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An Agricultural Law Research Article

**An Essay: U.S. Food and Agriculture in the  
21<sup>st</sup> Century: Is USDA Still Relevant**

by

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# AN ESSAY: U.S. FOOD AND AGRICULTURE IN THE 21ST CENTURY: IS USDA STILL RELEVANT?

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## I. INTRODUCTION

This essay is intended to be a short reflection on a fabulous legal job—General Counsel of the United States Department of Agriculture (USDA)—and a comment from the perspective of having served in that office and addressing the challenges facing USDA today. Created in 1862 and described by President Lincoln as “the People’s Department,” USDA has a hand in virtually all aspects of the business of food and agriculture, rural development, and food aid. Everyone employed is critical. Free-market advocates disdain farm subsidy programs. Consumer groups are wary of regulation of food safety by a “bully” who advocates strongly in favor of market access for agricultural products. Environmentalists criticize multi-purpose use management initiatives of the United States Forest Service. Producers who see market opportunity in product differentiation want country-of-origin labeling (COOL) requirements now and dislike being forced to participate in generic product promotion campaigns. Congress frequently switches priorities in mid-stream and changes policy through appropriations management. The Inspector General’s job is to uncover wrongdoing and mismanagement. Most agree it simply takes too long for USDA to get anything done.

This level of controversy makes for very interesting and challenging legal work, all of which is handled by the USDA Office of the General Counsel, with assistance from the Department of Justice in federal court litigation. The General Counsel is nominated by the President, confirmed

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by the Senate, charged with the responsibility for the legal policy of the Department, and designated as the chief legal counsel to the Secretary of Agriculture. I had the honor and pleasure of serving in that position from April 2002 to April of 2005 for two Secretaries of Agriculture, Ann M. Veneman and Mike Johanns.

These were extraordinarily busy years for myself and the approximately 250 other fine lawyers with whom I worked. The call to rise to new challenges was constant, necessitated by the changing nature of the business and social fabric of agriculture in the early 21st century and the need to adapt to enormous changes in the world around us. Large institutions do not adapt quickly or easily. This characteristic is particularly true when adaptations must proceed through the resource and procedure-intensive process prescribed by the Administrative Procedure Act. The difficulty in making large entities change is particularly when jurisdiction is shared across multiple programs or multiple executive branch departments, when there are major divisions among respective constituent interests to mediate, and where major elements of the USDA program are premised upon antiquated Depression-era economic and social policies that have been outgrown.

In working as counsel for USDA, lawyers experience both successes and failures. We rejoice in the first, learn from the second, and laugh and cry with our clients like good counsel everywhere as together we strive to accomplish the work of this "People's Department." I left USDA with a profound respect for the people and programs of the Department and a conviction that the problem-solving collaboration possible in a department which houses both the promotion and regulation of agriculture can be a powerful tool for progress. Much good work has been accomplished in the past several years in the areas of homeland security, plant and animal health, food safety, and new product promotion; yet, much remains to be done to enable the Department to respond quickly and efficiently to the new demands this century will place on agriculture and the new opportunities it will afford.

To illustrate these points, this essay will discuss two broad policy issues of significant importance facing USDA today. These policy concerns are (1) whether the combination of market promotion and regulatory activities in a single executive branch department infect USDA with an unresolvable conflict of interest, and (2) whether USDA has the capacity to evolve into a leadership role for the consumer-driven food and agriculture sector of the twenty-first century.

## II. CAN AN EXECUTIVE BRANCH DEPARTMENT BE BOTH A CHAMPION OF THE BUSINESS OF THE FOOD AND AGRICULTURE SECTOR AND A STRONG REGULATOR OF FOOD SAFETY, PLANT AND ANIMAL HEALTH, AND ECONOMIC COMPETITION?

I arrived at USDA without a strong opinion on this subject. My background as a Department of Justice trial attorney and manager, and partner in a large Washington natural resource and environment practice firm had accustomed me to dealing with executive branch regulators such as the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Federal Trade Commission (FTC). My experience bridged both adversarial relationships with regulators in litigation and collaborative relationships directed at legislative and regulatory solutions. This experience led to issues of concern and substantial successes in both areas .

USDA is certainly a different place. Its combination of social, economic, research, promotion, and regulatory missions create a far broader mandate than that enjoyed by those who are solely regulators. For example, USDA is devoted to maintaining and enhancing the prosperity of the agriculture sector. The Foreign Agriculture Service is solely dedicated to the promotion of the interests of United States' agriculture internationally. The Rural Development programs are intended to support rural infrastructure, business, and community development. Originally created in response to the rural community crisis experienced in the Depression, it is equally important today to re-energize economic development and prosperity in rural America.

The Food and Nutrition Service is responsible for making sure that people who need food assistance get it—through the Food Stamp, school lunch, and Women, Infant (WIC) programs. Today, nearly one-half of the children in the United States qualify for WIC assistance. Extension and research programs work closely with state land grant and 1890s colleges on developing intellectual capital and knowledge to support and advance agricultural initiatives. The Natural Resource Conservation Service works with farmers on a daily basis to enhance and to develop new best management practices for conservation and environmental protection. The Agricultural Marketing Service (AMS) has multiple legal authorities to assist with marketing, promotion and research of a variety of agricultural commodities. These programs are strongly integrated in the fabric of the food and agriculture business and the communities in which they are conducted.

In addition, USDA was initially charged with the primary regulatory responsibility for (1) food safety of meat, poultry, and processed eggs; (2) the protection of plant and animal health and responsibility to prevent the introduction and dissemination of foreign plant and animal disease; (3) implementation and enforcement of the various farm programs; and (4) regulation of competition in the fruit and vegetable sector, grain inspection

and handling, and packer and stockyards activities. The first of these, food safety, is most often the focus of charges that USDA has a conflict of interest that negatively affects its regulatory responsibilities and generates calls for a single food safety agency. At various times, USDA's other responsibilities are similarly attacked.

What are the merits of these charges? I think the conflict-of-interest charge, upon examination, fails. First, the Food Safety and Inspection Service (FSIS) has its own Under-Secretary, whose sole responsibility is Food Safety. No competing sector promotion responsibilities exist. The agricultural promotion programs operate under the auspices of the Under Secretary for Regulatory and Marketing Programs. While both report to the Secretary of Agriculture, both are independent in the areas of their jurisdiction based on long-standing delegations of authority from the Secretary.

Second, in times of crisis, a very real advantage exists in having the agriculture sector programs in a single department because it is far easier to coordinate response actions. The best example of this from my experience at USDA was the response to the coming of bovine spongiform encephalopathy (BSE or "mad-cow disease" to the United States). Within one week of finding the BSE-infected cow in Washington State on Dec. 23, 2003, Secretary Veneman announced a suite of response measures which included (1) new and more protective food safety standards issued by FSIS, (2) an animal trace-back and epidemiological investigation by the Animal and Plant Health Inspection Service (APHIS), (3) an increased animal disease surveillance system with roles for both FSIS and APHIS, and (4) direction to develop an animal identification system to facilitate traceback.

This response was widely credited as appropriately responsive to food safety and animal health concerns, as well as serving to calm United States business markets. The immediate response would not have occurred if these responsibilities were spread across multiple departments and bureaucracies. Indeed, jurisdiction to enhance the ruminant feed ban, a primary defensive weapon in the spread of BSE lay with FDA. Today, more than three years after the finding of the first BSE-infected cow, that specific FDA regulation has not been changed, although modifications have been proposed.

Third, the power of the mission objective of USDA to promote the economic interests of agriculture mandates strong and effective regulation of health, safety, and environmental interests within its jurisdiction to at least the same degree as that of a single-objective enforcement agency and in many cases, far beyond that. USDA understands very clearly the cost of a regulatory mistake because its Commodity Credit Corporation (CCC) is called upon to fund the economic consequences of a contamination event affecting agricultural commodities. The cost of a mistake can be enormous in the agricultural market, and an after-the-fact enforcement action is no substitute for rigorous pre-approval procedures.

An example of this can be seen in the Department's regulation of agricultural biotechnology. USDA is responsible for plant health under the Plant Protection Act. Under the general authority of this law, USDA has developed regulatory programs for review and authorization for planting of biotech plants, including research in pharmaceutical and industrial use bio-engineered plants. In 2002 during a routine inspection of a research plot, USDA discovered evidence of non-compliance by Prodigene with a permit condition requiring monitoring and removal of second generation corn plants containing pharmaceutical material which were the subject of the permit. The violation was discovered as a result of a focused APHIS inspection process. Following the discovery of non-compliance, the enforcement action was quickly filed and banned material was traced to a grain elevator. Once traced, the material was required to be destroyed. The enforcement action against the permittee secured a fine sufficient to repay CCC for the corrective action taken and resulted in a number of additional permit requirements, which have now become standard in APHIS permits. USDA has also initiated work on an environmental impact statement to fully explore the environmental issues related to these applications of biotechnology, which will provide the rule for updated regulatory procedures.

In sum, the critics on this point have it wrong. Risk assessment and risk management are the hallmark tools of the science-based decision-making which characterizes modern regulation of health, safety, and environmental threats. We are beginning to understand that such assessments need to be eco-system wide and need to consider cumulative and synergistic effects. Now is not the time to sever the regulation of agriculture from its organic roots.

### III. CAN USDA MAKE THE CHANGES NECESSARY TO SUCCESS FOR THE FOOD AND AGRICULTURE SECTOR TO 21ST CENTURY SUCCESS?

The Depression Era is over and the United States is no longer a nation of farmers. We have become so efficient in agricultural production that over twenty-five percent of the production of every acre is destined for export. In 2005, United States taxpayers spent almost \$16 billion on price and income support programs for farms and ninety-two percent of commodity program spending was paid on five crops—corn, wheat, soybeans, cotton and rice. Farm payments are being capitalized into increased land values and shutting the door on new farmers who do not either marry into or inherit an existing family-owned farm.

Food security is a fundamental national security interest. Resiliency is the new buzzword of homeland security planning. Resiliency requires the ability to replicate and replace services regionally and locally. Quarantines are a preferred option for addressing outbreaks of plant and animal disease that cannot otherwise be controlled. Plant and animal disease is on

the rise. The current concern about a pandemic influenza is focused on the capacity of a virulent strain of avian influenza, H5NI, to mutate into a human-to-human transmissible form. Farms are very important, and we need to maintain both the large and the small farms. Outsourcing and monopolies in food production should be limited. A just-in-time supply chain that runs out of food in three days is dangerous.

We live in a consumer-driven economy. Consumers are better informed than ever and feel empowered to make their own decisions, particularly about the food they eat, where it comes from, and how it is produced. Every day consumers hear messages about how the food we choose can make us healthy or predispose us and our families to diabetes, heart attacks, and cancer. These messages come from medical experts, food producers, governments, and consumer groups. Sometimes they are wrong. Having choices and obtaining adequate information to make one's own decisions becomes more and more important. Organically-produced food and artisanal breads and cheeses are bright spots in the food sector—and there is growing interest in locally produced food, as well as food of United States origin.

Urban and suburban non-farmers like the idea of farms, but not the reality of having them for neighbors. Increasing friction exists from the suburban encroachment into rural areas regarding environmental issues, the very use of land for agricultural purposes, and water use. Indirect source pollution is the largest issue in clean water and much of that is attributed, correctly or not, to agricultural activities, particularly those associated with large farms. At the same time, the need to revitalize and to renew the resource of rural America is a critically important social and homeland security issue.

The World Trade Organization (WTO) does not think highly of our farm subsidies, nor does much of anyone who is not a recipient; yet, we need to grow our global markets. This message has been made loudly and clearly in the Farm Bill listening sessions, which have been conducted around the country by Secretary Johanns over the past few months. This is not a debate about whether we have a national interest in a strong agriculture and food sector. We absolutely do. The debate stems from whether the support system we have now is the appropriate one for this century given (1) the WTO decision that the United States cotton subsidy program violates international agreements; (2) the inability of young people to enter agriculture; (3) the contribution of farm payments to rising land values and increasing cash rents; (4) the concentration of support on corn, wheat, soybean, cotton, and rice farmers; and (5) the exclusion of farmers raising other crops (two-thirds of the total).

What can USDA do? Quite clearly, there is a lot that USDA cannot do. The fundamental structure of the farm subsidy programs is mandated by Congress and it is Congress who must find the political will and consensus to modify these programs to better fit the needs and goals of the

21st century. The farm subsidy programs will be a prime topic of debate for the 2007 Farm Bill, and if the USDA listening sessions provide any measure, many citizens are giving serious consideration thought and attention to this subject.

It is equally clear that a lot can be done in regards to this issue by USDA along with the help and support of its constituents. A great deal has already been done providing a good foundation for change and for revised policy initiatives in the Farm Bill. Since September 11, 2001, USDA has been deeply involved in strengthening the resiliency of the agriculture and food sector. A prime example of that effort is the newly developed agriculture and food annex to the National Response Plan, which outlines for the first time an explicit plan of action for response to either a terrorist attack or natural disaster. This approach will play an integral role in the response to pandemic influenza, should such an epidemic occur. If a pandemic were to occur, supply chains would be disrupted in multiple areas, stress personnel and transportation systems would be impaired, and the development of alternative mechanisms for highly regulated activities would be necessitated. A critical need exists for businesses in this sector to plan for such an event by working with USDA and local authorities to ensure that their own response plans fit within this framework. The positive impact of local sources of supply is obvious.

USDA has legal authorities now that can be used creatively to stream consumer-desired information to the market and to facilitate consumer choice. AMS has a wealth of opportunity to structure production and to process claims supported by auditing, which can be implemented quickly for all types of agricultural commodities, including fruits and vegetables. For example, for several years, AMS has had a voluntary COOL claim guideline, but it has not been used. Some argue that unless the COOL guideline is mandatory, it is too costly to create and to maintain the records needed to audit and to verify the claim. Is there financial risk if everyone is not simultaneously required to make this investment? Yes. Is there market opportunity? If this information is pertinent to consumer purchasing behavior, a market opportunity most certainly exists. Should all consumers be required to bear the cost of that claim if it is not relevant where agricultural products come from? In a free-market economy, the answer is likely no. Consumers have proven to be very capable of understanding that only products carrying the organic claim are in fact organic. They have also demonstrated a willingness to pay substantially more for such products—a boon to the producer.

What about the environmental and water use issues for agriculture? While not a regulator in this area per se, USDA has historically been called upon to represent the interests of agriculture within the executive branch of these issues. Over the past several years, the USDA's Natural Resources Conservation Service (NRCS) has developed a close working relationship with EPA. Both organizations recognize that environmental issues for



working lands present different issues than those presented by industrial operations, and both are working together to develop approaches based upon best management practices used by farmers in response to environmental issues. Congress has helped change the landscape in this area with conservation programs for working and non-working lands, which promote sustainable agriculture. A strong need in this area is for the development of data to measure the benefits of the various conservation programs in use in such a way as to facilitate credits for pollution reduction in the EPA programs. This task is well-suited to the impressive economic and statistical resources of USDA, but one which would be assisted by some tweaking of the law in the next farm bill.

Finally, the response to WTO in large measure returns to Congress, and first and foremost, the WTO decision on the cotton subsidy case must be addressed. WTO will have an opportunity is to use the 2007 Farm Bill to debate how to restructure the support programs for agriculture in order to align them with this century's needs and objectives. Green box farm payments are not counted as trade distorting under these international agreements; however, they can include properly structured homeland security initiatives to ensure the continued existence of an agricultural base, which is sufficiently resilient to meet the food security needs of the United States. These green box farm payments are accessible to next-generation farmers and are designed to promote the economic well-being of rural communities, environmental quality goals, carbon sequestration activities, and so forth.

These measures are long overdue, and the time for change has come. USDA has the expertise, the ability, and the mission alignment necessary to implement them.