Would you do that [wash it] on a steak? Of course not. So, what's the difference between a steak and a chicken?" Dr. Edward L. Menning, the former chief veterinarian of the U.S. Air Force, lambasted the USDA for not giving "a damn about the shit the birds float through."

Carol Tucker Foreman, who as Assistant Agriculture Secretary, pushed through the rule change in 1977, laments today that "[i]t was a bad idea, and I was responsible for it. * * * And the birds are dirtier now than they were then." In a shocking report, the USDA's own scientists working at the Russell Research Center in Georgia concluded in a 1987 study that "[r]epeated rinsing or washing does not eliminate potential contaminants." Instead, it was found that washing simply transfers the fecal contamination to birds that were clean before. An immediate outcry arose from public interest groups claiming the case against washing had been made by the USDA itself and confirmed what the critics of washing had been saying for years.

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\begin{align*}
217. & \quad 60 \text{ Minutes, transcript, supra note 19, at 12.} \\
218. & \quad \text{Id. at 13.} \\
219. & \quad \text{USDA Told to Probe Its Meat-Inspection Policy, New York, April 1, 1985, at 12.} \\
220. & \quad \text{Anthan, Contamination Rate Reaches 80% at Some U.S. Poultry Plants, Des Moines Register, April 12, 1987, \$ A, at 9, col. 1.} \\
221. & \quad \text{Id. at col. 4.} \\
222. & \quad \text{Anthan, Tougher Rules Demanded to Curb Hazardous Poultry, Des Moines Register, April 14, 1987, \$ A, at 1, col. 4.} \\
223. & \quad \text{Anthan, USDA Admits Poultry Rules Ineffective, Des Moines Register, July 1, 1988, \$ A, at 1, col. 1.} \\
224. & \quad \text{Id.} \\
225. & \quad \text{Id. at 10, col. 6.}
\end{align*}
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Congressman Smith, a long-time champion of food wholesomeness and an expert on it, has led a charge to force the USDA to return to its pre-washing procedures. Each year for the past several years, he has introduced legislation to prohibit the washing of poultry carcasses contaminated with feces.226 To date, however, Congress has not been willing to overrule the agency's decision on washing. The irony is that the industry itself suffers in the end. For example, whenever there is publicity about a salmonella outbreak in the United States, Japan immediately stops buying poultry from our country and shifts its purchases to Brazil and Thailand.227

Nevertheless, in a further manifestation of the agency's concern for the wishes of the processors, the FSIS has remained unconvinced washing is wrong. In fact, in 1989 it requested those same department scientists to study washing one more time just to make sure their incriminating 1987 findings were valid.228 That response, of ordering yet another study in the face of the substantial evidence from the first study which condemned washing, speaks volumes in itself about the stubbornness and recklessness of this agency.

Those with more of a consumer orientation would argue the FSIS should have required processors to discontinue the practice in the interim, based on the shocking findings of the government's first study. Unfortunately, the FSIS does not share that view. The fact of the matter is that the agency's mandates are conflicting and, at times, difficult to reconcile. It exists not only to protect the public but also to not do anything that would be destructive to the agricultural industries it regulates. The dilemma is not only the agency's fault. If Congress, through its Agriculture Committees, had cracked down on the USDA and required it to get tougher on the poultry industry, the Agency would have. Many members of the Agriculture Committees are strongly pro-industry, however, and favor the approaches taken by the FSIS. In several ways, the Agency receives its signals and its orientation from the Congress.

The ultimate insanity, however, was reached in 1990 when the FSIS announced it had solved the problem of "fecal soup." It did so in a way that, to no informed observer's surprise, would allow processors to continue washing and to maintain their fast line speeds. The government's solution to the problem of salmonella contamination: simply irradiate the chickens before they are shipped to vendors. Dr. Lester Crawford announced in January, 1990, that the FSIS was seeking Food

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and Drug Administration approval of its plan to permit processors to irradiate poultry up to 100,000 rads (3 kilo Gray), thus "nuking" the salmonella, and that he expected FDA concurrence in the near future. Stunned critics recoiled at the plan, contending more care should be taken to scientifically confirm that products treated with radiation are safe for people to eat.

The irradiation proposal is rather extreme, given the fact that other alternatives abound to correct the problem. The processors could be required to spray the carcasses with hot water or run them through steam cabinets, or, as is the practice in Western Europe, cold air jets could be trained on the birds. Those options would not even make processors slow down their lines. However, they would force processors to retool their plants and to discard their soup tanks. In the Agency's view, the latter is apparently too much to ask of processors. The Agency plans to just give them radiation permits instead.

Further evidence of the Agency's lack of receptiveness of criticism or comment can be found in the USDA's actions in response to criticism of its washing policy. The USDA fired Dr. Telleen from his job in the field as a food safety auditor and transferred him to headquarters in Washington to shuffle papers as a reward for coming forward with his criticism. Also, then Secretary of Agriculture Richard Lyng blasted the "60 Minutes" fecal soup episode as "terribly biased" and "an unfair attack on poultry inspection" which was "confusing to the public."

The most perfect example of agency defiance on this issue is the response of Dr. John Prucha, Assistant Deputy FSIS Administrator, to the question of whether or not IPI would result in increased fecal contamination. Prucha reportedly told union officials: "We're not trying to make [excrement] more palatable, but . . . we'll be able to tell you how much [excrement] you'll be eating."

The whole washing episode is most relevant to the merits of IPI in several respects. First, it was regarded by those opposing the IPI rule as the agency's first major abdication of its public health duty to keep plants on a tight inspection leash. Second, it can be readily seen as

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229. Anthan, USDA Seen Ok'ing Irradiation of Poultry Soon to Kill Bacteria, Des Moines Register, February 26, 1990, § A, at 3, col. 4.
230. Id. at cols. 5-6.
231. USDA Told to Probe Its Meat-Inspection Policy, New York, April 1, 1985, at 12.
233. Id.
234. Id.
admitted accommodation of the industry's interests. Third, it could be argued that washing, cross-contamination of clean birds by dirty ones in the same tank, picking chickens up off the floor and tossing them in, all represent the only kind of self-policing that processing plants know. If they cannot be trusted to discard carcasses that have fallen on the floor, can they be trusted to inspect themselves for sanitation?

A Fraud on the Public

Poultry products processed at federally inspected plants are labeled with a distinctive round legend about the size of a quarter. It reads: "INSPECTED for wholesomeness by U.S. Department of Agriculture P-42."  

Some critics have argued that even now, such representations are misleading. The USDA has publicly acknowledged that at least thirty-seven percent of the chicken carcasses processed are contaminated, so the label's assurance that the bird is wholesome is flatly untrue thirty-seven percent of the time. As Congressman Neal Smith has explained, protecting consumers from unwholesome poultry was the whole purpose of the 1968 Wholesome Poultry Products Act which he authored. That purpose was to be achieved by requiring federal bird-by-bird organoleptic inspection in every processing plant. Products passing that inspection could then be labeled with the USDA mark, and the public could rely on it in the grocery stores.

Smith argues that the USDA is violating the 1968 statute today by allowing processors to wash carcasses in fecal soup and by permitting them to increase line speeds to the point that birds go zipping past inspectors so fast that examination becomes nearly impossible. The Congressman notes that the definition of food wholesomeness means it is free from ever having been contaminated. Once a piece of poultry is contaminated with feces, for instance, it is permanently adulterated and no amount of washing or irradiating can change it. It is Smith's view that the USDA violates the 1968 statute and misleads the public every


237. Smith, Regulations to Ensure the Fowl We Buy is Fair, Des Moines Register, June 14, 1987, § C, at 1, col. 3.
time it allows poultry which has ever been exposed to feces or other contaminants to be labeled as wholesome.\textsuperscript{238}

The USDA and the industry contend that it is the consumer's responsibility to properly prepare and cook the chicken that is purchased, as heating it adequately will destroy all salmonella bacteria. The FSIS recommends that whoever prepares a meal at home with chicken should wear rubber gloves, sterilize all surfaces that come in contact with the poultry, and make sure the poultry does not touch any other food.\textsuperscript{239} Kenneth Blaylock, president of the union representing federal inspectors, retorts: "It's not fair to expect consumers to behave as if they're decontaminating Three Mile Island when all they want to do is cook their Sunday dinner."\textsuperscript{240}

The USDA label does not alert consumers to those necessities; it does not indicate that there is a one-out-of-three chance their purchase is laced with dangerous salmonella or even that they must take certain cooking precautions to protect themselves. Rather, the label assures them that the product has been inspected by the federal government and that it is wholesome.

I submit that it is deceitful for the USDA, under the present system, to label as "inspected for wholesomeness by U.S." products that a federal inspector sees for only one second or less, and products that are in fact not seen at all by federal inspectors who have moved on to the next plant on their day's itinerary.

Nevertheless, under the existing system a federal inspector is at least on the premises for some time every day. Under the proposed rule, less than daily inspections would be made. The agency's notice of proposed rule-making at issue here did not recommend any change in the language of the inspection label even though federal inspectors would be visiting some large plants only once a week or once a month. To permit the use of such a label under IPI, with plant employees shouldering the inspection duties rather than federal inspectors, would be to work a gross fraud on the American consumer, because such a label, under those circumstances, would plainly be a lie.

\textit{The Status of Federal Inspection Today}

The inspection model in place today is essentially comparable to the one extant before IPI was proposed. There is daily federal inspection of all plants, although the duration of each inspection is limited.\textsuperscript{241}

\begin{itemize}
\item 238. Id. at col. 5.
\item 239. Devine, The Fox Guarding the Hen House, Southern Exposure, supra note 8, at 40.
\item 240. Id.
\item 241. Id. at 664.
\end{itemize}
Ironically however, the FSIS has now fully deployed the PBIS computer system to assign inspectors to various plants, determine the time they are to spend at each, and enumerate the tasks they are to perform once there.242 The computer once heralded by the Agency as the brain of IPI, has become the brain of the Agency's existing inspection system, and is now managing the federal inspection of all poultry processing plants in America.

As to the future, the possibility that the USDA might ask Congress to extend its authorization to eliminate daily federal inspection at the expiration of the sunset provision of the Processed Products Inspection Improvement Act in 1992 has diminished dramatically in the wake of the torrent of opposition the plan attracted in its first offering in 1988.243 But those who waged the battle against IPI in the rule-making studied here are maintaining their vigil in the event the government attempts to resurrect the plan.244

VI. CONCLUSION

The debacle that was the USDA's attempt to eliminate daily federal inspection of poultry processing plants is a deplorable indictment of decision-making in that department. This rule-making in the backrooms of the FSIS reeked of the arrogance of agency power and stubborn self-righteousness.

Of course, the Administrative Procedure Act was adopted to eliminate such agency witlessness and to open up rule-makings to those most affected by them—the people. Indeed, the APA enfranchised the public to influence administrative agency decision-making on the theories that such input would enhance the correctness of agency decisions and that the people had a right to be heard.

To be sure, the violation of the APA in this case resulted in predictable flaws in the Agency's rule. But even more culpable in the FSIS' approach here was its rejection of the premise that the people have a meaningful role to play in the decisions of their government.

Clearly, the powerful officials within the walls of the USDA and FSIS never understood the vision of the APA or of Will Rogers who, when told that one day the country would honor him with a statue in the U.S. Capitol, replied "Well, if they ever do, I want to stand where I can keep an eye on our Hired Help."245 The FSIS never appreciated

242. Id. at 666.
244. Id.
that it was the "hired help" rather than some regal, omnipotent rule-maker, leading to its collision with the APA.