

COMMENTS

THE WHOLESOME MEAT ACT AND INTRASTATE MEAT PLANTS

I. INTRODUCTION

When Congress enacted the Wholesome Meat Act,¹ in December of 1967, an atmosphere of consternation spread throughout a large portion of the meat industry.²

The general aim of this new Act was to require that *all* meat plants, whether interstate or intrastate, be subjected to the same inspection standards and maintain substantially the same facilities.³ This broadened scope differed drastically from the reach of previous federal meat legislation.

Prior to December 15, 1967, the Federal Meat Inspection Act,⁴ which was enacted in 1907 and last amended in 1938,⁵ attempted to assure the wholesomeness of the nation's meat supply by requiring both antemortem and postmortem inspection of all meat and meat food products moving in "interstate or foreign commerce."⁶ Since such products are mainly slaughtered and processed by the large meat packing plants, these operators were required to comply with the 1907 law. Thus, by 1967 the huge packer and processor was already familiar with federal inspection standards and federal facilities and construction requirements.⁷

By contrast, the small intrastate operators had been totally unaffected by the 1907 law.⁸ Hence, in 1967 the prospect of now

1. Act of Dec. 15, 1967, Pub. L. No. 90-201, 81 Stat. 584, 21 U.S.C.A. §§ 601-691 (Supp. 1970).

2. Following the passage of the Act the National Institute of Locker and Freezer Provisioners organized a "fight fund" by raising their dues in order to retain "legal counsel on a continuing basis." *The INSTI-TOOTER*, Sept. - Oct. 1969, Vol. XVIII, No. 8, at 1.

3. See 21 U.S.C.A. §§ 602 and 661. See also, S. REP. NO. 799, 90th Cong., 1st Sess., U. S. CODE CONG. & AD. NEWS, 2191 (1967).

4. 21 U.S.C. §§ 71-91, 34 Stat. 1260-1265 (1907). It is interesting to note that this Act was only an appropriation measure tacked onto other agricultural legislation but became known as The Meat Inspection Act.

5. See Act of June 29, 1938, Pub. L. No. 776, 52 Stat. 1235, *amending* 21 U.S.C. § 91 (1907).

6. 21 U.S.C. § 71, 34 Stat. 1260 (1907).

7. U.S.D.A. pamphlet No. 0-342-073 (54), *Federal Facilities Requirements for Small Existing Meat Plants*, at 1 (1969) [hereinafter cited as U.S.D.A. pamphlet. This pamphlet is reprinted in *FREEZER PROVISIONING AND PORTION CONTROL* (July/August, 1969) 1.

8. It should be noted, however, that there was a period during which intrastate plants were subjected to federal inspection to provide for war-time emergency. See 56 Stat. 351 (1942).

having to meet United States Department of Agriculture⁹ inspection and construction requirements made these operators most uneasy.¹⁰ This group includes thousands of small lockers and meat processing plants along with those plants which perform both custom slaughtering¹¹ and retail meat processing within the same facilities.¹² Since operations of this type are for the most part located in rural parts of the country,¹³ not only these plants, but the small communities which depend heavily upon their services were greatly affected by the provisions of the Wholesome Meat Act.¹⁴

It is the purpose of this article to analyze the general rights and obligations of the various types of plants under the Wholesome Meat Act of 1967,¹⁵ as amended by the Curtis Amendment,¹⁶ and as implemented in Nebraska by the Nebraska Meat and Poultry Inspection Law.¹⁷ Special emphasis will be placed on the problems of the small intrastate plants—namely the custom slaughterers and retail operators—since plants of this character are usually located in midwestern states such as Nebraska.¹⁸

II. CONDITIONS LEADING TO THE WHOLESOME MEAT ACT OF 1967

In 1962, and again in 1967, surveys of the meat industry were

9. Hereinafter cited as U.S.D.A.

10. See U.S.D.A. pamphlet, *supra* note 7, at 1.

11. Custom slaughtering can be defined as: that slaughtering that is performed for hire by a slaughterer who kills and perhaps processes hogs and cattle and other meat animals, for the owner of such meat animals, and all of the meat and meat products are returned to that owner and used by him in his own household. In other words, just as an owner can kill his own animal and eat the meat without being subject to the Federal inspection, he can hire someone else to do the work. *Hearings on S. 3512, S. 3592, S. 3603 Before a Subcomm. of the Comm. on Agriculture and Forestry*, 91st Cong. 2nd Sess. (1970). (Statement of Senator Carl T. Curtis, Rep., Neb.).

12. Press Release from the Office of Senator Carl T. Curtis (Rep., Neb.) (Feb. 6, 1970).

13. 116 CONG. REC. 3994 (daily ed., March 19, 1970) (Statement of Senator Roman Hruska, Rep., Neb.).

14. See *Hearings*, *supra* note 11, at 9. (Statement of Senator Carl T. Curtis, Rep., Neb.). In comparing the situation in other states to that of Nebraska, Senator Curtis quoted from a letter from the Commissioner of Agriculture for the State of Georgia: "We here in Georgia have many such plants which are dependent upon both custom operations and commercial operations for their continuance in existence. They also are the sole supply of many of our rural areas and small communities for meats." See also, note 262 *infra*.

15. See note 1 *supra*.

16. Act of July 18, 1970, Pub. L. No. 91-342, 84 Stat. 438, amending 81 Stat. 584 § 23 (1967).

17. NEB. REV. STAT. §§ 54-1901 to 54-1915 (Supp. 1969).

18. This article will not discuss the imported meat provisions of the Wholesome Meat Act since those provisions will generally not apply to small midwestern plants. See 21 U.S.C.A. § 620 (Supp. 1970), 81 Stat. 590.

conducted by the U.S.D.A.¹⁹ As reported by the Department, these surveys demonstrated that while the Federal Meat Inspection Act of 1907²⁰ had been adequate to handle the problems of the early 1900's, this law was no longer effective to meet the challenges of a modern, highly mechanized, aggressive industry where conditions were changing rapidly.²¹ Hence, Congress realized that if the pres-

19. *Hearings on S. 2147, S. 2218, and H.R. 12144. Before a Subcomm. of the Comm. on Agriculture and Forestry, U.S. Senate, 90th Cong. 1st Sess., 79 (1967).*

20. *See note 4 supra.*

21. During the 1967 legislative hearings it was agreed: that the 1962 survey showed in virtually every jurisdiction the instances of unsanitary meat, unwholesome meat, unsanitary packing conditions, or processing conditions, the introduction of additives such as water and other fillers, and the misleading labeling requirements were rather widely found in all jurisdictions to be beneath the standards of Federal inspection that would be required if they were under Federal inspection. *Hearings, supra* note 19, at 80.

Whether the findings of these surveys are valid is subject to question. The National Observer, May 20, 1968, at 1, col. 2, reported the following:

Washington, D.C.

Agents of the Federal Government fanned out across the nation last July under urgent and explicit instructions from Washington to gather examples of horrid conditions in meat-processing plants not under U.S. Government control.

Swiftly and often with calculated deception, the Federal men got what they were ordered to get. Their findings, which were widely accepted as factual and unbiased Government inspection reports, painted a picture of widespread filth in meat handling. These reports were later to be used as undisputed authority for scare stories that frightened the public and helped stampede Congress into passage of a new and tougher Federal meat-inspection law—the Wholesome Meat Act of 1967.

What can now be confirmed is the nasty fact that the "evidence" gathered last July was deliberately biased, that the tainted reports were used to mislead Congress and the public, that they put a lie in the mouth of President Johnson, duped a large number of well-meaning people, including Ralph Nadar and Betty Furness and did a superb con job on much of the nation's press.

Findings Challenged

The stench of the filthy-meat survey began sweeping out belatedly early this year when state and industry officials challenged the authenticity of some of the inspectors' findings. An investigation by this newspaper revealed that U.S. inspectors had, indeed, fudged on some facts [The National Observer, Jan. 29, 1968] and that other reports were doctored in Washington to make them sound even more damning than they were. [The National Observer, Feb. 12, 1968].

The Observer's inquiry uncovered the fact that a written memorandum with explicit instructions to field inspectors did exist. . . .

Entitled "Special Project QQ & C (Quick, Quiet, and Confidential)", the memo instructed agents to use guile in entering plants not under Federal supervision, to select plants "in which you would expect to find the most discrepancies, to look for horrible examples" of unsanitary conditions in those plants, and to describe them "in dramatic, graphic terms with impact, such as cancer-eye, pus, manure, disease, excreta, cockroaches, rats, flies, loose

ent day consumer is to be fully protected from unwholesome meat and meat food products, a new and more comprehensive law must be fashioned which would remedy the serious flaws²² of the prior law.

The major defects of the 1907 Act can be summarized as follows: first, there was an absence of any provision for coordination of federal and state meat inspection efforts;²³ second, enforcement tools in the Act were inadequate to check the unscrupulous operator who was polluting the nation's meat supply with unwholesome meat products;²⁴ and, third, the Act lacked specific authority for

paint, cobwebs, rust, grease, overhead dripping sewer lines, toilet facilities, mice, flour, excess water, chemicals, excess fat, etc., instead of other more acceptable terms."

A sense of urgency was emphasized because, as the memo put it, the information "is to be used at Congressional hearings now being held. . . ."

In a letter accompanying the release of the memo to the National Observer, Rodney E. Leonard, administrator in Washington of the Consumer and Marketing Service, states that the memorandum "was issued by a subordinate field official, and that certain parts of it did not represent the policy or instructions of this Service."

But in an interview here last week, Mr. Leonard acknowledged that the memo did, in fact, reflect the 'substance' of instructions telephoned to all field officers from Washington.

"The men were told," he says, "to arrive at the plants unannounced, ask for permission to enter without stating their purpose, and, if admitted, to record their factual observations. We are satisfied that they carried out this mission and accomplished this goal without any improper conduct, without any substantive inaccuracy, and without being underhanded about it."

Difference in Standards

The standards that Marketing Service officials set for judging conduct, inaccuracies, and underhandedness are, of course, their own. But there's ample evidence to conclude that those standards are not widely shared, especially by those people who were being slyly investigated.

It should be noted, first off, that Federal inspectors had no jurisdiction last summer over state inspected packing plants. (They do now, as a result of the law signed last Dec. 15.) Nonetheless, Mr. Michael's memo clearly directs Federal inspectors "to gain entrance into non-Federally-inspected plants . . . under the guise of (a) meeting local inspection personnel to gain co-operation in our normal G & ES work (b) discussing our denaturing and decharacterizing requirements with management, (c) etc.

A diligent effort to determine precisely how and why the quickie survey came about turns up no definitive answers. It is known, however, that many congressmen were not impressed by the results of an old USDA survey made in 1962. Though it was an extensive and serious study of meat inspection operations, the facts in it were well-dated by the summer of 1967. . . .

22. *Hearings, supra* note 19, at 61.

23. *Id.*

24. *Id.* In the absence of more positive preventive measures it was far too easy for dealers in dead animals, renderers, animal food handlers and others to divert unfit meat into human food channels. Under the 1907

supervising those independent types of operations which had arisen with the great technological advances occurring after its enactment, *i.e.*, boning establishments, cold storage warehouses, jobbers, renderers, etc.²⁵

In addition, the U.S.D.A. found that the inadequacies of the Act had created two unsatisfactory conditions within the states and the industry, itself:

First, the states had failed to establish effective inspection systems for intrastate meat.²⁶ The Act of 1907 had left the states free to regulate and inspect meat slaughtered, processed and sold intrastate. However, due to various state and local difficulties in enacting and enforcing such statutes, there was a widespread diversity among the various states as to the application of meat inspection laws.²⁷ For the most part, the reasons for state leniency were financial, though some of the problems were political in nature.²⁸ Statistically, in 1967 there were approximately 17,000 slaughtering and packing plants in the United States of which 2,000 were federally inspected under the 1907 Act and these produced 85% of the meat eaten by American consumers. The remaining 15,000 plants, which were small and sometimes seasonal, produced the other 15% of American meat.²⁹ These 15,000 intrastate plants might be located within one of the twenty-nine states having mandatory ante- and postmortem inspection statutes similar to federal statutes, or within one of the twelve states with voluntary (but inadequate) meat inspection statutes, or, even perhaps, in one of the seven states having no meat inspection statutes whatsoever.³⁰

Act the government did not even have the authority to seize or detain meat which was known to be unfit and intended for human consumption so long as the meat product was not handled by a federally inspected plant.

25. *Id.*

26. *Id.* at 172.

27. *Id.* These Hearings revealed that nearly half of the states (21) were found not to have enacted any mandatory inspection laws whatsoever. And, only a handful of the mandatory programs which were in effect provided any real and meaningful protection. Some of the programs were consumer protective in name only. Some were simply sources of patronage and marked by partisan politics. Many state programs were greatly underfinanced and undermanned. Many had a great variety of exemptions, including the exclusion of the major cities, other communities and many other counties of the state. Some provided only spot checks instead of continuous inspection.

28. *Id.* at 171.

29. *Id.* at 165 and 243.

30. *Id.* at 68. The Hearings found as follows:

States with voluntary (inadequate) meat inspection statutes (12): Arizona, Colorado, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, Pennsylvania, and Texas. States with no meat inspection statutes (7): Alabama, Alaska, Delaware, Maryland, Minnesota, New Hampshire, and

Second, the U.S.D.A. concluded from its surveys that the federally inspected plants competed at an economic disadvantage with non-inspected plants—particularly in three ways:³¹ (1) non-inspected plants had more inducements to offer to producers,³² (2) the cost of processing was higher in inspected plants due to condemnations, and, (3) the non-inspected processor could offer his product at a price which the inspected processor found difficult to match.³³ Since meat in interstate shipment was federally inspected, but directly competed with non-inspected meat which was sold intrastate, and, since the market for meat was nationwide, it was obvious that only a uniform standard of inspection could remedy these disadvantages.

The result of these findings finally led the Department of Agriculture to propose a draft of a bill to “clarify and otherwise amend the Meat Inspection Act, to provide for cooperation with appropriate state agencies with respect to state meat inspection programs, and for other purposes.”³⁴

South Dakota. [Some of these States have General Food and/or Sanitation laws, but no State Meat Inspection Statutes as such. Municipal Systems operate in some of these States.]

States with statutes imposing mandatory ante and post mortem inspection (29): Arkansas, California, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana (effective 1970), Iowa, Massachusetts, Missouri, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio (effective July 1, 1968), Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia (effective July 1, 1968), Washington, West Virginia, Wisconsin (effective Jan. 1, 1968) and Wyoming.

States with statutes imposing mandatory processing inspection (27): Arkansas, California, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee (effective Jan. 1, 1968), Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming (footnote inserted).

31. *Id.* at 276.

32. Mention was made throughout the Hearings about so-called “cripple buyers” whose sole job was to buy crippled and diseased animals for introduction to non-federally inspected plants.

33. *Hearings, supra* note 19, at 276. The Hearings state at 175: [A] plant outside of the Federal inspection system can reduce its costs because it can purchase meat that is less wholesome and can slaughter and process that meat into products much less expensively but under more dangerous conditions—can pump its meat full of cheap additives such as water, cereals, and the like, and then can disguise the unsatisfactory meat or its products through mislabeling and through other kinds of devices, such as coloring . . . , such as ascorbate, so that the consumer is defenseless in determining the best buy, that is, the best quality product put out by the federally inspected plant which it has had to produce at more cost and against this less costly and more dangerous product of less quality produced by its competitor outside of the reach of those same high standards.

34. S. REP. NO. 799, *supra* note 3, at 2188.

III. GENERAL PROVISIONS OF THE WHOLESOME MEAT ACT

The legislation which Congress ultimately enacted in 1967 was substantially the same as that submitted by the Department of Agriculture.³⁵ Essentially the Wholesome Meat Act of 1967 operates to:

- (1) broaden the present meat inspection program by establishing a Federal-State cooperative arrangement under which the Federal Government would provide financial, technical, and scientific assistance to State agencies in order to improve the quality of State meat inspection services. This financial aid could amount to as much as one-half of the cost of a State program;
- (2) modernize and combine present statutes relating to meat inspection;³⁶
- (3) give the Secretary of Agriculture needed authority over wholesalers, truckers, warehousemen, brokers, renderers, and animal food manufacturers in order to control the traffic in unfit meat and meat products. This would provide additional insurance against the possibility of these products being sold to unsuspecting consumers for use as human food;
- (4) provide the Secretary of Agriculture with authority to immediately impose Federal Standards on intrastate commerce at the request of a governor; and,
- (5) provide that the Secretary of Agriculture may impose Federal standards on any intrastate plant if he determines that the plant is producing adulterated meat or meat food products for distribution which would clearly endanger the public health. Under this provision the Secretary would notify the Governor of the State of the transgression and would take affirmative action only if the Governor failed to do so.³⁷

A. TITLE I

More specifically, Title I,³⁸ which substantially re-enacts the provisions of the 1907 Act, contains the Act's definitions and de-

35. For a detailed analysis of the provisions of the Wholesome Meat Act, the history of its enactment, and comparison to prior law, see Note, *The Wholesome Meat Act of 1967*, 2 SUFFOLK UNIV. L. REV. 256 (1968).

36. For example, The Meat Inspection Act; The Federal Food, Drug, and Cosmetic Act; The Fair Packaging and Labeling Act; The Tariff Act of 1930; The Federal Trade Commission Act; The Horse Meat Act; The Agricultural Marketing Act of 1946; and The Communications Act of 1934; together with related state statutes. See *Hearings*, *supra* note 19, at 40 and 21 U.S.C.A. § 677, 81 Stat. 599.

37. S. REP. No. 799, *supra* note 3, at 2190.

38. 21 U.S.C.A. §§ 601-624 (Supp. 1970), 81 Stat. 584-593 (1967).

claration of policy; provisions for mandatory antemortem inspection;³⁹ provisions applying the act to articles "capable of use as human food;"⁴⁰ provisions restricting entry of materials into inspected plants;⁴¹ provisions regulating marking, labeling, and packaging;⁴² specific prohibitions;⁴³ provisions prohibiting forgery, destruction, misuse of devices, and misrepresentation;⁴⁴ provisions requiring identification and separate preparation of equine meat;⁴⁵ imported meat provisions;⁴⁶ exemption provisions;⁴⁷ provisions clarifying the terms "adulterated" and "equines"⁴⁸ and, finally, provisions for regulation of storage and handling.⁴⁹

39. 21 U.S.C.A. § 603 (Supp. 1970), 81 Stat. 588, 592. See also S. REP. No. 799, *supra* note 3, at 2197, which explains that section 3 does not result in any change in the program. It makes a nonsubstantive drafting change by deleting "interstate or foreign" before "commerce" in sections 3 and 23 of Title I of the Federal Meat Inspection Act, in view of the definition of "commerce" in section 1 of this bill. It also makes antemortem inspection mandatory.

40. 21 U.S.C.A. § 604 (Supp. 1970), 81 Stat. 588, 592. See also S. REP. No. 799, *supra* note 3, at 2197 which states that section 4 makes it clear that the post mortem inspection provisions of the act apply to articles capable of use as human food rather than merely to those intended for transportation or sale for such use. This would make enforcement easier by eliminating any need to prove intention as to use for human food. The term "capable of use as human food" would be defined by section 1(k) of the act, as amended by section 2 of the bill, to exclude denatured or naturally inedible articles or articles properly identified as not for human food.

For a case dealing with interstate shipment of meat intended for use as dog food, in which the Secretary attempted to apply inspection and marking requirements of the Act, see *Meddin Brothers Packing Company v. United States*, 417 F.2d 17 (5th Cir. 1969).

41. 21 U.S.C.A. § 605 (Supp. 1970), 81 Stat. 588, 592. See also S. REP. No. 799, *supra* note 3, at 2198.

42. 21 U.S.C.A. § 607 (Supp. 1970), 81 Stat. 592. "To prevent the use of false, deceptive, or misleading marks, labels, or containers," S. REP. No. 799, *supra* note 3, at 2198.

43. 21 U.S.C.A. § 610 (Supp. 1970), 81 Stat. 589. See also S. REP. No. 799, *supra* note 3, at 2199. Such prohibitions concern the sale, transportation, or other specified transactions, with respect to meat and the other specified articles capable of use as human food if not in compliance with the Act, *i.e.*, if they are adulterated or misbranded or have not been inspected and passed as required by Title I.

44. 21 U.S.C.A. § 611 (Supp. 1970), 81 Stat. 589. See also S. REP. No. 799, *supra* note 3, at 2200-2201. The old law exempted farmers, retail butchers, and retail dealers. The new law exempts producers and custom slaughters and retains the retail exemption.

45. 21 U.S.C.A. § 619 (Supp. 1970), 81 Stat. 590.

46. 21 U.S.C.A. § 620 (Supp. 1970), 81 Stat. 590.

47. 21 U.S.C.A. § 623 (Supp. 1970), 81 Stat. 591.

48. 21 U.S.C.A. §§ 601(j) and (m) (Supp. 1970), 81 Stat. 584. See also S. REP. No. 799, *supra* note 3, at 2203 which explains that the new provisions include mule meat which was not covered under the old law and is difficult to distinguish from horsemeat.

49. 21 U.S.C.A. § 624 (Supp. 1970), 81 Stat. 593.

B. TITLE II

Title II⁵⁰ is a new section not formerly in the Federal Meat Inspection Act. This title sets forth the Secretary's authority to issue regulations;⁵¹ prohibits commerce in animal products not intended for human use unless denatured, properly identified as not intended for human use, or naturally inedible;⁵² and further provides for record keeping by certain processors, slaughters, and handlers.⁵³

The records inspection provisions of this Title provide that all persons subject to the Act's requirements "shall at all reasonable times, upon notice by a clearly authorized representative of the Secretary, afford such representative access to their places of business and an opportunity to examine the facilities, inventory, and records thereof, to copy all such records."⁵⁴

Because of Title II two types of individuals and establishments are included in the application of the Wholesome Meat Act who were previously not subject to federal inspection:

- (a). certain handlers of livestock, meat or meat food products, and certain handlers of dead, dying, disabled, or diseased animals and their products;⁵⁵ and,
- (b). intrastate slaughtering and processing plants.

The first group includes those handlers who either do business with interstate meat plants or conduct related industries. Congress was here concerned with giving the Secretary of Agriculture much-needed authority over wholesalers, truckers, warehousemen, bro-

50. 21 U.S.C.A. §§ 641-645 (Supp. 1970), 81 Stat. 593-94.

51. 21 U.S.C.A. § 641 (Supp. 1970), 81 Stat. 593.

52. *Id.*

53. 21 U.S.C.A. § 642 (Supp. 1970), 81 Stat. 593. *See also* S. REP. NO. 799, *supra* note 3, at 2205 (1967), which clarifies that it was the intent of the committee that nothing in the Act be construed as having any applicability to manufacturers of livestock and poultry feeds with respect to their activities of acquiring or using processed animal byproducts in the manufacture of feeds.

54. 21 U.S.C.A. § 642(a) (Supp. 1970), 81 Stat. 593. *See Note, The Wholesome Meat Act of 1967*, 2 SUFFOLK L. REV. 256 which states at 267: This provision, upon litigating, could be argued as inconsistent with the two recent Supreme Court decisions of *Camera v. City of San Francisco* [387 U.S. 523 (1967)] and *See v. City of Seattle* [387 U.S. 541 (1967)], holding that the fourth amendment prohibition against unreasonable search and seizure extends to governmental inspection of residential and commercial property. However, the Congress expressed a clear intent to limit this inspection to those certain records which are properly necessary for the effective enforcement of the bill [199 CONG. REC. H. 16346 (daily ed. Dec. 6 1967) (Remarks of Congressman Purcell).] (footnotes inserted).

55. S. REP. NO. 799, *supra* note 3, at 2189 (1967).

kers, renderers, and animal food manufacturers, in order to control traffic in unfit food.⁵⁶ By 1967, it was clear that there was a need for federal inspection with respect to these individuals, since the original scope of the 1907 law was to regulate and inspect only slaughter houses. These dealers, therefore, had been left free to engage in activities completely free of federal regulation and accordingly abuses had resulted which required attention. Since 1907 the meat industry has expanded from slaughtering into processing and other forms of manufacturing. The nation's ability to produce meat products in enormous volume has been totally revolutionized. Advanced technology, rapid transportation and communication, intensified marketing, and new food preservation methods have all done their share in the structure and technology of the meat packing industry.⁵⁷ Major slaughtering plants have moved from urban, centralized locations to widely decentralized spots in livestock feeding areas. Plants which process and manufacture meat products have become highly specialized. They are tending away from production areas and moving nearer to major consumer markets.⁵⁸ Hence, inspection of handlers within this category became essential to a complete and effective regulation of the industry.

The second group—intrastate plants—consists basically of two different types of operations. On the one hand, there are the large packing plants which are owned by national meat packing companies, but which are incorporated and operate wholly within a single state, thereby previously escaping federal meat inspection requirements. And, on the other hand, there are the small, independent meat processing and slaughtering plants which actually constitute the largest number of plants affected by the Act.

In regard to the large packer, the Department of Agriculture saw that the 1907 Act⁵⁹ had a built-in profit incentive which caused the big processors to limit their sales to a single state in order to avoid the costs of federal inspection, construction and equipment requirements. For instance, the former law required proper walls, nonporous construction, proper cleansing facilities for antemortem and postmortem inspections, etc. Obviously, the non-federally inspected plant could make great savings by being free of such construction requirements and by further taking meat in the 4-D category (dead, dying, disabled, or diseased cat-

56. *Hearings, supra* note 19, at 58.

57. *Id.* at 52.

58. *Id.* at 53.

59. 21 U.S.C. § 71, 34 Stat. 1260 (1907).

tle, sheep, swine, etc.) and passing it off to the consumer as wholesome meat. A non-inspected plant could also gain tremendous savings by putting inexpensive additives, such as cereals and water, into meats and meat food products and passing these products off as wholesome meat to the consumer. In addition, there were advantages in misleading labeling if a plant wished to engage in such a practice.⁶⁰

It has not been proven that all, most, or even a substantial minority of the large intrastate plants in the country were operating under any of the above motives.⁶¹ However, as has already been noted,⁶² the laws existing in virtually all the states before 1967 were far below the standards of federal inspection, and in fact, some states had no meat inspection laws at all.⁶³ Moreover, even in those states where laws had been adopted which were similar to the Federal Act, administrative inadequacies or inadequate appropriations had caused the development of practices which were substantially below that required by federal inspection.⁶⁴

As a result of the inadequate enforcement of inspection laws within most, if not all, of the states, there existed financial incentives, as well as competitive advantages, in the operation of packing plants by large companies within a single state. For example, Swift, the largest meatpacker in the world, had established intrastate plants which were extremely large and in which tremendous quantities of meat were being slaughtered and processed, presumably to take advantage of the lower competitive costs which were possible by staying outside of the reach of federal jurisdiction.⁶⁵

It appears that Congress, in enacting Title II took great stock of the surveys conducted by the Department of Agriculture in 1962 and 1967. The attitude expressed in the legislative history of this Title indicates a firm belief that adulterated and misbranded products from such intrastate plants were actually intermingled in retail outlets with wholesome, unadulterated products for sale to an unsuspecting public.⁶⁶ It was in the interest of protecting the consuming public from such dangers that this portion of the

60. *Hearings, supra* note 19, at 80-81.

61. *See* comments of National Observer, *supra* note 21.

62. *See* text at notes 26 to 30 *supra*.

63. *Id.*

64. *Hearings, supra* note 19, at 80.

65. *Id.* at 81.

66. *Id.* at 53.

Wholesome Meat Act was passed.⁶⁷

With reference to the small intrastate plant, these operators, like the large subsidiary plants, were formerly beyond the grasp of federal inspection. But, unlike the many large plants, their motives for selling only intrastate were seldom, if ever, profit generated. Many small rural communities depend solely on the services of the small locker plants whose operators also engage in custom slaughter for farmers and residents in the surrounding areas. Hence, such plants, although totally intrastate, play an important part in the overall meat market of the nation.⁶⁸

The question of the extent to which the Federal Government can extend its jurisdiction over intrastate plants has been raised most often. This problem was given serious consideration by the U.S.D.A. in conjunction with its support of the Wholesome Meat Act.⁶⁹

A study by the Legislative Reference Service⁷⁰ of the Library of Congress concluded that it was well within the power of Congress to extend coverage of the Act to regulation of all meat packing plants, including those engaged in purely, local, intrastate commerce. Relying on *United States v. Wrightwood Dairy Co.*,⁷¹ *Wickard v. Filburn*,⁷² and *Houston & Texas Railway v. United States*,⁷³ the study reasoned that,

Congress has been deemed competent to subject local commercial activities to Federal regulations whenever it could be established that control of the activity was essential to the effective enforcement of an otherwise permissible exercise of federal power over what was undeniably commerce between the states. The Wholesome Meat Act falls within this restriction and thus is a permissible law.⁷⁴

In addition, the Legislative Research Service pointed to other federal laws which encompassed the regulation of local business, to wit: The Labor Management Relations Act,⁷⁵ The Fair Labor

67. *Id.* at 141-164 (Comments of Ralph Nader).

68. *Hearings on H.R. 16480, H.R. 16485, H.R. 16791, H.R. 16895, H.R. 16908, H.R. 17276, H.R. 17457, and S. 3592 Before a Subcomm. of the Comm. on Livestock and Grains of the Comm. on Agriculture, House of Representatives, 91st Cong. 2nd Sess., 3 (1970).* See also note 262 *infra*.

69. *Hearings, supra* note 19, at 77.

70. *Id.* at 78.

71. 315 U.S. 110 (1942).

72. 317 U.S. 111 (1942).

73. 234 U.S. 342 (1914).

74. See *Hearings, supra* note 9, at 78.

75. 29 U.S.C. §§ 142(1); 152(7); 158(b)(4)(i) (1964). See also *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *NLRB v. Stroller*, 207 F.2d 305 (9th Cir. 1953), *cert. denied*, 347 U.S. 919 (1954); *NLRB v. Richter's*

Standards Act,⁷⁶ Labor Management Reporting and Disclosure Act,⁷⁷ and the Civil Rights Act (Equal Employment Opportunities).⁷⁸ Since these laws already affect the intrastate meat processor, the field was not entirely without precedent.

Congress found that processing of meat in each plant, no matter how small, affects meat processed for interstate commerce⁷⁹ and that regulation of *all* such processing is necessary to effectively regulate the interstate commerce in meat. Thus, under this test, the significant fact is not whether an operator actually does busi-

Bakery, 140 F.2d 870 (5th Cir.) *cert. denied*, 322 U.S. 754 (1944); Shore *ex rel. NLRB v. Teamsters Local*, 169 F. Supp. 817 (W.D. Pa. 1959).

76. 29 U.S.C.A. § 203(s) (1964). *See also* Selan v. Becker, 71 F. Supp. 689 (E.D. Wis. 1947) and Brooks Packing Co. v. Henry, 192 Okl. 533, 137 P.2d 918 (1943).

77. 29 U.S.C.A. § 402(c) and (e) (1964).

78. 42 U.S.C.A. § 2000e(b) and (h).

79. During the Senate hearings on the Wholesome Meat Act in 1967, the USDA submitted a brief illustrating the jurisdiction of the Federal Government, that is, the Department of Agriculture. That brief is quoted herein:

Authority for Providing for the Regulation of Intrastate Commerce in Meat and Meat Food Products

The Constitution of the United States of America in Article I, Section 8, enumerates the powers of the Congress by providing the Congress shall have certain enumerated powers including the power "to regulate Commerce with foreign Nations, and among the several States," it further provides that in connection with these enumerated powers the Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers."

The courts have held that the foregoing quoted powers include authority to regulate not only commerce among the States but activities which burden and affect such commerce and further have held that where necessary to effectively carry out the regulating of commerce among the States it becomes necessary to make regulations applicable within States that this power is vested in the Congress under this Section of the Constitution.

The Congressional findings set forth in Section 2 on page 11 of S. 2147 include findings that unwholesome, adulterated and misbranded meat and meat food products: (1) impairs effective regulation of meat and meat food products in interstate and foreign commerce; and (2) are injurious to the public welfare and destroy markets for wholesome, not adulterated and properly labeled and packaged meat and meat food products.

These and other findings in this section are founded on the fact that 85 percent of the commercial slaughtering is conducted in Federally inspected houses engaging in interstate commerce and it follows that intrastate slaughtering and handling without inspection substantially affects meat in interstate commerce and regulation may be found to be necessary in order to effectively regulate the interstate commerce in meat.

The present Meat Inspection Act and Poultry Products Inspection Act require that all products produced in establishments subject to Federal inspection under these Acts be prepared in accordance with the requirements thereunder regardless of where such products are distributed whether within or without the State where produced. These requirements are based upon the aforementioned authorities. *Hearings, supra* note 19, at 77.

ness across a state border⁸⁰ but rather, whether interstate commerce is *affected* in any manner⁸¹ by his activity. If such an effect can be found, then application of the Act to that activity is within the constitutional powers of Congress.

C. TITLE III

Title III,⁸² also a new addition to the 1907 Act, provides for federal and state cooperation. This Title⁸³ provides for extension of the federal inspection system to operations and transactions wholly within a state—either,

- (1) Upon request of the Governor of the State, or
- (2) If the Secretary determines that the State does not have an inspection system at least equal to the Federal system within two years after the enactment of the Wholesome Meat Act (three years if the Secretary has reason to believe that the State will have such a system within such a period).⁸⁴

The adequacy of a state system would be determined by the Secretary after consultation with the governor or his representatives, and Titles I and IV of the Act would become applicable to intrastate transactions within thirty days after publication in the Federal Register of the Secretary's designation of the state. If the state subsequently establishes a system equal to federal standards, the designation could be revoked.⁸⁵ After the initial period, the federal system could be made applicable or inapplicable as required by the inadequacy or adequacy of the state system.⁸⁶

Title III also provides for the extension of Titles I and IV (inspection and enforcement provisions) of the Wholesome Meat Act to an individual intrastate plant if the Secretary determines that such plant is producing adulterated meat or meat food products which would clearly endanger the public health, and the state fails to take action within a reasonable time after notice is given to the governor and the appropriate advisory committee. Titles I and IV would be withdrawn from such plant only when the Secretary determines that state requirements are at least "equal to" federal requirements.⁸⁷

80. 21 U.S.C.A. § 602 (Supp. 1970), 81 Stat. 587.

81. *Id.*

82. 21 U.S.C.A. § 661 (Supp. 1970), 81 Stat. 595.

83. 21 U.S.C.A. § 661(c) (Supp. 1970), 81 Stat. 596.

84. *Id.* See also S. REP. No. 799, *supra* note 3, at 2205-06 (1967) and text at note 125 *infra*.

85. 21 U.S.C.A. § 661(c)(1) and (3) (Supp. 1970), 81 Stat. 597.

86. *Id.*

87. *Id.*

The first important challenge to this section occurred in May of 1970 in *Fargo Packing Corporation v. Hardin*.⁸⁸ In 1969 the North Dakota State Legislature passed new meat legislation known as the North Dakota Meat Inspection Act.⁸⁹ In May of 1969, this state legislation was approved by a U.S.D.A. official for the purposes of a cooperative agreement under the State-Federal Cooperative portion of the State Act;⁹⁰ however, it was the official opinion of the U.S.D.A. that, while the legislation was adequate for purposes of the cooperative agreement, "The law as enacted was clearly deficient for purposes of [the 'equal to' requirements of] the Federal Act."⁹¹

The objections of the U.S.D.A. were set forth in its status report evaluation which stated:

The exemption provision of the North Dakota law does not require that exempt custom slaughterers must limit their operations to custom services only. It appears to exempt those carcasses or parts which are being prepared for custom use by a plant that also engages in buying and selling meat and meat food products. This provision is therefore less restrictive than the exemption provision of the Federal Act. This is a major problem area, in terms of the "equal to" wording of the Act, which will require correction *prior to December 15, 1970*. Some of the penalty provisions are less than those imposed by the Federal Act, although these are not as significant relative to the December, 1970 deadline, as the difference in exemptions.⁹²

Although the Governor of North Dakota advised the Secretary of Agriculture that, "Corrective measures in the three areas

88. 312 F. Supp. 942 (D. No. Dak. 1970).

89. Chapter 36-23.1, N.D.C.C.

90. 312 F. Supp. at 945.

91. *Id.*

92. *Id.* (emphasis added). The North Dakota Act, Section 36-23.1-03, set forth the following exception to the inspection requirements of the Act:

3. The slaughtering is performed by any person as a custom service for the owner of the animal, and the carcass or the parts thereof are for the exclusive use of such owner and the members of his household and his nonpaying guests and employees, *regardless of whether or not such custom service slaughterer is engaged in selling inspected carcasses or the parts thereof, meat or meat food products at wholesale or retail in or on the same plant or premises where such custom service slaughtering is performed* (emphasis added).

The provision clearly was not "equal to" the federal requirement of § 623 (a) [prior to the Curtis Amendment explained in text at notes 127 to 138 *infra*] which excepted from inspection custom slaughtering for personal, household, guest and employee uses,

Provided, that such custom slaughterer *does not engage* in the business of buying or selling any carcasses, parts of carcasses, meat or meat food products of any cattle, sheep, swine, goats or equines, capable of use as human food (emphasis added).

which you mention in your letter cannot be attempted until the next session of the legislature which will begin in January, 1971,"⁹³ the Secretary notified the Governor that, even taking into consideration the allowable one year extension period,⁹⁴ it did not appear that North Dakota could bring its standards to a level equal to federal requirements within the required period.⁹⁵ Thus, on March 15, 1970, the Secretary designated North Dakota as a State in which the provisions of Titles I and IV of the Wholesome Meat Act would be applied to operations and transactions within the State.⁹⁶ Thereafter the U.S.D.A. issued certain "guidelines" as to the manner in which the Act would be enforced in North Dakota particularly with regard to custom exemptions.

This action prompted the Fargo Packing Corporation, the North Dakota Frozen Food Locker Association, the Shy-Ann Meat Service and Supply, Inc., and Theron Strinden to file suit in the United States District Court for the District of North Dakota seeking a temporary restraining order, preliminary injunction and declaratory relief. The plaintiffs alleged that such designation of their State "was unlawful and wrongful, will result in irreparable harm, damage and injury to the Plaintiffs and other persons similarly affected . . . (and that) . . . it will result in immeasurable economic loss and services to small rural communities."⁹⁷ In addition, the plaintiffs contended that the "guidelines" issued by the Secretary were invalid because they exceeded his authority and that

93. 312 F. Supp. at 947.

94. 21 U.S.C.A. § 661(c) (Supp. 1970), 81 Stat. 595-597.

95. 312 F. Supp. at 947. It should be noted that the North Dakota State Emergency Committee met on December 18, 1969, but decided not to appropriate emergency funds sufficient to qualify the state.

96. See *Notice of Designation under Federal Meat Inspection Act*, 35 Fed. Reg. 4652 (1970).

97. 312 F. Supp. at 946. The review sought is stated in more detail by the court at 947, as follows:

The Plaintiffs specifically seek a review:

1. of the Secretary's discretion designating North Dakota subject to Federal Inspection;
2. of the conduct by the Secretary and the North Dakota Livestock Sanitary Board responsible for the enforcement of the Federal-State cooperative agreement;
3. of the Secretary's "legal interpretation" of Title 21, U.S.C.A., Section 623 (custom exemption), and its effect upon the meat packing and processing plants in North Dakota;
4. of the Secretary's "legal conclusion, based upon his interpretation of said Section 623 (custom exemption) that Chapter 36-23.1 NDCC permits a custom exemption that is in conflict with the Federal Act;
5. of the alleged failure of the Secretary to publish regulations enforcing the Federal Act, as required by law; and
6. the application by the Federal inspectors of allegedly unreasonable regulations as to construction requirements under the Act.

further the Federal Meat Inspection Regulations were not properly promulgated according to the procedures required by the Administrative Procedure Act.⁹⁸

The Defendant, Secretary C. Hardin of the United States Department of Agriculture, in addition to denying the allegations of unlawful actions and irreparable harm, strongly contended that the actions of the Secretary were a lawful exercise of his discretion and under the Act are final and not subject to judicial review. As pointed out by the Department, the Secretary is expressly authorized to cooperate with appropriate State agencies "whenever *he determines* that it would effectuate the purposes of this chapter,"⁹⁹ and designation actions of the Secretary are predicated upon the proposition, "If the Secretary *has reason to believe . . .*"¹⁰⁰ Hence, since section 701 of the Administrative Procedure Act¹⁰¹ precludes judicial review "to the extent that . . . action is *committed to agency discretion by law*,"¹⁰² the Department argued that the court lacked jurisdiction to review these actions.

The court conceded the Department's arguments that the above aspects of the Act wherein the actions of the Secretary were solely discretionary are not subject to review.¹⁰³ And, in fact, the court noted that once the Secretary "has reason to believe" that a state has failed to develop or is not enforcing requirements "at least equal to" those of the Wholesome Meat Act, the language of that Act actually makes it "the mandatory duty of the Secretary to promptly make such designation."¹⁰⁴ Hence, this major provision of Title III was viewed as containing both a discretionary condition and a mandatory duty predicated upon the ultimate exercise of that discretion.

However, the court did not find itself totally without jurisdiction in this matter. As was noted in *Barlow v. Collins*:¹⁰⁵

Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.¹⁰⁶

98. 5 U.S.C.A. § 552(a). See also text at notes 177 to 179.

99. 21 U.S.C.A. § 661(a) (emphasis added).

100. 21 U.S.C.A. § 661(c) (i) (emphasis added).

101. 5 U.S.C.A. § 701(a).

102. 5 U.S.C.A. § 701(a) (2) (emphasis added).

103. 312 F. Supp. at 948.

104. *Id.*

105. 397 U.S. 159 (1970).

106. *Id.* at 165.

Thus, after a careful examination of the Act as a whole, the court determined that it did have a "limited jurisdiction"¹⁰⁷ to review those determinations of the Secretary which concern the interpretation of the statutory phrase "custom exemption" and the propriety of the issuance of guidelines. Relying upon the authority of *Harmon v. Brucker*,¹⁰⁸ the court, therefore, took limited jurisdiction in order to "construe the applicable statutes to determine whether the Secretary has exceeded his authority."¹⁰⁹

Proceeding upon this limited basis, the court compared the language of the Federal Act concerning "custom exemptions" with that of the State Act.¹¹⁰ Both the federal and state language were found to be free of ambiguity and thus it was clear to the court that the State Act did not meet the federal standards. As stated by the court:

Thus the "custom exemption" section of the Act is purely statutory; those who may be embraced within its provisions are precisely limited by its language; *there is no discretion vested in the Secretary as to its application*; and it is the *duty* of the Secretary to enforce this provision of the Act as written. As the meaning of the words used is clear, it must be concluded that the intent of Congress in passing the Act was in accordance therewith and as expressed thereby.¹¹¹

The issuance of guidelines, which were intended as working instructions for the use and convenience of Government inspection, was also found to be "well within the general authority of the Secretary relating to inspection of a meat plant for the purpose of determining whether it constitutes a danger to public health."¹¹² Thus, after additionally finding that the promulgation of regulations had been properly accomplished in accordance with the procedures of the Administrative Procedures Act,¹¹³ and that the record disclosed no other violation of law, the court denied the

107. 312 F. Supp. at 948.

108. 355 U.S. 579 (1958).

109. 312 F. Supp. at 948-49.

110. For the language of both acts (prior to the Curtis Amendment) see note 92 *supra*.

111. 312 F. Supp. at 949. (emphasis added). It is interesting to note that there was an amendment pending before Congress at the time of this suit which would probably have obviated the Department's objections to this part of the North Dakota Act; but the court noted at 951: "Under the circumstances here prevailing, this Court has absolutely no authority or jurisdiction, by any means, to delay or postpone enforcement of the Act, regardless of the likelihood of favorable Congressional legislation or of possible future action by the State."

112. *Id.* at 949.

113. *Id.*

plaintiff's motion for preliminary injunction.

In summarizing, however, the court did note some matters, which, though "legally irrelevant and beyond the power of this court to remedy"¹¹⁴ were worthy of concern. With regard to these matters the court stated:

There appears to be no question but that the designation of North Dakota as a state under the Federal Meat Inspection Act will have a very substantial economic impact on many individuals and communities in North Dakota. The Court is aware of this fact and is concerned about it. It may also be true that the effect of such designation is or will be much more extensive than anticipated by Congress. However, the necessity for and the wisdom of the provisions of the Act were for the sole determination of the legislators. So long as the actions taken by the Secretary are within the framework of the Act they are not subject to judicial review. The Court has jurisdiction to determine whether the Secretary violated the law or exceeded his authority; if he did not, this Court has no power to substitute its judgment for that of the Secretary.¹¹⁵

As this first judicial test of Title III makes evident, the forceful actions of the U.S.D.A. authorized by this provision of the Act will be upheld so long as the Secretary of Agriculture does not exceed his statutory authority. Review by the courts of actions under this Title will, therefore, be of a limited nature only.

D. TITLE IV

Title IV,¹¹⁶ also a new section, contains "Auxiliary Provisions" pertaining to the enforcement of the Act. Essentially it provides for withdrawal or refusal of inspection service,¹¹⁷ detention,¹¹⁸ seizure and condemnation,¹¹⁹ and injunction as new enforcement tools.¹²⁰

In accordance with the Administrative Procedure Act,¹²¹ the U.S.D.A. published its proposed regulations for implementing the Wholesome Meat Act in the Federal Register, on August 14, 1969.¹²² At that time the U.S.D.A. sought suggestions on these proposals from members of the meat industry to be submitted to

114. *Id.*

115. *Id.*

116. 21 U.S.C.A. §§ 671-691 (Supp. 1970), 81 Stat. 597-600. S. REP. No. 799, *supra* note 3 at 2206-08.

117. 21 U.S.C.A. § 671 (Supp. 1970), 81 Stat. 597.

118. 21 U.S.C.A. § 672 (Supp. 1970), 81 Stat. 598.

119. 21 U.S.C.A. § 673 (Supp. 1970), 81 Stat. 598.

120. 21 U.S.C.A. § 674 (Supp. 1970), 81 Stat. 599.

121. 5 U.S.C.A. § 553(b) (1967), 80 Stat. 383.

122. U.S.D.A. Proposed Meat Inspection Regulations §§ 301-335, 34 Fed. Reg. 13194 (1969).

the Department by October 13th of that year.¹²³ In October, that time period was given a sixty-day extension.¹²⁴ Just prior to the December 15, 1969 deadline for compliance with the Wholesome Meat Act, the U.S.D.A. granted a one-year extension to all states which were working in cooperation with the U.S.D.A. to upgrade their inspection programs.¹²⁵ On October 3, 1970, the U.S.D.A. published its finally adopted rules and regulations in the Federal Register.¹²⁶

IV. CUSTOM SLAUGHTERING AND THE CURTIS AMENDMENT

Custom slaughtering is governed by Section 23 (a) of the Act.¹²⁷ This section originally provided an exemption from Title I requirements for anyone who engaged in custom slaughtering.¹²⁸

123. *Id.* at 13255.

124. 34 Fed. Reg. 15362 (1969).

125. This extension was granted by administrative determination of the Secretary to each state individually under the authority of § 623(c). The memo sent by the Secretary to the state also set forth the deficiencies of that state's meat inspection laws and the changes necessary to bring the state requirements to "equal to" standards.

By December 15, 1969, Maryland, California, and Florida had been declared "equal to" and North Dakota had been taken over (designated) by the federal inspection system. For the status of states as of April 18, 1970, see survey report of U.S.D.A. published in *THE NATIONAL PROVISIONER*, Vol. 162, No. 16, April 18, 1970 at 23.

126. U.S.D.A. Meat Inspection Regulations §§ 301-335, 35 Fed. Reg. 15552 (1970). Note that while Nebraska had earlier drafted regulations based on the proposed federal regulations for implementing its 1969 meat inspection law, most states have been awaiting the action of the U.S.D.A. on the proposed regulations and presumably will adopt the regulations adopted by the U.S.D.A.

127. 21 U.S.C.A. § 623(a) (Supp. 1970), 81 Stat. 593. "The provisions of this subchapter requiring inspection of the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products at establishments conducting such operations for commerce shall not apply to the slaughtering by any person of animals of his own raising, and the preparation by him and transportation in commerce of the carcasses, parts thereof, meat and meat food products of such animals exclusively for use by him and members of his household and his nonpaying guests and employees; nor to the custom slaughter by any person, firm, or corporation of cattle, sheep, swine or goats delivered by the owner thereof for such slaughter, and the preparation by such slaughterer and transportation in commerce of the carcasses, parts thereof, meat and meat food products of such animals, exclusively for use, in the household of such owner, by him and members of his household and his nonpaying guests and employees; *Provided*, That such custom slaughterer does not engage in the business of buying or selling any carcasses, parts of carcasses, meat or meat food products of any cattle, sheep, swine, goats, or equines, capable of use as human food." See also H.R. REP. No. 1221, 91st Cong., 2d Sess. (1970).

128. *Id.*

This exemption, however, was contingent upon the custom slaughterer *not* engaging in the business of buying or selling *any* meat or meat products whatsoever.¹²⁹ This caused a problem for many small businesses which needed both the custom slaughter operation and the retail operation in order to operate at a profit. By prohibiting a business from engaging in both forms of operation within the same facility, Sec. 23 (a) thereby threatened the entire existence of many such small businesses.¹³⁰

This dilemma led Senator Carl T. Curtis of Nebraska¹³¹ to introduce to the Senate on March 13, 1970, a revised bill—later to be called the Curtis Amendment¹³²—“to amend the Federal Meat Inspection Act, as amended to clarify the provision relating to custom slaughtering operations.”¹³³ In short, the Curtis Amendment permits custom slaughtering of livestock for farmers and

129. *Id.*

130. *Hearings, supra* note 68, at 3. See also note 262 *infra*.

131. Others who supported this bill were Senators Hruska, Bellmon, Burdick, Dole, Proxmire, Jordon, McGee, and Young. *Hearings, supra* note 11, at 7.

132. *Id.*

133. The full text of the Amendment is as follows:

An Act to amend the Federal Meat Inspection Act, as amended, to clarify the provisions relating to custom slaughtering operations. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:* The Federal Meat Inspection Act (34 Stat. 1260, as amended by the Wholesome Meat Act, 81 Stat. 584), is hereby amended by deleting the proviso from paragraph (a) of section 23 of the Act, and the colon preceding said proviso, and substituting therefor the following: “nor to the custom preparation by any person, firm or corporation of carcasses, parts thereof, meat or meat food products, derived from the slaughter by any person of cattle, sheep, swine, or goats of his own raising, or from game animals, delivered by the owner thereof for such custom preparation, and transportation in commerce of such custom prepared articles, exclusively for use in the household of such owner, by him and members of his household and his nonpaying guests and employees: *Provided*, That in cases where such person, firm, or corporation engages in such custom operations at an establishment at which inspection under this title is maintained, the Secretary may exempt from such inspection at such establishment any animals slaughtered or any meat or meat food products otherwise prepared on such custom basis: *Provided further*, that custom operations at any establishment shall be exempt from inspection requirements as provided by this section only if the establishment complies with regulations which the Secretary is hereby authorized to promulgate to assure that any carcasses, parts thereof, meat or meat food products wherever handled on a custom basis, or any containers or packages containing such articles, are separated at all times from carcasses, parts thereof, meat or meat food products prepared for sale, and that all such articles prepared on a custom basis, or any containers or packages containing such articles, are plainly marked ‘Not for Sale’ immediately after being prepared and kept so identified until delivered to the owner and that the establishment conducting the custom operation is maintained and operated in a sanitary manner. Pub. L. No. 91-342, 84 Stat. 438.

ranchers to be carried on within the same establishments where meat is cut and sold at retail. However, the Amendment prescribes strict requirements which must be met in order for these two types of activities to be conducted within the same facilities.¹³⁴ Upon introducing the bill, Senator Curtis summarized its provisions as follows:

First, the Secretary of Agriculture would promulgate regulations assuring that the custom-slaughtering operations and all of the products thereof "are separated at all times" from the meat which is handled for sale at retail.

Second, the containers or packages containing custom-slaughtered meat would have to be plainly labeled "Not for Sale" immediately after being prepared, and kept so identified until delivered to the owner.

Third, the establishment conducting custom operations would have to be "maintained and operated in a sanitary manner" as prescribed by the Secretary of Agriculture.

Finally, all meat processed and sold at retail in such an establishment must come from a slaughter plant which is inspected under the regular standards prescribed in the Wholesome Meat Act as it exists today.¹³⁵

Senator Curtis emphasized that the Amendment "actually is a technical amendment designed to clarify the provisions of the 1967 Act with respect to custom slaughtering operations."¹³⁶ The Senator stressed that the Amendment was "not designed to permit anything that was not intended by the principle sponsors and supporters"¹³⁷ of the 1967 Wholesome Meat Act. He further affirmed that great pains were taken "to make certain that it does not create loopholes or do violence in any way to the intent of the Wholesome Meat Act."¹³⁸

Hence, the 1967 Wholesome Meat Act, as amended in 1970, regulates both the large and the small meat processor and handler, the interstate and the intrastate handlers, and the retail as well as the custom slaughtering dealers.

V. INTRASTATE PLANTS¹³⁹

A plant which operates solely within the boundaries of the state in which it is located and whose products do not move across

134. *Id.* See also 116 CONG. REC. 3674 (daily ed., March 13, 1970).

135. 116 CONG. REC. 3674 (daily ed., March 13, 1970).

136. *Id.*

137. *Id.*

138. *Id.*

139. The scope of this portion of the article will include only those plants which are located in states that have been admitted to the Union.

the boundaries of that state is known as an intrastate meat plant.

If the state in which such a plant operates has adapted its meat inspection laws to the requirements of the Wholesome Meat Act so that the state standards of inspection and construction are "at least equal to" those set out in the Federal Act, the intrastate plant would be subject to state inspection only.¹⁴⁰ Thus, such a plant would be visited by a full-time state inspector and subjected to "at least" the same standards of operation as are applied under the federal inspection system to plants operating interstate. However, it should be noted that an intrastate operator, unless exempted by the state act, must comply fully with all of the requirements of that state's act. Hence, if such requirements are more stringent than those contained in the Wholesome Meat Act, he must operate in accordance with those stricter standards, and any violation of those standards will subject him to the penalty provisions of the state act.

If the state in which such an intrastate plant operates has not adapted its inspection laws to meet the standards of the Wholesome Meat Act, the Secretary may designate such a state "as one in which the provisions of subchapters I and IV . . . shall apply to operations and transactions wholly within such State."¹⁴¹ This would mean that the intrastate plant existing within such state must then comply with the full requirements of inspection and construction of the Federal Act and would be subjected to federal inspection and enforcement. Such a plant would then become known as an "Official Establishment."¹⁴²

Certain provisions of the Act cover Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and any other territory or possession of the United States. 21 U.S.C.A. § 601(f), (g), and (i) (Supp. 1970). However it should be noted that under Section 623(b), the Secretary may exempt from inspection requirements certain slaughtering operations located "in any Territory not organized with a legislative body" if the product of such operation is "solely for distribution within such Territory when the Secretary determines that it is impracticable to provide such inspection within the limits of funds appropriated for administration" of the inspection laws. Certain sanitary conditions may be prescribed by regulation as a prerequisite for such an exemption. 21 U.S.C.A. § 623(b) (Supp. 1970), 81 Stat. 593.

140. See 21 U.S.C.A. § 661 (Supp. 1970), 81 Stat. 595, for requirements of federal and state cooperative agreements in developing state meat inspection programs equal to the requirements of the Federal Act.

141. 21 U.S.C.A. § 661(c)(1) (Supp. 1970), 81 Stat. 595. This action would be taken only after the Secretary notifies and consults with the governor of the state and publication of such designation in the Federal Register. See *Fargo Packing Corporation v. Hardin*, 312 F. Supp. 942 (D. No. Dak. 1970) for the first judicial test of this designation power—discussed in text at notes 88 to 115 *supra*.

142. U.S.D.A. Meat Inspection Reg. § 301.2(i), 35 Fed. Reg. 15554 (1970).

In addition, even if the state within which the intrastate plant exists has an inspection system "equal to" the federal requirements, if the U.S.D.A. should determine that "any establishment within a State is producing adulterated meat or meat food products for distribution within such State which would clearly endanger the public health,"¹⁴³ that establishment alone can be designated as subject to the provisions of the Wholesome Meat Act.¹⁴⁴ Before such designation is made, however, the Secretary of Agriculture will notify the governor of the state and the appropriate advisory committee; but, "[i]f the State does not take action to prevent such endangering of the public health within a reasonable time after such notice,"¹⁴⁵ the establishment and operator thereof will be so designated "as though engaged in commerce until such time as the Secretary determines that such State has developed and *will enforce* requirements at least equal to"¹⁴⁶ the federal standards. Hence, one intrastate plant alone can be subjected to federal inspection as an "Official Establishment" if the state in which it is located fails to enforce its "equal to" standards against such plant.

In the event an entire state has been "designated" by the Secretary and all intrastate plants become subject to federal inspection and construction/facilities requirements, there are two types of establishments which may be exempted from these requirements—the custom slaughterer and the retail store.

A. THE CUSTOM SLAUGHTER EXEMPTION

The custom exemption can be obtained by those plants which slaughter and process livestock or meat owned solely by others.¹⁴⁷ The "cattle, sheep, swine, or goats (may be) delivered by the owner thereof for such slaughter, and the preparation"¹⁴⁸ by the custom operator; or the owner may slaughter the livestock himself and deliver the carcass or parts thereof for preparation by the custom operator.¹⁴⁹ However, both the Act and regulations

143. 21 U.S.C.A. § 661(c) (1) (Supp. 1970), 81 Stat. 595.

144. *Id.*

145. *Id.*

146. *Id.* (emphasis added).

147. 21 U.S.C.A. § 623(a) (Supp. 1970). *See also* U.S.D.A. Meat Inspection Reg. § 303.1(a) (2), 35 Fed. Reg. 15557 (1970). The exemption is also available to an individual who slaughters livestock of his own raising "exclusively for use by him, a member of his household, and his non-paying guests and employees." U.S.D.A. Meat Inspection Reg. § 303.1(a) (1), 35 Fed. Reg. 15557 (1970).

148. U.S.D.A. Meat Inspection Reg. § 303.1(a) (2), 35 Fed. Reg. 15557 (1970).

149. *Id.*

require that such meat be "exclusively for use by (the owner) and members of his household and his nonpaying guests and employees."¹⁵⁰

As explained in the earlier discussion of the Curtis Amendment, under the amended Federal Act, a custom operator may conduct custom slaughtering operations and retail sales of meat within the same establishments. Such dual operations can only be maintained if the custom products and any containers or packages containing such articles "are separated at all times from carcasses . . . or meat food products prepared for sale"¹⁵¹ and that all such custom articles and packages in which they are contained "are plainly marked 'Not for Sale' immediately after being prepared and kept so identified until delivered to the owner . . ." ¹⁵²

It is also possible that an "Official Establishment" which does slaughtering for wholesale can obtain a custom exemption if, in conjunction with its wholesale operations, it also does custom slaughtering. However, the regulations set forth the following limitations:

If exempted custom slaughtering or other preparation of products is conducted in an official establishment, all facilities and equipment in the official establishment used for such custom operations shall be thoroughly cleaned and sanitized before they are used for preparing any product for sale.¹⁵³

Questions have been asked by both establishment owners and hunters concerning the custom processing of game animals. The 1967 Wholesome Meat Act permits custom processing of the game animals in the same establishment where meat is cut and sold commercially, but does not set out the conditions of such processing.¹⁵⁴ The Curtis Amendment, however, does set forth the standards for such processing. The Amendment requires the custom slaughterer to provide for *complete separation* of those game meats which are slaughtered for the game owner from those inspected meat products which are offered for sale to the pub-

150. 21 U.S.C.A. § 623(a) (Supp. 1970), 81 Stat. 593.

151. Pub. L. No. 91-342; 84 Stat. 438 *amending* 21 U.S.C.A. § 623(a). See also U.S.D.A. Meat Inspection Regs. § 303.1(a) (ii) and (iii).

152. *Id.*

153. U.S.D.A. Meat Inspection Reg. § 303.1(a) (iv), 35 Fed. Reg. 15557 (1970).

154. In support of the Curtis Amendment it was argued: "The same permission should be extended to farmers and ranchers who want to have their livestock slaughtered and processed for their own use, and it is important to prescribe conditions for such processing for game as well as domestic animals." (Remarks of Sen. Carl T. Curtis, Rep., Neb.) 116 CONG. REC. 3674 (daily ed., March 13, 1970).

lic.¹⁵⁵ Using the "Rule of Reason" it will remain for the individual inspector to determine whether a plant's facilities adequately comply with the "complete separation" requirement.¹⁵⁶

While custom operations are exempt from the inspection requirements, it should be noted that they are nevertheless subject to the sanitation,¹⁵⁷ adulteration,¹⁵⁸ and misbranding¹⁵⁹ sections of Act. These provisions apply to both the plant's facilities and its actual processing operations.¹⁶⁰ Sanitation inspection of the custom plant will take place when the plant first applies for a license,¹⁶¹ and thereafter on a periodic basis by inspectors assigned to circuits containing several such plants.¹⁶²

There are a variety of factors which affect the wholesomeness of the product in the course of slaughtering. The regulations are designed to require certain *minimum* standards with regard to the type of facilities and procedures used by the custom operation in order to prevent the adulteration of products in the course of slaughtering and processing.¹⁶³ This means that if a plant owner cannot afford to buy a particular piece of equipment suggested by the government,¹⁶⁴ he will be allowed, in some instances, to buy or use a substitute piece of similar equipment if it can accomplish the same purpose and still retain a sanitary and unadulterated product.¹⁶⁵ For instance, in the case of containers or tubs, stainless steel is generally favored; but if the plant is too small to warrant such expense, the Department of Agriculture will generally allow

155. See note 133 *supra* for full text of amendment.

156. According to the U.S.D.A., "Simply defined the [Rule] means that judgment of facilities and equipment requirements is based on an evaluation of what is necessary to meet inspection needs and to produce wholesome product under sanitary conditions." U.S.D.A. pamphlet, *supra* note 7, at 1.

157. 21 U.S.D.A. § 608 (Supp. 1970), 81 Stat. 588, 592. See also U.S.D.A. Meat Inspection Reg. § 303.1(a)(2)(i), 35 Fed. Reg. 15557 (1970).

158. 21 U.S.C.A. § 623(c), 81 Stat. 591.

159. *Id.*

160. See U.S.D.A. Meat Inspection Reg. § 308 (1970), 35 Fed. Reg. 15561 (1970). "Facilities" includes such things as lights, walls, cutting tables, floors, sinks, barrels and other containers, shelves, and types of equipment used in various stages of processing. "Operations" includes such things as packaging, labeling, possible use of additives and other practices carried on by a plant.

161. U.S.D.A. Meat Inspection Reg. § 308.1 (1970); 35 Fed. Reg. 15561 (1970).

162. U.S.D.A. Meat Inspection Reg. § 306.1 (1970); 35 Fed. Reg. 15559.

163. U.S.D.A. Meat Inspection Reg. § 308 (1970); 35 Fed. Reg. 15552 (1970).

164. See U.S.D.A. pamphlet *supra* note 6, at Addendum.

165. *Id.* See also H.R. Rep. No. 998 (to accompany H.R. 12144), 90th Cong. 1st Sess. 21-22 (1967).

substitute metals or substances which are easily cleanable and which can be kept in a sanitary manner.¹⁶⁶

Thus, it is clear that the Wholesome Meat Act was not intended to force small plants out of business.¹⁶⁷ In applying the provisions of the Act, each plant will be approached individually by the Department of Agriculture, with special regard for that plant's particular problems, operating conditions, and circumstances.¹⁶⁸ This is true not only of small retail and custom slaughtering establishments, but also of plants that are classified as "Official Establishments".¹⁶⁹

In the case of the small plants, however, where the volume of production does not warrant substantial remodeling or the expense of elaborate sterilization equipment, certain concessions will be made as long as sanitation, the main objective of the Wholesome Meat Act, can be maintained.¹⁷⁰ However, this does not mean that such plants will not be closed down if the Department determines they are producing adulterated meat or meat products injurious to public health.¹⁷¹

B. THE RETAIL ESTABLISHMENT EXEMPTION

The Wholesome Meat Act, itself, makes no mention of a retail establishment exemption. However, the regulations make it clear that "The requirements of the Act and the regulations in this subchapter for inspection of the preparation of products do not apply to operations of types traditionally and usually conducted at retail stores and restaurants"¹⁷² Thus, the thousands of retail meat markets (which do no slaughtering whatsoever), such as sausage and bologna speciality houses, delicatessens, grocery stores and supermarkets, would appear to be free of the inspection requirements of the Act.

In the Proposed U.S.D.A. Meat Inspection Regulations,¹⁷³ a retail store was defined as: Any place of business where preparations and handling of products are limited to:

166. *Id.* at 19 and Addendum.

167. *Id.* at Addendum.

168. *Id.*

169. *Id.*

170. See *CAPITOL LINE-UP* (weekly pamphlet of Nat. Institute of Locker and Freezer Provisioners), Nov. 20, 1969, at 1.

171. U.S.D.A. Meat Inspection Reg. § 303.1(f) (1970), 35 Fed. Reg. 15558 (1970).

172. U.S.D.A. Meat Inspection Reg. § 303.1(d)(1), 35 Fed. Reg. 15557 (1970).

173. U.S.D.A. Proposed Meat Inspection Regs. §§ 301-335, 34 Fed. Reg. 13194 (1969).

- (i) Cutting up, slicing, and trimming carcasses, halves, quarters, or wholesale cuts into retail cuts such as steaks, chops, and roasts and freezing such cuts;
- (ii) Grinding and freezing products made from meat;
- (iii) Curing and/or coking products;
- (iv) Breaking bulk shipments of products;
- (v) Wrapping or rewrapping products.¹⁷⁴

These proposed regulations also made it clear that to qualify as a retail establishment at least 90 percent of the sales must be made to household consumers,¹⁷⁵ and all sales must be in "normal retail quantities" which was defined as an aggregate which "does not exceed a quarter carcass of the species purchased."¹⁷⁶

However, in January of 1970, a more liberal definition was utilized by the U.S.D.A. which exempted far more "retail" operations from inspection. This definition was found in the guidelines which were distributed by the Consumer and Marketing Service of the U.S.D.A. to North Dakota plant operators in preparation for the federal takeover of inspection in that state.¹⁷⁷ Under those guidelines, a "normal retail quantity" would be an entire carcass or equivalent amount of meat from the species purchased, rather than a quarter carcass. And, instead of requiring 90 percent of sales be made to household consumers, the rate was lowered to 51 percent. Thus 49 percent of total sales could be to hotels, restaurants, and institutions.⁷⁸ Exempted retailers under these guidelines, could handle only inspected meat; they could do no slaughtering or custom processing. They could, however, make sausage or other products from the inspected meat without further inspection, a process from which a wholesale operator (i.e. packers, purchasers, jobbers, etc.) was restricted.¹⁷⁹ As required under the proposed regulations, retailers could not sell to wholesalers.

Ultimately in October of 1970, the final regulations were adopted.¹⁸⁰ The definition of "retail store" as set out in these regulations indicates a median ground was adopted between the above two positions. This definition reads as follows:

174. *Id.* §§ 301.2(ddd) and 303.1(c) (2).

175. *Id.* § 301.2(ddd).

176. *Id.* § 303.1(c) (3).

177. See THE NATIONAL PROVISIONER, Vol. 162, No. 7, Feb. 14, 1970, at 9. See also *Fargo Packing Corp. v. Hardin*, 312 F. Supp. 942 (D. N. Dak. 1970) for details of legal challenges made by North Dakota packers to such guidelines. This case is discussed in the text at notes 88 to 115 *supra*.

178. *Id.*

179. *Id.* at 28.

180. U.S.D.A. Meat Inspection Regs. §§ 301-335, 35 Reg. 15552 (1970).

A retail store is any place of business where the sales of products are made to consumers only; at least 75 percent, in terms of dollar value, of total sales of product represents sales to household consumers and the total dollar value of sales of product to consumers other than household consumers does not exceed \$10,000 per year, only federally or State inspected and passed product is handled or used in the preparation of any product, except that product resulting from the custom slaughter or custom preparation of product may be handled or used in accordance with paragraph (a) (2) of this subchapter but not for sale; no sale of product is made in excess of a normal retail quantity as defined in subdivision (ii)¹⁸¹ of this subparagraph; the preparation of products for sale to household consumers is limited to traditional and usual operations as defined in subdivision (i)¹⁸² of this subparagraph; and the preparation of products for sale to other than household consumers is limited to traditional and usual operations as defined in (a), (b), (d), and (e) of subdivision (i) of this subparagraph.¹⁸³

One not familiar with practices and circumstances existing within the meat industry might question why custom operations and retail establishments are allowed to perform the same functions as large interstate plants and yet remain exempt from the inspection requirements which govern the latter. Basically, the rationale for this policy is twofold: *First*, most small retail and custom slaughtering establishments do not do a sufficient volume of business to justify the expense of a full-time inspector. (The legislative history of the Wholesome Meat Act discloses a rather strong argument to the effect that since the state's people are the ones being protected by the Act, they should be the ones required to pay for it.¹⁸⁴ If the Federal government were to pay for a full time inspec-

181. *Id.* § 303.1(d) (2) (ii) defines this as "Any quantity or product purchased by a consumer from a particular retail supplier shall be deemed to be a normal retail quantity if the quantity so purchased does not in the aggregate exceed one-half carcass."

182. *Id.* According to § 303.1(d) (2) (i), "Operations of types traditionally and usually conducted at retail stores and restaurants are the following:

- (a) Cutting up, slicing, and trimming carcasses, halves, quarters, or wholesale cuts into retail cuts such as steaks, chops, and roasts, and freezing such cuts;
- (b) Grinding and freezing products made from meat;
- (c) Curing, cooking, smoking, or other preparation of products;
- (d) Breaking bulk shipments of products;
- (e) Wrapping or rewrapping products.

183. *Id.* § 303.1(d) (2) (iii). A retail store at which custom slaughtering or preparation of products is conducted is not thereby disqualified from exemption as a retail store.

184. See *Hearings supra* note 19, at 114 for statement of L. Blaine

tor in each of the intrastate plants, not previously subject to federal inspection, a great burden would be placed on the federal taxpayers which would far outweigh the resulting benefit from such a practice.¹⁸⁵) *Second*, the policy behind meat inspection of protecting the consuming public from unwholesome meat products, would serve no useful purpose in the case of retailers since all meat purchased for sale to the retailer must be purchased from an officially inspected plant. And, in the case of custom operations, since all meat processed is solely for the owner's use, there is no connection with the general or public welfare, hence, the policy of the Act is again not contravened.

It should be noted, however, that although retail establishments are exempted from inspection standards, these operations are subject to the adulteration and misbranding provisions of the Act and the regulations thereunder.¹⁸⁶ And, if such an establishment operates in violation of these requirements or any of the other requirements for exemption, the Administrator of the Consumer and Marketing Service Department of the U.S.D.A. will notify the operator of such violations and afford him an opportunity to be heard regarding such complaints.¹⁸⁷ Should the Administra-

Liljenquist, President and General Manager, Western States Meat Packers Assoc. Mr. Liljenquist's statement is quoted here in part:

[T]here is controversy in the Congress as to who should pay for the cost of inspection.

Back in 1906 when the Meat Inspection Act was considered, it was finally determined that the packers ought not to pay for the cost of the policing of the plants, but the public should pay for it because it is a public health service, for the benefit of the people, to see that all meat entering interstate commerce is clean and derived from wholesome, disease-free animals.

Meat inspection services are the policing of the industry by the Federal inspectors in the case of the Federal law, and by the State inspectors in the case of the State laws, which should be paid for by the people who are directly benefited by it, that is, the consuming public.

So, for that reason, we feel that if the Federal Government should take over complete responsibility to inspect meat in intrastate commerce, to do the entire inspection job as proposed by the Mondale bill, that this would so add to the Federal cost that there would be even more pressure exerted to shift the cost of meat inspection to the packers.

We cannot have the best possible meat inspection if the persons policed are paying for the policemen. That is obvious.

185. *Id.* Mr. Liljenquist in the 1967 Hearings, referring to a proposal by Senator Mondale that the Federal Government inspect all packing plants and all processing plants regardless of their size, stated, "In that event it would probably cost in the neighborhood of \$100 million a year, thereby causing added pressure on the part of the Congress to shift the cost to the packing industry. This would not be in the best public interest."

186. U.S.D.A. Meat Inspection Reg. § 303.1(e), 35 Fed. Reg. 15558 (1970).

187. *Id.* § 303.1(d) (3).

tor have reason to believe, even after such hearing, that violations have occurred, strict recordkeeping requirements may be imposed upon the retailer in order to effectuate the purposes of the Act.¹⁸⁸ Further, if any one retailer existing within a state which has "equal to" standards is found to be producing products which would clearly endanger the public health, the Administrator may extend federal inspection standards to that establishment alone in the same manner as described for custom operators above.¹⁸⁹

VI. STATE MEAT INSPECTION IN NEBRASKA

Prior to 1967, the laws of the several states contained a wide variety of requirements ranging from general inspection requirements for obtaining a license, to spot checks, to purely voluntary inspection—all far below the federal requirement of continued ante and postmortem inspection of every ounce of meat processed.¹⁹⁰ It was the intention of Congress, in passing the Wholesome Meat Act, that every ounce of meat sold to American consumers would be inspected under federal standards or standards "at least equal to" those of the Federal Government.¹⁹¹ Thus, the inspection of intrastate plants still remains with the states; however, they are no longer allowed to use their own standards, but must now develop standards "at least equal to" federal standards.¹⁹²

In accordance with the Wholesome Meat Act provision that state laws become at least "equal to" the federal law,¹⁹³ the Nebraska Legislature enacted the Nebraska Meat and Poultry Inspection Law¹⁹⁴ which is intended "to assure that only wholesome meat and poultry products enter regular commercial meat channels of commerce and to provide that same are identified and truthfully labeled."¹⁹⁵ Following approval by the Governor on September 19, 1969, the Act became immediately effective.¹⁹⁶

188. *Id.*

189. *Id.* § 303.1(f).

190. 21 U.S.C.A. § 71 (1907), 34 Stat. 1260.

191. S. REP. No. 799, *supra* note 3, at 2190.

192. 21 U.S.C.A. § 661 (Supp. 1970), 81 Stat. 595.

193. *Id.*

194. NEB. REV. STAT. §§ 54-1901 to 54-1915 (Supp. 1969). Note that this article is concerned with only red meat inspection and will not discuss the provisions on poultry inspection. Most new state laws combine both meat and poultry inspection provisions in compliance with the Wholesome Meat Act of 1967 and the Wholesome Poultry Products Act of August 18, 1968, Pub. L. No. 90-492 § 17, 21 U.S.C.A. §§ 451-470 (Supp. 1970), 82 Stat. 807.

195. NEB. REV. STAT. § 54-1903 (Supp. 1969).

196. L.B. 1367 Sec. 18: "Since an emergency exists, this act shall be in full force and take effect from and after its passage and approval, according to law."

For the most part, the Act merely reiterates the provisions of the Wholesome Meat Act;¹⁹⁷ however, in order to better understand the situation in Nebraska, it might be well to compare the status of meat inspection as it previously existed in the state to that which the new law will provide.

Prior to passage of the Nebraska Meat and Poultry Inspection Law, Nebraska had separate statutes which embraced different licensing requirements for rendering establishments,¹⁹⁸ slaughter houses,¹⁹⁹ cold storage houses,²⁰⁰ and frozen food locker plants.²⁰¹ The new law, however, governs *all* such operations²⁰² since it was the intent of Congress that the Wholesome Meat Act apply not only to meat processing and slaughtering establishments, but to *anyone* who handles or deals with meat in any manner enroute to the consumer.²⁰³ The licensing procedures under the new law, notwithstanding higher license fees, are substantially the same as those under the previous statutes, except in the case of slaughterhouses. Under prior law, slaughterhouses could not even be "built" until a license was obtained from the Nebraska Department of Agriculture.²⁰⁴ The new legislation abolishes this distinction by allowing building without a license, but restricts operations by not allowing establishments to "operate or maintain" themselves until a license is issued.²⁰⁵

It is also notable that under the new Nebraska Act "conformity with the provisions of this act and the rules and regulations promulgated thereunder by the director"²⁰⁶ is required for issuance of a license, while under the previous statutes it was only necessary that a plant be found to be "sanitary"²⁰⁷ before a license could be obtained. This requirement, alone, proves to be a major difference in the new licensing requirements. Should such conformity be

197. However, there are differences which will be discussed later in the text.

198. Neb. Laws, c. 12, art. VII, §§ 1-3 [1927]; Neb. Laws, c. 194, § 1 [1947]; Neb. Laws, c. 8, § 16 [1965]; Neb. Laws, c. 336, § 2 [1965] (repealed 1969).

199. Neb. Laws, c. 195, § 2 [1947]; Neb. Laws, c. 8, § 20 [1965] (repealed 1969).

200. NEB. REV. STAT. 81-2,123 (Reissue 1968).

201. NEB. REV. STAT. 81-2,134.03 (Supp. 1969).

202. NEB. REV. STAT. 54-1904 (Supp. 1969).

203. 21 U.S.C.A. § 602 (Supp. 1970), 81 Stat. 587.

204. Neb. Laws, c. 195, § 2 [1947]; Neb. Laws, c. 8, § 20 [1965] (repealed 1969).

205. NEB. REV. STAT. § 54-1904 (Supp. 1969).

206. *Id.*

207. NEB. REV. STAT. §§ 81-2,123 (Reissue 1968) and 81-2,134.03 (Supp. 1969).

lacking after issuance of a license, the new law further provides for suspension or revocation of a license if a plant constitutes "a menace to public health" or if there is "violation of any of the provisions of this act."²⁰⁸

The earlier Nebraska statutes set forth detailed procedures for appeal from an order of the Department of Agriculture in the case of slaughterhouses only.²⁰⁹ Statutes dealing with other types of establishments lacked any such definitive appeal procedure. By contrast, the Nebraska Meat and Poultry Inspection Law covers *all* establishments in providing the right to hearings by the director, appeals to the district court of the county, and finally to the Supreme Court of Nebraska.²¹⁰ This is essentially parallel to the provisions of the Wholesome Meat Act.²¹¹ The Nebraska law, however, describes the hearing procedure more elaborately than does the Wholesome Meat Act.²¹²

The new law requires certain records to be kept by the owner of each establishment and made available to the Nebraska Department of Agriculture upon their demand. Such records must "fully and correctly disclose all transactions involved in their business."²¹³ This requirement is intended to comply with section 202 of the

208. NEB. REV. STAT. § 54-1904 (Supp. 1969).

209. Neb. Laws, c. 195, § 13 [1947] (repealed 1969).

210. NEB. REV. STAT. § 54-1905 (Supp. 1969).

211. 21 U.S.C.A. § 671 (Supp. 1970), 81 Stat. 597. This section provides for the withdrawal of inspection service "after opportunity for a hearing" if the secretary should determine that the applicant or recipient of the inspection service unfit to engage in business by reason of having been convicted of committing a felony or has more than once been convicted of violating a law based on handling, acquiring or distributing unwholesome, mislabeled or deceptively packaged food or any other fraud concerning food transactions. 21 USCA § 607(e) also provides for hearing and judicial review if a person does not agree with a ruling of the Secretary regarding a marking or labeling practice.

212. NEB. REV. STAT. § 54-1905 (Supp. 1969). For example, the new Nebraska statute provides that "the burden of proof and of proceeding with the evidence shall be on the department and every party shall have the right to compulsory process, to representation by counsel of his own choosing and to cross examination of and confrontation by witnesses against him."

213. NEB. REV. STAT. § 54-1907 (Supp. 1969). The following classes of persons are required to keep such records . . . :

(1) Any persons who engage in or for intrastate commerce in the business of slaughtering any livestock or poultry, or preparing, freezing, packaging or labeling, buying or selling, transporting, or storing any livestock products or poultry products for human food or animal feed; or

(2) Any persons who engage in or for intrastate commerce in the business of rendering, pet feed manufacturing, buying, selling, storing, or transporting any wholesome or dead, dying, disabled, or diseased livestock or poultry, or parts of the carcasses of any such livestock or poultry which died either by slaughter or otherwise.

Wholesome Meat Act.²¹⁴ Recordkeeping requirements under previous statutes and regulations were not as clearly defined.

The Nebraska Act provides the Director of Agriculture with authority to "promulgate and enforce such rules and regulations as are necessary to the proper administration and enforcement of the provisions of this act."²¹⁵ The particular requirements which the regulations shall ordain are specifically set forth in the Act.²¹⁶ Pursuant to these provisions of the Nebraska Meat and Poultry Inspection Law, the Nebraska Department of Agriculture has promulgated regulations for slaughtering establishments and is in the process of preparing regulations for rendering establishments.²¹⁷

The remainder of the Nebraska Meat and Poultry Inspection Law enumerates the types of authority²¹⁸ and powers²¹⁹ of the Director of Agriculture, describes those acts which will be considered violations of the Law²²⁰ and when such acts will be considered crimes,²²¹ and sets forth the procedure for destruction of livestock.²²² The Act repeals previous sections covering rendering establishments²²³ and slaughterhouses,²²⁴ while leaving in effect The Nebraska Food Act²²⁵ and other statutes pertaining to meats,²²⁶ foods,²²⁷ and locker plants²²⁸ to act in conjunction with the Nebraska Meat and Poultry Inspection Law.

It should be noted that on the eve of December 15, 1970, which is the deadline for compliance with the Wholesome Meat Act, the Nebraska meat inspection program has not yet been certified as

214. 21 U.S.C.A. § 642 (Supp. 1970), 81 Stat. 593.

215. NEB. REV. STAT. § 54-1906 (Supp. 1969).

216. *Id.*

217. Neb. Rules and Regulations Governing Meat Inspection, §§ 301-325, duly promulgated under the Nebraska Rules for Administrative Agencies, §§ 84-903 - 84-908 (Reissue 1968). These regulations must again be revised in the light of the changes made in the final Federal regulations.

218. NEB. REV. STAT. § 54-1906 (Supp. 1969).

219. NEB. REV. STAT. § 54-1908 (Supp. 1969).

220. NEB. REV. STAT. § 54-1909 (Supp. 1969).

221. NEB. REV. STAT. § 54-1913 (Supp. 1969).

222. NEB. REV. STAT. §§ 54-1912 (Supp. 1969).

223. Neb. Laws, c. 12, art. VII, §§ 1-6 [1927]; Neb. Laws, c. 194, § 1 [1947]; Neb. Laws, c. 8, § 16 [1965]; Neb. Laws, c. 336, § 2 [1965]; Neb. Laws, c. 336, § 3 [1965]; Neb. Laws, c. 336, §§ 1 and 4 [1965] (repealed 1969).

224. Neb. Laws, c. 195, §§ 1-18 [1947]; Neb. Laws, c. 8, § 20 [1965]; Neb. Laws, c. 269, §§ 1-3 [1961] (repealed 1969).

225. NEB. REV. STAT. §§ 81-217.11 to 81-217.27 (Reissue 1966).

226. NEB. REV. STAT. §§ 28-1014 and 28-1017 (Reissue 1964); NEB. REV. STAT. §§ 81-2,211 to 81-2,216 (Reissue 1966).

227. NEB. REV. STAT. §§ 81-217.01 to 81-217.10 (Reissue 1966); NEB. REV. STAT. §§ 81-218 to 81-293 (Reissue 1966); NEB. REV. STAT. §§ 81-2,122 to 81-2,134 (Reissue 1966); NEB. REV. STAT. §§ 81-2,111 to 81-2,121 (Reissue 1966).

228. NEB. REV. STAT. §§ 8-2,134.01 and 81-2,134.11 (Reissue 1966).

"equal to" U.S.D.A. standards.²²⁹ According to a memo from the U.S.D.A. to the Nebraska Department of Agriculture, there are basically three main deficiencies in the Nebraska law which must be corrected by amendment or regulation in order to make the Act "equal to" Federal standards: (1) the present Act does not expressly state that the intent of the meat inspection program is to bring inspection standards for intrastate operations and commerce to a level at least "equal to" the programs under the Federal Act;²³⁰ (2) the Act does not include a clause which specifically provides that no person shall, contrary to the regulations prescribed by the Secretary, fail to use or detach, deface, or destroy any official device mark or certificate;²³¹ and, (3) the Act contains no provision for finality of administrative determination when timely appeals or applications for judicial review are not made as provided for the Federal Act.²³²

Hence, if these deficiencies are remedied by a revision of the State Act or regulations, it would appear that the Nebraska meat inspection program would be acceptable to the U.S.D.A. if properly administered.²³³ Therefore, it appears that the Nebraska statute will, in time, effectively implement the provisions of the Wholesome Meat Act with respect to state meat inspection.

Statistically, before 1967, there were 48 federally inspected

229. See letter and evaluation report dated Nov. 14, 1969, addressed to the Director of the Nebraska Department of Agriculture from the U.S.D.A. which sets forth the deficiencies in the State's program. (copy retained in our law review files).

Presently only seven state inspection programs: Tennessee, Washington, California, Florida, Maryland, New Mexico, and Idaho, have been certified as "equal to" Federal. However, as the December 15, 1970, deadline draws near, it is probable that more and more state programs will be approved. North Dakota inspection was taken over in June, 1970, by the U.S.D.A. It is possible the same thing will happen to Indiana. See THE NATIONAL PROVISIONER Vol. 163 No. 19, Nov. 7, 1970 at 47.

230. NEB. REV. STAT. § 54-1903 (Supp. 1969) presently states the law's intent as follows: "The intent of [this Act] is to assure that only wholesome meat and poultry products enter regular commercial meat channels of commerce and to provide that same are identified and truthfully labeled."

231. NEB. REV. STAT. § 54-1909(10) presently provides only for what cannot be done. The federal standard has a *mandatory* requirement which must be included. See 21 U.S.C.A. 607(a), 81 Stat. 588.

232. The objections of the U.S.D.A. were reiterated by Dr. Don Breiden, U.S.D.A. Consumer and Marketing Service Liaison Officer to the Nebraska Department of Agriculture in a recent interview with this writer. Cf. 21 U.S.C.A. §§ 607(e) and 671 (Supp. 1970), 81 Stat. 588 and 597.

233. *Id.* U.S.D.A. inspection teams are presently surveying Nebraska meat plants to determine whether the State is operating in an "equal to" manner. It would appear from the Nebraska Regulations governing meat inspection, *supra* note 217, that the deficiencies of the Act have been remedied.

plants in Nebraska and 273 nonfederally inspected plants in operation.²³⁴ Under the new Act, Nebraska has 110 "Official Establishments" in operation. These official establishments have inspectors conducting, not only sanitation inspection, but also, antemortem and postmortem inspection of livestock. There are at present 73 federally inspected plants in Nebraska. The increase in federally inspected plants is probably due in part to a decision by a few plants to submit to federal inspection in order to obtain the advantages of interstate shipment. Nebraska currently has 143 "official plants" which limit their production to custom slaughtering of livestock and identify such carcasses as "Not for Sale" in commerce. These plants are inspected on a patrol surveillance program.

The plants in operation in Nebraska range from small plants under a single operator to large plants utilizing a great number of employees. There are currently 193 combination locker and slaughtering establishments in operation. In addition, approximately 550 meat markets are listed which handle only inspected products. These latter do no slaughtering and are under surveillance patrol programs only. Retail stores with locker facilities are licensed and regulated under a different act, The Frozen Food Locker Plants Law.²³⁵

The Nebraska Department of Agriculture believes that approximately 15 to 20 plants have closed since passage of the Wholesome Meat Act. The number varies due to the fact that several plants have closed only to reopen at a later date. Likewise, others have changed the nature of their operations in order to be licensed as either a retail store or a frozen food locker plant.²³⁶

VII. THE ROLE OF THE COURTS UNDER THE WHOLESOME MEAT ACT

Sections 6 (e)²³⁷ and 401²³⁸ of the Wholesome Meat Act pro-

234. The statistical information provided herein was furnished in a recent letter from William L. Gilmore, Department Attorney, Nebraska Department of Agriculture (October 14, 1970) a copy of which is retained in our law review files.

235. NEB. REV. STAT. 81-2134.01 et seq. (Reissue 1966).

236. There is some similarity between these Nebraska figures and recent U.S.D.A. statistics. The U.S.D.A. states that at the end of 1969 there was a decrease of 2,065 intrastate plants subject to inspection and an increase of 901 plants under Federal inspection. See THE NATIONAL PROVISIONER, Vol. 162, No. 16, April 18, 1970, at 23.

237. 21 U.S.C.A. § 607(e) (Supp. 1970), 81 Stat. 588, which pertains to marking, labeling, and the size or form of containers.

238. 21 U.S.C.A. § 671 (Supp. 1970), 81 Stat. 597 which provides the right of the Secretary to refuse to provide or withdraw inspection.

vide for hearing procedures under the Act. In both sections any determination by the Secretary or other department official is conclusive and final unless the person adversely affected either appeals to the appropriate court or applies for judicial review of the Secretary's determination and order within thirty days after the effective date of such order.²³⁹ Section 403 provides for action by the Department in United States district courts to enforce seizure or condemnation of articles being prepared, sold, transported, distributed, offered, or received, which are capable of use as human food and are adulterated, misbranded or otherwise not in compliance with the provisions of the Act.²⁴⁰

The Act is less specific as to the hearing procedures when inspection services are withdrawn for failure to maintain sanitary conditions. However, section 6(m) (4)²⁴¹ defines an article as "adulterated" if it is produced under unsanitary conditions.²⁴² Thus, if the Secretary should determine that certain conditions of a plant are unsanitary, he may tag the unsanitary equipment, utensils, rooms, or compartments,²⁴³ and, in addition, condemn any articles prepared, stored, or transported therein.²⁴⁴ No prior hearing is required when such action is taken, and in addition, complaint against the plant can be filed by the Department in a federal district court.²⁴⁵ However, the plant operator can also bring action against the Secretary in United States district court, under the catch-all clause²⁴⁶ of section 404,²⁴⁷ if he believes the Secretary has exceeded his authority in taking such action.²⁴⁸ But, unless the Secretary has actually exceeded his authority, his determination or order in

239. In the case of § 607(e), 81 Stat. 588, appeal is to be made to the United States court of appeals for the circuit in which such person, firm, or corporation has its principle place of business or to the U.S. Court of Appeals for the District of Columbia Circuit.

In the case of § 671, 81 Stat. 597, application for judicial review is to be made to the appropriate court. The Act vests the United States district courts specifically with jurisdiction to enforce, and to prevent and restrain violations of the Act and jurisdiction in all other kinds of cases arising under the Act, except as provided in § 607(e), 81 Stat. 588 of the Act.

240. 21 U.S.C.A. § 673(a) (Supp. 1970), 81 Stat. 598.

241. 21 U.S.C.A. § 601(m)(4) (Supp. 1970), 81 Stat. 585.

242. Sanitary conditions are more fully defined in the U.S.D.A. Meat Inspection Reg. § 308, 35 Fed. Reg. 15561 (1970).

243. U.S.D.A. Meat Inspection Reg. § 308.15, 35 Fed. Reg. 15563 (1970).

244. 21 U.S.C.A. § 673(a) (Supp. 1970), 81 Stat. 598.

245. *Id.*

246. ". . . all other kinds of cases arising under this chapter . . ." 21 U.S.C.A. § 674 (Supp. 1970), 81 Stat. 599.

247. *Id.*

248. See *Harmon v. Bruckner*, 355 U.S. 579 (1958); and *Fargo Packing Corp. v. Hardin*, 312 F. Supp. 942, 946 (D. N. Dak. 1970).

the area of sanitation is not reviewable by a court.²⁴⁹ Nevertheless, due to the impact of the Act upon small intrastate plants,²⁵⁰ especially custom slaughtering and retail establishments which had never before been subjected to standards as strict as the federal standards, law suits are bound to arise²⁵¹ with respect to this aspect of the new law.²⁵²

Probably the most troubling question which the courts will face will be whether or not an inspector acted "arbitrarily" in exercising his discretion. The small plants especially have found this term quite applicable to their situation in this time of change and adjustment within their industry.²⁵³ One of the biggest problems

249. Administrative Procedure Act, 5 U.S.C.A. § 701(a) (2). This section precludes judicial review of administrative action "committed to agency discretion by law," and under certain circumstances it is clear that determinations of the officer to whom discretion is granted are final and beyond review. See *Fargo Packing Corp. v. Hardin*, 312 F. Supp. 942, 946 (D. N. Dak. 1970); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958); and *Kendler v. Wirtz*, 388 F.2d 381 (3rd Cir. 1968).

250. See note 2 *supra*.

251. *Nebraska v. Hersch Packing Co.* (D. Ct. Scottsbluff County, Nebraska), Docket No. 21157, is the only action which has arisen thus far under the Nebraska Act. This action arose after an inspector had complained to the management that slaughter of animals had begun prior to his arrival at the plant. This, he complained, prevented him from making the required ante mortem inspection of the livestock. Subsequently, the management refused to allow the inspector to enter the plant. The State sought an injunction against further operations without inspection.

Representatives of the Company together with their attorney met with Department personnel following filing of the suit and stipulated to entry without further proceedings. The order was entered accordingly. Although the suit is pending, according to a letter from William L. Gilmore, Attorney for Nebraska's Department of Agriculture, the State has worked out a suitable agreement with the management and this suit will probably be dismissed. See letter retained in our law review files.

252. For example, in August of 1968, an action was brought in the United States District Court for the Northern District of California by Chip Steak Co. against the U.S.D.A., Docket No. 49834, attacking the Department's authority to approve substances for use in the preparation of meat food products and its authority to reject label applications on the basis of product contents. In connection with that suit, the Western States Meat Packers Association (at the suggestion of U.S. District Court Judge William J. Sweigert of San Francisco) requested that the U.S.D.A. conduct a hearing on the procedure for regulation of food additives in meat food products set forth in § 318.7 of the Proposed Meat Inspection Regulations. As a result of such hearing, the adopted regulations were revised to prevent the use of certain dangerous additives. Noting the dangers inherent in potassium sorbate and other sorbates in certain products, the revised regulations (§ 318.7(d) (2)) specifically prohibit their use in certain products. See *THE NATIONAL PROVISIONER*, Vol. 161, No. 12, Sept. 20, 1969, at 39.

253. See *IOWA REFRIGERATED LOCKER ASSOCIATION BULLETIN*, Dec. 1969, at 1.

in administration is that the small plants, which have been forced by the Act to make the most changes, have been unable in many cases, to learn exactly what is expected of them. Not even the inspectors, themselves, seem to be sure of the new law's requirements.²⁵⁴ A typical situation which leads to confusion and misunderstanding between an inspector and plant management has been described as follows:

An inspector will visit a plant on a given day and will give the owner a list of things that he must do to bring his operation into compliance. The next time the inspector comes in, he'll compile a new list, even though the items on the first list were all taken care of. On the inspector's third visit, the same thing happens . . . only this time he may indicate that one or two of the items previously taken care of are no longer considered to be important. It isn't long before the operator is thoroughly confused, for it becomes clear to him that the inspection people really don't know exactly what they do want. It's at this point that even the most cooperative locker and freezer provisioner loses his patience and becomes convinced that he is not being integrated into a practical, well planned meat inspection program, but is the victim of "harassment".²⁵⁵

One rural midwestern plant owner described to this Review how a State inspector walked into his combination locker and slaughtering plant and stated that the plant had insufficient lighting. The owner had just previously had the lighting checked by a higher state inspection official who had used a light meter and had accepted the lighting system. Thus, the owner immediately protested to the State Director of Inspection. In reply, he received an unresponsive letter telling him to procure certain pamphlets from the Federal Government in order to better inform himself of the requirements of the new law.²⁵⁶ These types of "harassment" have aroused and confused numerous small plant owners throughout the country.

There are basically two reasons cited for the occurrence of this so-called "harassment"—inexperienced personnel and lack of communication within the Department.²⁵⁷ It stands to reason that more inspectors, both state and federal, will be needed to implement the stricter provisions of the new laws. On the one hand,

254. THE NATIONAL PROVISIONER, Vol. 163, No. 13, Sept. 26, 1970, at 19.

255. CAPITOL LINE-UP (weekly pamphlet of Nat. Institute of Locker and Freezer Provisioners), Nov. 20, 1969, at 1.

256. See letter from this plant owner contained in our law review files.

257. See THE NATIONAL PROVISIONER, Vol. 163, No. 13, Sept. 26, 1970, at 19-20.

the Department of Agriculture of the State of Nebraska is presently training its inspectors to meet the new needs and requirements; however, such inspectors are being trained to understand only the situations in the types and sizes of plants which they will be assigned to inspect.²⁵⁸ On the other hand, new federal inspectors are being trained on a broader scope so that they will understand the over-all problems and situations existing in all of the various types and sizes of plants.²⁵⁹ Hence, training of state inspectors may prove deficient in some respects.

However, despite the various types of training to which inspectors are exposed, the past incidences of "harassment" indicate certain weaknesses exist within the system. These problems will eventually have to be resolved. Nevertheless, if "harassment" should occur, and thereby endanger the existence of one's business, an appeal to the courts is appropriate.²⁶⁰

VIII. CONCLUSION

The fundamental purposes of the Wholesome Meat Act and the corresponding state acts are to protect the consuming public from meat and meat food products which are adulterated or misbranded.²⁶¹ In doing so, these Acts affect, not only the plants, themselves, but also the communities in which they are located.²⁶²

258. Comments of Dr. Donald Breeden, U.S.D.A. Liaison Officer to the Nebraska Department of Agriculture made in an interview with this writer.

259. *Id.*

260. See *CAPITOL LINE-UP* (weekly pamphlet of Nat. Institute of Locker and Freezer Provisioners), Nov. 20, 1969, at 3.

261. 21 U.S.C.A. § 602 (Supp. 1970), 81 Stat. 587.

262. See *Hearings, supra* note 11, at 8, for the following letter to Senator Curtis from Mr. H.L. Gerhart, Jr., President of the First National Bank of Newman Grove, Nebraska:

April 9, 1970

Dear Senator Curtis: Our small town has been served by a good meat market for many years, during which time it has processed cattle and hogs for farmers and ranchers and handled retail meat for the consumers of this area. The present owner has lived here all his life and is well known and respected as a capable meat man.

The enactment of the Wholesome Meat Act has created problems which are making it difficult for this small businessman to stay in business. His volume is simply not large enough to operate as a processor alone. Yet, he can no longer sell meat over the retail counter without in effect adding an entire new facility separate from the present one and his volume will not justify this type of capital outlay and increased overhead.

If he cannot continue, he will lose his investment which represents all he has and our town will lose a business that it badly needs.

The tragedy in this whole thing is that he is running a good clean business. As a customer and fellow businessman of this meat market operator, I know that people in and around Newman Grove

While the initial reaction on the part of the small plant operators was one of confusion, hesitancy, and in some cases near panic, it is gradually becoming obvious that these Acts are not designed to force the small plants out of business.²⁶³ On the contrary, they actually provide a mechanism whereby most of the small plants can improve their facilities and operating efficiency.

have been buying meat in this business place for forty or more years with no ill effects. I'm certain they will stop buying when he fails to offer a clean wholesome product. His customers have never requested the Government tell them how or where to buy meat.

The State of Nebraska recently passed an inspection law to comply with the Federal Law and so I'm afraid we now have a buck-passing situation where the State inspectors blame the Federal Government and the USDA says the State is responsible for his troubles.

This small town and others like it are having a serious survival problem as it is, without having to battle the government which should be helping us build businesses rather than destroying the businesses we now have.

Everyone is in favor of clean meat but it appears that this recent law has gone beyond its intent and may force this good meat man out of business thus depriving all of us a source of good meat. I'm told that many other small towns are facing this same problem.

We very much appreciate your interest in our problem and thank you for anything you can do to help our meat processor and others like him to stay in business and continue to serve their communities as they have in the past.

Sincerely,
H.L. Gerhart, Jr.
President

In his statement before the Senate Committee on Agriculture and Forestry (April 15, 1970), Senator Curtis asserted: "I am not here pleading only for the businessmen who are adversely affected by the meat inspection law but for their entire communities." The Senator then quoted from a letter from David City, Nebraska, referring to the problems faced by their local locker plant operator, which stated, "His business is drawing people from as far as 25 to 30 miles away and this is desired by other businessmen in David City." See also H.R. REP. No. 1221 (Agriculture Committee), 91st Cong. 2nd Sess., at 3 (1970) (Statement of Roy W. Lennorton, Administrator, Consumer and Marketing Service).

263. 116 Cong. REC. 3592 (daily ed., March 19, 1970), for statement of Senator Hruska in cosponsoring the Curtis Amendment, which notes:

[A]pproximately 7,000 locker and freezer provisioners may be forced to close their doors before the end of the year if the Wholesome Meat Act is not changed. And, the reason is not that small meat processors cannot produce wholesome meat under sanitary conditions, but rather, apparently due to technical oversight, the act failed to recognize the problems of these local processors.

If the small town meat processors are forced out of business, there will be many undesirable results. First, large sums of capital and many years of hard work invested by the owners of these businesses will be lost. Next, thousands of jobs in rural communities will be lost. Also, tax revenues now provided by these businesses will be lost. Moreover, thousands of farmers and ranchers will be deprived of needed slaughtering and processing services forcing them to devise their own facilities and use their own time for slaughtering. I am told that this could result in increased black-marketing of uninspected meat.

Undoubtedly, there will be a number of plants which existed previously and which now will find it impossible to operate under the new law because the amount of their business is insufficient to justify the costs of the improvements necessary for compliance.²⁶⁴ But, for the bulk of the locker plants, custom slaughterers, and small retailers, there appears to be evolving a workable relationship with the government officials who are attempting to implement and apply the new law. In due time these new laws should afford the consumer greater protection while also encouraging progress and stability within the industry.

Dennis Naughton—'71

264. See FREEZER PROVISIONING AND PORTION CONTROL, Vol. 30, No. 9, Oct. 1969, at 32.