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**No Rule of Thumb:
The Conflict of Digital Palpation
Under the Horse Protection Act**

by

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No Rule of Thumb: The Conflict of Digital Palpation Under the Horse Protection Act

BY CLARK CASE*

INTRODUCTION

The Tennessee Walking Horse has long been hailed as an equine breed characterized by beauty, versatility, performance, and controversy. The Horse Protection Act (“the Act”),¹ was aimed at ending alleged inhumane training practices in the Walking Horse² show industry. Admittedly, the Act was passed with sound intentions and has provided needed changes for the Walking Horse industry by ridding the horse shows, exhibitions, and sales of unnecessary and deplorable mistreatment of this beautiful breed. However, the United States Department of Agriculture’s (“USDA”) enforcement of the Act has deteriorated in its fairness to

* J.D. expected 2003, University of Kentucky. The author would like to dedicate this Note to Hack’s Royal, Another Generator, Noon’s Golden Nugget, Collector’s Martini, and Special Stock, the Tennessee Walking Horses who inspired this research. The author would like to thank Professors John M. Rogers and Michael P. Healy, both of the University of Kentucky College of Law, for their insights and suggestions on approaching this Note.

¹ Horse Protection Act, Pub. L. No. 91-540, 84 Stat. 1404 (1970) (codified as amended in 15 U.S.C. §§ 1821-1831 (2000)).

² The Tennessee Walking Horse is a specific breed of horse, whose official registry is the Tennessee Walking Horse Breeders’ and Exhibitors’ Association (“TWHBEA”). It is common throughout the industry to refer to the Tennessee Walking Horse simply as the “Walking Horse.” In fact, many organizations within the industry, including the Walking Horse Owners Association (“WHOA”), the Kentucky Walking Horse Association (“KWHA”), and the Ohio Valley Walking Horse Association (“OVWHA”), shorten the name of the breed. Therefore, any reference to the Walking Horse throughout this Note refers specifically to the Tennessee Walking Horse. See, e.g., *Walking Horse Owners Association*, at <http://www.breedersguide.com/whoa/home.html> (last visited Apr. 4, 2002); *Kentucky Walking Horse Association*, at <http://www.kywho.com> (last visited Apr. 4, 2002).

such an extent that it is crippling the Tennessee Walking Horse show industry.³

Specifically, the USDA imposes civil penalties⁴ for soring⁵ a horse under the Act based solely on USDA veterinarian reports of examinations⁶ which use the digital palpation⁷ method to examine the horse. Soring occurs when prohibited instruments and training techniques are used on the horse to exaggerate its natural gait for competition.⁸ Through litigation in administrative proceedings and the federal circuit courts of appeals, a battle has developed over the proof required for a horse to be deemed sore under the Act.⁹ This battle has not been considered outside the courts, as no scholarly analysis of the Act or the issue of digital palpation exists. While the administrative proceedings and the majority of the federal circuit courts of appeals hold that a horse's reaction to digital palpation alone is substantial evidence to uphold a finding of soreness,¹⁰ the Fifth Circuit Court of Appeals has rejected the evidentiary sufficiency of digital palpation.¹¹

Reason, fairness, and the law indicate that the Fifth Circuit has indeed taken the appropriate stance. It is clear that the split between the circuit courts needs to be resolved in order to bring certainty and fairness to an aged American industry and equine pastime that is struggling to protect

³ For example, at the July 13, 2001 Walking Horse Owners' Youth Association Jamboree Horse Show in Murfreesboro, Tennessee, early projections indicated that more than 200 horses would be entered at the show. Before the show began, a certain distrusted USDA veterinarian arrived to examine the horses prior to and after exhibition. Subsequently many exhibitors and trainers took their horses and left the show without even entering, leaving only fifty-nine entries in a show with thirty different classes. David L. Howard, *A Special Day?*, WALKING HORSE REP., July 23, 2001, at 14.

⁴ 15 U.S.C. § 1825(b).

⁵ *Id.* § 1821.

⁶ *Id.* § 1824(c).

⁷ Digital palpation is performed by pressing the thumb and forefinger against the pastern of the horse while holding its hoof off the ground. See 9 C.F.R. § 11.21(a)(2) (2001). In theory, if the horse moves its foot when the area is pressed, then the horse is deemed to have been "sored" for the purpose of enhancing its gait as a show horse. See *infra* notes 175-86 and accompanying text.

⁸ See BOB WOMACK, *THE ECHO OF HOOFBEATS: A HISTORY OF THE TENNESSEE WALKING HORSE* 274-80 (3d ed. 1994).

⁹ See discussion *infra* Part III.

¹⁰ See discussion *infra* note 94 and accompanying text.

¹¹ See *Young v. USDA*, 53 F.3d 728 (5th Cir. 1995), discussed *infra* notes 128-54 and accompanying text.

itself, its horses, and its enthusiasts from the tyranny of an unreliable process employed by the USDA.

Part I of this Note discusses the relevant background information necessary for a thorough understanding of the issue. It contains a brief background and explanation of the Tennessee Walking Horse as a breed, show horse, and industry.¹² Further, Part I provides an overview of the Horse Protection Act and its regulations, including a discussion of its enforcement by the USDA and several challenges the Act has withstood.¹³

Analysis of several Horse Protection Act cases is the subject of Part II. Specifically, Part II focuses on the circuit split as to the reliability of digital palpation as an examination method for soreness.¹⁴ The Sixth Circuit cases of *Gray v. USDA*¹⁵ and *Bobo v. USDA*¹⁶ are analyzed as the paradigm of the majority opinion that digital palpation reports are reliable evidence.¹⁷ In contrast, *Young v. USDA* is examined to understand the Fifth Circuit's rejection of the reports of digital palpation as reliable evidence.¹⁸

Part III discusses and analyzes why the USDA reports of digital palpation are clearly unreliable and insufficient evidence to prove that a horse has been sored in violation of the Horse Protection Act. First, the shortcomings of digital palpation are examined from a lay viewpoint, focusing on the patent unreliability of the guidelines set forth for this method of examination in the federal regulations.¹⁹ Second, the analysis of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁰ is applied to the calculus of substantial evidence review in Horse Protection Act cases to demonstrate the insufficiency of digital palpation as evidence of soring.²¹

Finally, the conclusion offers a solution to the inequity imposed on the Tennessee Walking Horse industry, discussing the alternative means of enforcing the Horse Protection Act in a manner that is effective, efficient, and fair to all parties involved.²² It is clear from an examination of the

¹² See discussion *infra* Part I.A.

¹³ See discussion *infra* Part I.B.

¹⁴ See discussion *infra* Part II.

¹⁵ See *Gray v. USDA*, 39 F.3d 670 (6th Cir. 1994), discussed *infra* notes 98-119 and accompanying text.

¹⁶ See *Bobo v. USDA*, 52 F.3d 1406 (6th Cir. 1995), discussed *infra* notes 120-27 and accompanying text.

¹⁷ See discussion *infra* Part II.B.

¹⁸ See *Young v. USDA*, 53 F.3d 728 (5th Cir. 1995), discussed *infra* Part II.C.

¹⁹ See discussion *infra* Part III.A.

²⁰ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), discussed *infra* notes 200-21 and accompanying text.

²¹ See discussion *infra* Part III.B.

²² See discussion *infra* notes 222-29 and accompanying text.

pertinent statutes, cases, administrative regulations, and opinions that the digital palpation method currently employed by the USDA is insufficient as evidence to prove soreness under the Horse Protection Act. Such evidentiary techniques should be displaced in favor of methods of examination and regulations which would give the Tennessee Walking Horse Show Industry a standard which is neither arbitrary nor unfair.

I. BACKGROUND

A. *An Overview of the Tennessee Walking Horse*

The Tennessee Walking Horse is a relatively new breed of horse, created in the late nineteenth century by crossbreeding Morgans, Standardbreds, Thoroughbreds and American Saddle Horses, among others.²³ The result of this mixture of breeds over several generations was a horse with a remarkably gentle disposition, a strong, elegant stature, and, perhaps most importantly, a smooth gait that was unique to the Tennessee Walking Horse.²⁴ Two specific gaits, the flat-walk and running-walk, are natural to the Tennessee Walking Horse breed.²⁵ Both gaits are a variation of a pace, but the Walking Horse uses quick action in its front legs and takes long strides with its back legs to produce a smooth, gliding ride.²⁶ This natural gait of the Tennessee Walking Horse led to immense popularity as a pleasure horse, since the breed could carry riders quickly and smoothly, quite unlike the uncomfortable jarring a rider experiences when moving quickly upon a horse that trots.²⁷

Shortly after the development of the Tennessee Walking Horse as a distinct breed and the establishment of a registry for the horse,²⁸ exhibitions

²³ WOMACK, *supra* note 8, at 13. In the opinion of the author, this volume is the singular most authoritative and exhaustive publication examining the genealogical background and general history of the Tennessee Walking Horse. *See generally id.* at 1-203.

²⁴ *See id.*

²⁵ *See id.* at 231-35 for an in-depth analysis of the gaits of the Tennessee Walking Horse and the proper methods of judging such gaits.

²⁶ *See id.* at 231.

²⁷ *See id.* For a demonstration of the characteristic gaits of the Walking Horse, see Tenn. Walking Horse Breeders' and Exhibitors' Ass'n, *Video of Walking Horse Gaits*, at <http://www.twhbea.com/062568D6007A2B8A/Index/gaitvideos.html> (last visited Apr. 4, 2002). This website is hosted by the official Tennessee Walking Horse registry.

²⁸ In the 1930s, several Tennessee Walking Horse breeders in Tennessee began to collect pedigrees and genealogical data pertaining to the existing stock of walking horses in the area. They then formed an independent registry for the breed,

of the breed became widespread in middle Tennessee and beyond, where owners would bring their walking horses to engage in competition.²⁹ By as early as 1941, Tennessee Walking Horse classes had spread to horse shows as far west as Santa Barbara, California.³⁰ Judges at these events would compare the horses entered in the show and select the prize-winning horses based on disposition, gait, and stature.³¹ As these competitions spread and intensified, specific systems and techniques of training developed to enhance and exaggerate the gaits of the Walking Horse. Perhaps the words of Professor Womack best describe the driving forces behind the evolution of the training of the Tennessee Walking Horse:

People have always moved impatiently toward what they consider perfection. Since concepts of perfection change, the techniques employed to produce the ideal also change. In effect, the situation is one in which people look at the product with which they are working, imagine what it should be like, and begin moving the product from where it is to where they think it should be. Interestingly enough the process seldom ends. When the product finally reaches the original objective, people realize their ideal has moved forward, and the process continues.

In no other breed of horses has this process been more dramatically demonstrated than in the Walking Horse.³²

During the early years of show ring appearances, the Tennessee Walking Horse was shown flat-shod at slow speeds, where disposition and form were meticulously considered.³³ As time progressed, a vast and

then called the Walking Horse Breeders' Association. Now, the breed's registry is called the Tennessee Walking Horse Breeders' and Exhibitors' Association, which is located in Lewisburg, Tennessee. WOMACK, *supra* note 8, at 320-24.

²⁹ See generally *id.* at 204-26.

³⁰ *Id.* at 223.

³¹ See generally *id.* at 227-52 (reviewing the evolution and criteria for judging the Tennessee Walking Horse in performance events).

³² *Id.* at 253-54.

³³ See generally *id.* at 253-61. The following quote of a horse show spectator included in Professor Womack's book captures the essence of the excitement generated by the early Tennessee Walking Horses:

In the eyes of most show goers, the plantation or nodding walk horse appeared to be a poor relation of the stylish, brilliant, and beautiful gaited saddler [American Saddle Horse]. At the [Tennessee] state fair there was always one class a night for these slow, plain plantation nags with their slow, plain country riders. While the gaited horse riders were attired in

elaborate show industry had developed around the Tennessee Walking Horse.³⁴ Training of the breed had become an independent profession and certain horses were devoted to careers in the show ring—a far cry from the farmer cleaning up his trusty mount for occasional competition at the county fair horse show. The modern Walking Horse show industry boasts a proud horse with a flashy, high-stepping gait at grand performances. The Walking Horse’s natural gait was embellished by shoeing the horse with pads³⁵ and putting action devices, such as small rollers, chains, or bell boots,³⁶ around the horse’s front pasterns. The effect of these devices was to cause the horse to raise its front legs higher and stretch its back legs further, thus embellishing and exciting the natural gait of the Tennessee Walking Horse for the purposes of performance events.³⁷

B. *The Enactment and Provisions of the Horse Protection Act*

In 1970, Congress passed the Horse Protection Act³⁸ in response to unfavorable training techniques that had apparently become widespread in the show industry of the Tennessee Walking Horse.³⁹ The Horse Protection

black formals, the country boys had on whatever they left home wearing.

Id. at 225.

³⁴ *Id.* at 226.

³⁵ Pads are plastic, leather, or “similar pliant material” wedges put between the horse’s hoof and the horse shoe, thereby elevating the hoof of the horse from the ground. 9 C.F.R. § 11.2(b)(12) (2001). Under current regulations, the pad cannot exceed more than fifty percent of the natural hoof length. *Id.* § 11.2(b)(10).

³⁶ Rollers are small aluminum, rubber, or wooden rollers strung on a strap which fits around the horse’s pastern, or ankle area above the hoof. Chains are small metal or rubber links which also strap around the pastern area of the horse’s front legs. Bell boots are small boots that are worn on the horse’s pasterns, but proceed down to cover the upper portion of the horse’s hoof. The regulations enacted under the Horse Protection Act limit the weight of all the aforementioned action devices to six ounces per front limb of the horse. *Id.* § 11.2(b)(1)-(7).

³⁷ See WOMACK, *supra* note 8, at 272-73.

³⁸ Horse Protection Act, Pub. L. No. 91-540, 84 Stat. 1404 (1970) (codified as amended in 15 U.S.C. §§ 1821-1831 (2000)).

³⁹ 15 U.S.C. § 1822 reads as follows:

The Congress finds and declares that—

- (1) the soring of horses is cruel and inhumane;
- (2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;
- (3) the movement, showing, exhibition, or sale of sore horses in

Act, as amended in 1976, makes it illegal to cause a horse to be sore for the purpose of enhancing the horse's gait.⁴⁰ For a horse to be found "sore" under the Act, there must be evidence of use of devices or chemicals which caused the horse to experience pain in the pastern⁴¹ area of either its

intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

Id.

⁴⁰ The pertinent portions of the statute state:

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

...

(7) The showing or exhibiting at a horse show or horse exhibition; the selling or auctioning at a horse sale or auction; the allowing to be shown, exhibited, or sold at a horse show, horse exhibition, or horse sale or auction; the entering for the purpose of showing or exhibiting in any horse show or horse exhibition; or offering for sale at a horse sale or auction, any horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under section 1828 of this title prohibits to prevent the soring of horses.

Id. § 1824.

⁴¹ The pastern is the area of the leg on a horse below the ankle joint but above the hoof. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 861 (1988).

forelimbs or hindlimbs.⁴² The Horse Protection Act, in turn, vests power in the Secretary of the Department of Agriculture to create rules and regulations necessary to implement the provisions of the Act.⁴³

The Act and the Regulations⁴⁴ require all shows, exhibitions, or sales of Tennessee Walking Horses to have Designated Qualified Persons (“DQPs”) to conduct examinations of each horse prior to and, possibly, after performance or sale.⁴⁵ If a horse is found to be sore or potentially sore

⁴² 15 U.S.C. § 1821, in relevant part, reads as follows:

As used in this chapter unless the context otherwise requires:

(3) The term “sore” when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

Id.

⁴³ *Id.* § 1828.

⁴⁴ The Regulations are found at 9 C.F.R. §§ 11.1 - 11.41 (2001).

⁴⁵ 15 U.S.C. § 1823(c) reads as follows:

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary’s representative) under subsection (e) of this section.

Id. See also 9 C.F.R. § 11.7 (addressing the certification and licensing of DQPs).

under the meaning of the Act, then the DQP is to disqualify that horse from exhibition and subject that horse's trainer and owner to whatever fines or penalties are appropriate under the rules of the local (non-USDA) horse show organization that sanctioned the show.⁴⁶ In essence, the DQP system mandated by the Act and Regulations is set up to be an inner-industry regulation of soring Walking Horses. Beyond the inspection powers of the DQPs, each show, exhibition, or sale may be attended by USDA veterinarians, called Veterinary Medical Officers ("VMOs") who oversee the examinations of the DQPs and examine horses at their own discretion that they believe may be in violation of the Horse Protection Act.⁴⁷ In practice, only the finding of a violation of the Act by a VMO can sustain an action by the USDA against the trainer and owner of a disqualified horse; thus violations of the Horse Protection Act and imposition of the Act's severe penalties only occur when one or more VMOs have been present at a Tennessee Walking Horse show, exhibition, or auction.⁴⁸

The examination process followed by both the DQPs and the VMOs is fairly simple.⁴⁹ First, the handler of the horse to be shown brings the horse

⁴⁶ 9 C.F.R. § 11.20(b)(1)-(2). *See also id.* § 11.41 (guidelines by which each horse industry organization must submit their rules and procedures to the USDA).

⁴⁷ *Id.* § 11.4. It should be pointed out that the Regulations refer to the VMOs as "APHIS representatives," which individuals are the employees of the Animal and Plant Health Inspection Service of the USDA. *Id.* § 11.1. However, the author has chosen to refer to the USDA inspectors as either VMOs or USDA veterinarians throughout this Note, primarily because this is the designation given the inspectors in the opinions of the several circuit courts of appeals. *See, e.g.,* Young v. USDA, 53 F.3d 728, 729 (5th Cir. 1995) ("The USDA also employs veterinarians called Veterinary Medical Officers ('VMOs') to oversee the DQPs and examine some horses.").

⁴⁸ While the Act and Regulations leave open the possibility that a violation may be found by some other inspector, such as a DQP, to the author's knowledge (through personal experience and an examination of all materials), this has never happened. In turn, the presence of USDA veterinarians at a Tennessee Walking Horse show can have a profound effect on the number of horses entered. While most, if not all, of the horses are presumed to be sound and ready to pass inspection, many owners and trainers prefer not to risk the fines and disqualifications imposed upon violation of the Horse Protection Act. VMOs are almost always present at the larger horse shows, such as the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. However, VMOs also attend scattered, smaller shows throughout the United States. For an example of the effect the presence of VMOs can have on a small horse show, see *supra* note 3.

⁴⁹ 9 C.F.R. § 11.21 governs the inspection procedures required for DQPs, detailing the process by which each horse must be inspected prior to exhibition, show, or sale.

to a designated warm-up area which is contained and monitored by show officials and DQPs.⁵⁰ Upon arrival, the horse is led to the DQP station and its name, entry number and class number are told to the DQP. The DQP acknowledges the horse, then watches as the horse is led by its handler and caused to make a sharp turn while leading, usually around a traffic cone.⁵¹ If the horse does not move freely with its legs and does exhibit any signs of soreness, the DQP is empowered to assess the appropriate penalties.⁵² After being led, the horse is then stopped, and the DQP picks up the horse's front legs, one at a time, and examines the pastern area visually for hair loss, scars, abrasion, inflammation, and raised callouses.⁵³ If any of these abnormalities are found, then the horse may be disqualified automatically.⁵⁴ Thereafter, the DQP examines the horse's legs by digital palpation to determine whether there is abnormal sensitivity to finger pressure on the horse's legs.⁵⁵ Digital palpation is the application of pressure by the inspector's fingers and thumbs to the horse's legs, paying special attention to the pastern area where the action devices are placed on the horse.⁵⁶ If the horse gives a pain reaction to the digital palpation, it can be disqualified from the show, exhibition, or auction.⁵⁷ The DQP is further required to check all equipment for compliance with the Regulations.⁵⁸ Also, any failure of the examination by the horse can result in fines or disqualification against the horse, trainer, and/or owner by the horse show commission that sanctioned the show.⁵⁹

⁵⁰ *Id.* § 11.6 (detailing the inspection space and facility requirements that are to be provided by the management of a horse show in order for the horse show itself to not be found in violation of the Horse Protection Act).

⁵¹ *Id.* § 11.21(a)(1).

⁵² *Id.* § 11.21(d).

⁵³ *Id.* § 11.21(a)(2).

⁵⁴ *Id.* § 11.3. The scar rule was added to the Regulations subsequent to the original Act and applies only to horses born after October 1, 1975. (It is *highly* unlikely that there are any performance Tennessee Walking Horses still being exhibited today that meet the requirements of this grandfather clause.) Essentially, the scar rule allows a horse to be presumed sore under the Act without exhibiting sensitivity to digital palpation by observing tissue damage of various forms on the limb of the horse. *Id.* The scar rule, however, is not at issue in this Note, and none of the cases considered in this Note rely on the scar rule for a finding of violation of the Horse Protection Act.

⁵⁵ *Id.* § 11.21(a)(2). Digital palpation is the central issue and concern of this Note. See discussion *infra* Part III.A.

⁵⁶ 9 C.F.R. § 11.21(a)(2).

⁵⁷ 15 U.S.C. § 1825(c) (2000).

⁵⁸ 9 C.F.R. § 11.21(a)(3).

⁵⁹ *Id.* § 11.21(d); 15 U.S.C. § 1825(a)-(e).

The USDA veterinarians, if present at a show, may watch the entire examination process performed by the DQP.⁶⁰ At their discretion, the VMOs may reexamine any horse to determine whether the horse is illegally sore under the Horse Protection Act.⁶¹ If the VMOs discover a violation of the Horse Protection Act, they fill out a report noting their findings on the horse and their reasons for believing the horse to be sore in violation of the Act.⁶²

The process for post-performance examination is slightly different. In general, only the first place horse at a small show, and the first through third place horses at larger shows, are required to be examined following the performance.⁶³ As soon as the horse exits the show arena, it is to be brought directly to the DQP examination station, whereupon the DQP examines the action device around the horse's front pasterns for conformity with the USDA regulations.⁶⁴ Thereafter, the DQP asks the horse's handler to remove the action devices, whereupon the DQP weighs each device to ensure it is within the maximum allowed weight of the regulations. Currently, the maximum allowed weight is six ounces.⁶⁵ After this regulatory check, the DQP can reexamine the horse's pastern areas, both visually and using digital palpation.⁶⁶ Again, any evidence of soreness can be cause for disqualification, and whatever award the horse won in the show will be revoked.⁶⁷

⁶⁰ 9 C.F.R. §§ 11.4-11.5. Any VMO(s) present at a Tennessee Walking Horse show, exhibition, or sale are given extremely wide berth for examination of the horses for compliance with all provisions of the Act and its Regulations by §§ 11.4 and 11.5. Section 11.4(a) reads: "Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, horse exhibition, or horse sale or auction, shall allow any APHIS representative to reasonably inspect such horse at all reasonable times and places as the APHIS representative may designate." *Id.* Also, USDA representatives have open access to all horse trailers, barns, equipment, show management records, and show arenas during a show. *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ The guidelines for post-performance examination are not set forth in the Regulations promulgated by the Secretary of the USDA, but rather these procedures are established by the Horse Industry Organization that sanctioned the horse show. Therefore, it is the DQP's that follow the standard procedure of checking the horses placing in the top of each class. *See WOMACK, supra* note 8, at 350-51.

⁶⁴ *See id.*; *see also* 9 C.F.R. § 11.21(a)(3).

⁶⁵ 9 C.F.R. § 11.2(b)(1)-(7).

⁶⁶ *Id.* § 11.21(c).

⁶⁷ *Id.* § 11.21(d); 15 U.S.C. § 1825(a)-(c) (2000).

Also, the USDA veterinarians may watch the post-performance examination of the DQP, and thereafter conduct their own examination.⁶⁸ Again, the VMOs are authorized to lodge a complaint for violation of the Horse Protection Act at this point in the process, even though the horse has already been exhibited.⁶⁹

The Horse Protection Act provides for strict criminal and civil penalties to be assessed against the trainer and owner of a horse that is found to be sore.⁷⁰ After a horse has been found sore by the VMOs, the owner and trainer of the horse are faced with two options under the USDA Regulations.⁷¹ The owner and trainer, each charged under the Act independent of one another,⁷² may either make a constructive admittance of the charge by failing to answer the complaint brought by the USDA and then paying the fines and accepting the suspension,⁷³ or they may have a hearing before an administrative law judge ("ALJ").⁷⁴ The ALJ then conducts a trial, taking evidence from both the USDA and the defending trainer or owner and determines the liability and penalties under the Act.⁷⁵ Either side may then

⁶⁸ It should be emphasized again that the VMOs present at a Tennessee Walking Horse show are given extremely wide berth in what, when, where and to what extent they inspect the horses or any other matter for violation of the Horse Protection Act. See 9 C.F.R. §§ 11.4-11.5. In practice, the VMOs generally observe the post-performance re-examination of the DQPs and then either inspect the horse again or decline further inspection. However, the VMOs can examine any horse at any time after it has been entered in a show, which means that the VMOs could, under the Regulations, conduct an inspection of each horse before, after, and even during performance. Reasonableness is the only limit. See *id.* § 11.4. The Tennessee Walking Horse National Celebration requires entries to be made in late July, weeks before the Celebration begins. See discussion *infra* note 131 and accompanying text. A strict reading of the Regulations and the Act indicates that examinations and liability under the Horse Protection Act could be imposed on a horse at any time during that month after being entered in the Celebration. 9 C.F.R. § 11.4.

⁶⁹ 15 U.S.C. § 1825(a)-(e).

⁷⁰ *Id.* Based on the author's research, there have been no reported criminal actions under the Act's criminal liability provision at 15 U.S.C. § 1825(a), and the USDA predominantly brings an action for the civil penalties in sore horse violations under 15 U.S.C. § 1825(b). See, e.g., discussion *infra* Part III.A-C.

⁷¹ See 9 C.F.R. § 12.1 which states that the administrative adjudicative proceedings under the Horse Protection Act follow the Uniform Rules of Practice for the Department of Agriculture.

⁷² *Id.* §§ 11.4-11.5.

⁷³ See 7 C.F.R. § 1.139 (2002).

⁷⁴ *Id.* § 1.141.

⁷⁵ See *id.*

appeal the decision of the ALJ to a judicial officer (“JO”), who can review the decision made by the ALJ.⁷⁶

Further review under the Horse Protection Act is vested in the federal judiciary, whereby any party can obtain review in the court of appeals for the circuit in which that person resides or in the District of Columbia Circuit Court of Appeals.⁷⁷ All of the federal circuit courts of appeals have held that in Horse Protection Act cases, the appellate court can only set aside the decision of the administrative judges if there was not substantial evidence to support the decision.⁷⁸ The Supreme Court of the United States may thereafter accept an appeal of any of the circuit courts of appeals, but the Supreme Court has not, to date, taken certiorari in a Horse Protection Act case.⁷⁹

C. Challenges to the Horse Protection Act

While the focus of this Note is the sufficiency of evidence commonly used by the USDA to prove that a horse was sore under the Horse Protection Act, it is worthwhile to mention briefly some of the other issues that have come before the courts under the Act.⁸⁰ There have been a myriad of constitutional challenges to the Horse Protection Act, all of which have failed. Due process challenges have attacked the examination process used

⁷⁶ *Id.* § 1.145.

⁷⁷ 15 U.S.C. § 1825(b)(2) (2000).

⁷⁸ *E.g.*, *Gray v. USDA*, 39 F.3d 670, 675 (6th Cir. 1995) (holding that the decision of the JO required only a showing of substantial evidence to support the decision); *USDA v. Kelly*, 38 F.3d 999, 1002-03 (8th Cir. 1994) (holding the Secretary’s decision will be set aside only if “unsupported by substantial evidence”); *Wagner v. USDA*, 28 F.3d 279, 281-82 (3d Cir. 1993) (holding Secretary’s decision will be affirmed if supported by substantial evidence); *Elliot v. Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 144 (4th Cir. 1993) (finding the standard of review of agency decisions is one of substantial evidence); *Stamper v. Sec’y of Agric.*, 722 F.2d 1483, 1486 (9th Cir. 1984) (holding a Secretary’s decision will be set aside only upon a showing of substantial evidence); *Fleming v. USDA*, 713 F.2d 179, 188 (6th Cir. 1983) (noting that USDA decisions under the Act must be supported by substantial evidence); *Thornton v. USDA*, 715 F.2d 1508, 1510 (11th Cir. 1983) (stating that Secretary’s findings must be affirmed if supported by substantial evidence).

⁷⁹ *See, e.g.*, *Crawford v. USDA*, 50 F.3d 46 (D.C. Cir.) *cert. denied*, 516 U.S. 824 (1995); *Elliot*, 990 F.2d at 140, *cert. denied*, 510 U.S. 867 (1993).

⁸⁰ *See generally* Elizabeth Williams, Annotation, *Construction and Application of Horse Protection Act of 1970 (15 USCS §§ 1821 et seq.)*, 131 A.L.R. FED. 363 (1996).

by the USDA⁸¹ and the presumption of soreness which attaches following the declaration of a horse to be sore by the VMOs.⁸² Further, the Act has also been attacked arguing that the definition of "sore" is unconstitutionally vague.⁸³ None of these attacks has been successful.

On equal protection grounds, one owner claimed that the Horse Protection Act was unconstitutional because no action had ever been brought under the Horse Protection Act against any breed other than a Tennessee Walking Horse, even though there are thousands of breeds of performance show horses active in the United States.⁸⁴ The USDA JO ruled that the legislative history of the Act shows that it was meant specifically to protect Tennessee Walking Horses, since "soring" is a misdeed peculiar to this breed of horse alone.⁸⁵

Aside from constitutional challenges to the Act, numerous other issues have been adjudicated by the courts. The validity of the USDA's establishment of the allowed maximum weight of action devices has been upheld.⁸⁶ Numerous cases have determined that there is no need for showing intent to sore or knowledge of soreness to prove a violation of the Horse Protection Act.⁸⁷ However, several courts have held that the liability of a

⁸¹ *E.g.*, *Elliot*, 990 F.2d at 145-46.

⁸² *E.g.*, *In re Gray*, 52 Agric. Dec. 1044, 1076-77 (1993).

⁸³ *E.g.*, *Elliot*, 990 F.2d at 145-46; *Fleming*, 713 F.2d at 187.

⁸⁴ *In re Sparkman*, 50 Agric. Dec. 602 (1991). The list of breeds of horses that have dedicated, breed-specific performance show industries is practically endless. American Saddle Horses, Morgans, Hackneys, Rocky Mountain Horses, Arabians, Dressage, and Hunter-Jumper Event Horses all have very popular and widespread show industries. The author does not wish to examine the various performances of these breeds with scrutiny in the text, but it needs mention that high demands are placed on each breed of horse in training relative to their performance expectations. Moreover, it is true that peculiar training techniques are not unique to the Tennessee Walking Horse industry, as each breed of performance horse has specific demands and conformity to those demands is required for successful participation in the several industries. *See generally, e.g.*, WOMACK, *supra* note 8, at 204-82.

⁸⁵ *In re Sparkman*, 50 Agric. Dec. at 611 (citing the legislative history of the Act as conclusive evidence "that the soring techniques proscribed by the Horse Protection Act are used primarily on Tennessee Walking Horses.").

⁸⁶ *Am. Horse Prot. Ass'n v. Yeutter*, 917 F.2d 594, 599 (D.C. Cir. 1990) (holding that the determination of a maximum weight of six ounces for action devices was not arbitrary and capricious).

⁸⁷ *E.g.*, *Lewis v. Sec'y of Agric.*, 73 F.3d 312, 315 (11th Cir. 1996) (holding that ownership of a horse, in addition to entry and soreness, are the only required elements for the offense); *Crawford v. USDA*, 50 F.3d 46, 50-52 (D.C. Cir. 1995)

horse owner is limited to only those owners who allow their horse to be in violation of the Act.⁸⁸

II. THE BATTLE OVER DIGITAL PALPATION

A. *The Conflict Among the Federal Circuits as to the Sufficiency of VMO Reports of Digital Palpation*

The federal circuit courts of appeals are split as to whether the USDA veterinarians' reports of a horse's reaction to digital palpation are reliable evidence.⁸⁹ Under § 1825(d)(5) of the Act, "a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs."⁹⁰ In administrative proceedings pursuant to the Act,⁹¹ the ALJs and JOs have unwaveringly held that reports of reaction to digital palpation are sufficient evidence to invoke the presumption of soreness.⁹² Generally, the administrative

(accepting the USDA's position of strict liability for horse owners); *Stamper v. Sec'y of Agric.*, 722 F.2d 1483, 1488 (9th Cir. 1984) (holding that "a person need not intend to sore a horse in order to violate the [Horse Protection] Act"); *Thornton v. USDA*, 715 F.2d 1508, 1511-12 (11th Cir. 1983) (concluding that Congress' silence as to knowledge required for a civil penalty under the Horse Protection Act indicates that there is no required showing of knowledge of soreness or intent to sore).

⁸⁸ *See, e.g., Baird v. USDA*, 39 F.3d 131, 137 (6th Cir. 1994) (holding that an owner who expressly instructed the trainer not to sore the horse was not liable under the Horse Protection Act); *Burton v. USDA*, 683 F.2d 280, 282-83 (8th Cir. 1982) (finding an owner cannot allow a horse to be sore without knowledge of and acquiescence in the violation). *But see, e.g., Crawford*, 50 F.3d at 50-52 (rejecting the position of the Sixth and Eighth Circuit Courts of Appeals with respect to the requirement of proof that the owner "allowed" the horse to be entered for violation of the Horse Protection Act).

⁸⁹ *See, e.g., Young v. USDA*, 53 F.3d 728 (5th Cir. 1995), discussed *infra* notes 128-54 and accompanying text; *Gray v. USDA*, 39 F.3d 670 (6th Cir. 1994), discussed *infra* notes 98-119 and accompanying text.

⁹⁰ 15 U.S.C. § 1825(d)(5) (2000). *See also Martin v. USDA*, No. 94-3394, 1995 U.S. App. LEXIS 13606, at *2 (6th Cir. May 31, 1995) (per curiam) (stating that due process does not prevent the presumption of soreness from shifting the burden to the defendant once the USDA has introduced some evidence of sensitivity).

⁹¹ *See* discussion *supra* notes 71-76 and accompanying text.

⁹² *E.g., In re Tuck*, 53 Agric. Dec. 261, 292 (1994) (where an administrative judge said: "Based upon my examination of the record in this case, in addition to my examination of the records in 57 other Horse Protection Act cases, I am

decisions regarding this issue have been based on the notion that the USDA veterinarians examining the horses prior to a show, exhibition, sale, or auction had expert and experienced knowledge of the animal's response, and their findings with respect to the horse's condition were sufficient under digital palpation given the USDA's use of the test since time immemorial.⁹³

In numerous cases on appeal from USDA administrative decisions, several circuits have been faced with the argument that reports of digital palpation by USDA veterinarians were not sufficient evidence to establish a presumption of soreness. In the vast majority of those opinions, the circuit courts have upheld the evidentiary sufficiency of digital palpation for finding a violation of the Horse Protection Act.⁹⁴ However, the Fifth Circuit

convinced that palpation alone is a highly reliable method of determining whether a horse is sore, within the meaning of the Horse Protection Act."); *In re Bobo*, 53 Agric. Dec. 176, 191 (1994) (explaining that the USDA has long upheld digital palpation as sufficient evidence to support a finding that a horse is sore on its own, and that this assertion has been upheld by the courts); *In re Fly*, 51 Agric. Dec. 1128, 1140 (1992) (pointing out that "it has been the Secretary's policy to rely on [digital] palpation to determine whether a horse is sore."); *In re Sparkman*, 50 Agric. Dec. 602, 612 (1991) ("ample precedent exists for finding that a horse was sore, based on [its] reaction to palpation . . . without any thermovision or other evidence."); *In re Edwards*, 55 Agric. Dec. 892, 925 (1990) (stating that "[i]n many prior cases, the only evidence that a horse was sore was the professional opinion of the Department's veterinarians, based upon their palpation of the horse's pasterns.") (alteration in original).

⁹³ See, e.g., *In re Bennett*, 55 Agric. Dec. 176, 219 (1996) (stating that JO's reasons for accepting digital palpation as sufficient evidence "are based on the testimony presented in the particular case, as well as my accumulated experience in reading the record of every Horse Protection Act case appealed to the Secretary"); *In re Edwards*, 49 Agric. Dec. 188, 200 (1990) (stating "DQP examinations have repeatedly been found less probative than the [USDA] examinations and the [JO] has accorded less credence thereto").

⁹⁴ E.g., *Lewis v. Sec'y of Agric.*, 73 F.3d 312, 314-15 (11th Cir. 1996) (holding that the evidence was sufficient when two VMOs used digital palpation as the inspection technique despite the fact that the DQPs found no pain response); *Bobo v. USDA*, 52 F.3d 1406, 1412 (6th Cir. 1995) (stating that "[i]t is the Secretary's interpretation of his own regulations that evidence based on palpation alone may serve as the basis for a finding of 'soreness' under the [Horse Protection Act]"); *Crawford v. USDA*, 50 F.3d 46, 50 (D.C. Cir. 1995) (holding that "we have no legitimate basis to reject digital palpation as a diagnostic technique, whether used alone or not"); *Gray v. USDA*, 39 F.3d 670, 676-77 (6th Cir. 1994) (holding that reports of digital palpation were substantial evidence to support a finding of soreness); *USDA v. Kelly*, 38 F.3d 999, 1003 (8th Cir. 1994) (stating, in dicta, that

Court of Appeals has not vested such broad confidence in the professional opinions of the USDA veterinarians, holding that the reports of digital palpation were not sufficient evidence to uphold a violation of the Act.⁹⁵ For fullest understanding of the split between the Fifth Circuit and the Third, Fourth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits, it is necessary to analyze a few of the cornerstone cases in the area of digital palpation.

B. The Majority Holding of the Sixth and Other Circuits as to the Evidentiary Validity of USDA Veterinarian Reports of Soreness Based on Digital Palpation

The majority of the federal circuit courts have maintained that the reports of digital palpation alone constituted substantial evidence under the Act,⁹⁶ whereby a presumption of soreness was invoked based on these reports alone.⁹⁷ This rule has been established by several cases.

In *Gray v. USDA*,⁹⁸ the Sixth Circuit Court of Appeals ruled that reports of response to digital palpation were sufficient to constitute substantial evidence and to trigger the presumption of soreness under the Horse Protection Act.⁹⁹ Billy Gray, a veteran trainer of champion Tennessee Walking Horses, entered Pride's Night Prowler, a Tennessee Walking Horse, in the 31st Southern Championship Charity Horse Show in November of 1987.¹⁰⁰ Prior to the show, Billy Gray took the horse for

reports of sensitivity to the touch of a horse are sufficient for finding a violation of the Horse Protection Act because "the veterinarians described their usual testing procedures and indicated that the same procedure was used to test [the horse]."); *Wagner v. USDA*, 28 F.3d 279, 282-83 (3d Cir. 1994) (denying petition for review based on VMOs reports of horse's reaction to digital palpation); *Elliot v. Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 146 (4th Cir. 1993) (holding that abnormal sensitivity to digital palpation regarded and deduced by VMOs is sufficient to support a conclusion of soreness); *Stamper v. Sec'y of Agric.*, 722 F.2d 1483, 1486-87 (9th Cir. 1984) (holding that a post-performance examination conducted by digital palpation was sufficient evidence to raise the statutory presumption of soreness under the Horse Protection Act).

⁹⁵ See *Young v. USDA*, 53 F.3d 728, 732 (5th Cir. 1995), discussed *infra* notes 128-54 and accompanying text.

⁹⁶ See discussion *supra* note 94 and accompanying text.

⁹⁷ See 15 U.S.C. § 1825(d)(5) (2000); see also discussion *supra* note 94 and accompanying text.

⁹⁸ *Gray v. USDA*, 39 F.3d 670 (6th Cir. 1994).

⁹⁹ *Id.* at 677.

¹⁰⁰ *Id.* at 672-73.

inspection¹⁰¹ to the DQP station.¹⁰² The DQP examined Pride's Night Prowler for soreness and disqualified the horse from the show.¹⁰³ Two USDA VMOs were also present at the Southern Championship Charity Horse Show, and both observed the DQP's examination of Pride's Night Prowler.¹⁰⁴ Both VMOs testified in affidavits that they observed Pride's Night Prowler display a pain response to digital palpation of both forelegs.¹⁰⁵ Following the DQP examination, the VMOs requested that Gray allow them to examine Pride's Night Prowler for violation of the Horse Protection Act.¹⁰⁶ After their examination, both VMOs attested in affidavits that upon palpation of both forelegs, Pride's Night Prowler would shuffle his weight, raise his head, and attempt to withdraw his foot from the grip of the veterinarian.¹⁰⁷ The VMOs informed Gray that the horse was found to be sore under the definition of the Horse Protection Act, whereupon the VMOs completed a USDA Summary of Alleged Violations.¹⁰⁸

A complaint was filed against Gray by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") and a hearing was held before an ALJ for violation of the Horse Protection Act.¹⁰⁹ After several attempts at an interlocutory appeal, judgment was entered against Gray.¹¹⁰ The ALJ fined Gray \$2000 and disqualified him from participation in a show, exhibition, or auction for one year.¹¹¹ Gray then appealed the decision to a JO, who affirmed the judgment, but modified the penalty to disqualify Gray from participation for a period of five years pursuant to 15 U.S.C. § 1824(7).¹¹² Gray then appealed to the Sixth Circuit Court of Appeals.¹¹³

Before the Sixth Circuit, Gray took issue with several points, including the probative value of affidavits used in place of testimony by the USDA

¹⁰¹ See *supra* notes 44-69 and accompanying text for explanation of the procedure of enforcement of the Horse Protection Act.

¹⁰² *Gray*, 39 F.3d at 673.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 674.

¹¹⁰ *Id.* at 674-75.

¹¹¹ *Id.* at 675.

¹¹² *Id.*

¹¹³ *Id.*

veterinarians¹¹⁴ and the JO's increase of sanctions against Gray.¹¹⁵ The Sixth Circuit rejected all of these arguments.¹¹⁶

The Sixth Circuit's consideration was limited to Gray's strongest argument on appeal: that the evidence brought against Gray by the USDA was not sufficiently substantial, reliable, or probative to invoke a presumption of soreness under the Horse Protection Act.¹¹⁷ The Sixth Circuit dismissed this argument with suspiciously little discussion and some important silence. The court said "that neither the ALJ nor the JO relied on the presumption created by [15 U.S.C.] § 1825(d)(5)," and thereby Gray's argument failed.¹¹⁸ The court aptly evaded Gray's argument as to the probative value of the VMOs' reports by neglecting to discuss the argument at all. Generally, the court dismissed the entire rationale by saying:

Equally unavailing is Gray's claim as to the sufficiency of the evidence pertaining to the condition of Night Prowler at the time . . . [the VMOs] conducted their examinations. As is evident from their affidavits, . . . [the VMOs] confirmed independently what the DQP had already surmised; namely, that Night Prowler was "sore" within the meaning of the Act.¹¹⁹

Thus the Sixth Circuit Court of Appeals, in *Gray*, established its position that reports of digital palpation were sufficient to establish the soreness of a horse under the Horse Protection Act.

One year after *Gray*, the Sixth Circuit decided the case of *Bobo v. USDA*.¹²⁰ In *Bobo*, the facts and procedural posture were essentially the same as in *Gray*, in that a trainer and owner appealed a finding of a violation of the Horse Protection Act based on an examination of the horse relying solely upon digital palpation as the determinate.¹²¹ *Bobo* asserted

¹¹⁴ *Id.* at 676.

¹¹⁵ *Id.* at 677.

¹¹⁶ *Id.* at 676-78.

¹¹⁷ *Id.* at 675-77.

¹¹⁸ *Id.* at 677 n.7.

¹¹⁹ *Id.* at 676-77.

¹²⁰ *Bobo v. USDA*, 52 F.3d 1406 (6th Cir. 1995).

¹²¹ *Id.* at 1407-10. In this case, the horse in question was a Tennessee Walking Horse named Ultimate Beam, who was trained by William Bobo and owned by Jack Mitchell. Bobo and Mitchell entered Ultimate Beam in the Spring Fun Show at Shelbyville, Tennessee, on May 26, 1990, and at the Twenty-Second Annual Albertville Horse Show at Albertville, Alabama, on July 21, 1990. The violations

the argument that digital palpation alone cannot be the sole basis for a finding of soreness under the Horse Protection Act.¹²² As support for this argument, Bobo presented several provisos in House and Senate appropriations bills and amendments stating that no money would be used to pay the salary of a VMO that detected soreness under the Horse Protection Act using digital palpation as the sole technique.¹²³ Further, Bobo pointed to new guidelines set forth by the USDA, which required the VMO to examine the horse's gait and appearance in addition to digitally palpating the horse's legs.¹²⁴

These documentary and persuasive indicators of the unreliability of digital palpation were of no moment to the court, which approved digital palpation as a valid, sole indicator of soreness under the Horse Protection Act.¹²⁵ The court stated that "contrary to petitioners' assertions, a finding of 'soreness' based upon the results of digital palpation alone is sufficient to invoke the rebuttable presumption of 15 U.S.C. § 1825(d)(5)."¹²⁶ Essentially, the Sixth Circuit's reasons for this positive determination were that the provisos of the congressional bills and amendments were not sufficient to override the Regulations made by the Secretary of the USDA, and that the Secretary has always said that digital palpation was sufficient to prove soreness under the Act.¹²⁷ Armed with these rationales, the *Bobo* court followed the *Gray* decision in its legal determinations and its evasive reasoning to establish a firm position on digital palpation as a test for detecting soreness in horses. Not all of the federal circuit courts of appeals, however, have been so quick to defer to the findings of the USDA.

C. *The Fifth Circuit's Rejection of Digital Palpation in Young v. USDA*

In *Young v. USDA*,¹²⁸ the Fifth Circuit Court of Appeals rejected the widespread holdings that the VMOs' reports of digital palpation alone constituted substantial evidence to support a finding of violation of the

in question stem from examinations and failures of inspection by digital palpation at both of these horse shows. *See id.*

¹²² *Id.* at 1411.

¹²³ *Id.* *See also* discussion *infra* note 190 and accompanying text.

¹²⁴ *Bobo*, 52 F.3d at 1411-12.

¹²⁵ *Id.* at 1412-13.

¹²⁶ *Id.* at 1413.

¹²⁷ *See id.* at 1411-13.

¹²⁸ *Young v. USDA*, 53 F.3d 728 (5th Cir. 1995).

Horse Protection Act.¹²⁹ In *Young*, Floyd Sherman was the owner and Bill Young the trainer of a horse named A Mark For Me.¹³⁰ Sherman and Young entered A Mark For Me in the Tennessee Walking Horse National Celebration,¹³¹ where a DQP disqualified the horse from competition on August 31, 1990.¹³² The DQP testified that A Mark For Me displayed sensitivity to digital palpation, but he did not believe the horse to be “sore” under the definition of the Horse Protection Act.¹³³ Thereafter, two VMOs examined A Mark For Me and determined that the horse was sore under the Horse Protection Act.¹³⁴ The USDA filed a complaint against Sherman and Young alleging violation of the Act.¹³⁵

The ALJ dismissed the complaint after determining that an encounter between A Mark For Me and another horse en route to inspection caused A Mark For Me to be in a distressed state, which might have explained his reaction to the digital palpation.¹³⁶ The USDA appealed, and the JO reversed the decision of the ALJ and entered judgment against Sherman and Young, ordering that each pay a \$2000 fine and be disqualified from participation in exhibition for one year.¹³⁷

Sherman and Young appealed to the Fifth Circuit Court of Appeals, arguing that there was a lack of substantial evidence for the JO to find that A Mark For Me was sore under the Horse Protection Act.¹³⁸ Sherman and Young argued the conclusion was based “solely on the affidavits” of the

¹²⁹ *Id.* at 732.

¹³⁰ *Id.* at 729.

¹³¹ *Id.* The Tennessee Walking Horse National Celebration is the World Championship show of the Tennessee Walking Horse industry, held annually in Shelbyville, Tennessee. In 2001, there were a record 5037 horses entered in 167 classes at the Celebration and spectator attendance totaled 156,097 over the eleven-day event. Christy Howard Parsons, *The Walking Horse Industry Rides a Celebration High and All You Can Hear is Encore, Encore, Encore*, WALKING HORSE REP., Sept. 17, 2001, available at <http://www.walkinghorsereport.com/gen/091701celebrationlead.asp> (last visited Apr. 4, 2002).

¹³² *Young*, 53 F.3d at 730.

¹³³ *Id.* See also discussion *supra* notes 44-48 and accompanying text, explaining that the DQPs disqualify horses that are not legally sore under the Horse Protection Act, and that a horse’s failure of the DQPs’ examination and subsequent disqualification from exhibition do not generally establish soreness or lack of soreness under the Act.

¹³⁴ *Young*, 53 F.3d at 730.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

two VMOs and the USDA Summary of Alleged Violations, which the two VMOs completed after examining A Mark For Me.¹³⁹ In all of these documents, the only evidence of soreing reported was A Mark For Me's reaction to digital palpation, essentially stating that the VMOs concluded the horse was sore because the horse experienced pain when the veterinarians pressed their thumbs and forefingers against the forelimbs in the pastern area of the horse.¹⁴⁰ Sherman and Young's argument that the aforementioned documents were unreliable evidence was based on two main premises. First, they contended that the documents were regulatory inspection documents prepared with bias toward the USDA's position and in anticipation of litigation.¹⁴¹ Second, they argued that digital palpation was an unreliable method for determining whether a horse was sore.¹⁴²

The Fifth Circuit Court of Appeals found that the affidavits of the VMOs and the USDA Summary of Alleged Violations were indeed unreliable evidence; therefore, the court found insufficient evidence to support a finding that A Mark For Me was sore under the Horse Protection Act.¹⁴³ The court pointed out that the VMOs only filled out a Summary of Alleged Violations (as the VMOs testified) when a horse was found to be sore.¹⁴⁴ The court also found that the Summary of Alleged Violations only included reports of indicia that the horse was sore and not contrary indicia that the horse was not sore.¹⁴⁵ These findings led to a conclusion that the document was prepared in anticipation of litigation.¹⁴⁶ The court upheld the widespread doctrine that documents prepared in anticipation of litigation are not reliable as evidence,¹⁴⁷ thus concluding that "the documents themselves admittedly recorded a biased account of the results of the inspection" and "their probative value is limited."¹⁴⁸

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 732.

¹⁴⁴ *Id.* at 730-31.

¹⁴⁵ *Id.* at 731.

¹⁴⁶ *Id.* at 730-31.

¹⁴⁷ *Id.* at 730. *See also* *Palmer v. Hoffman*, 318 U.S. 109, 114-15 (1943) (holding that an accident report did not have the reliability of a regular business record because it was prepared in anticipation of litigation); *United States v. Stone*, 604 F.2d 922, 925-26 (5th Cir. 1979) (holding that an affidavit from the United States Treasury Department prepared in anticipation of litigation was unreliable evidence).

¹⁴⁸ *Young*, 53 F.3d at 731.

The court then considered the reliability of digital palpation as a test for determining whether a horse is sore under the Horse Protection Act.¹⁴⁹ Sherman and Young presented abundant expert testimony that criticized the validity of finding a horse to be sore based solely on digital palpation.¹⁵⁰ The Fifth Circuit analyzed the evidence against the reliability of digital palpation as follows:

Several highly qualified expert witnesses for the petitioners testified that sores could not be diagnosed through palpation alone. Petitioners also offered a written protocol signed by a group of prominent veterinarians coming to the same conclusion. The JO's basis for rejecting this evidence seems to be simply that it is contrary to the agency's policies and the agency's prior decisions. The JO does not point to scientific or medical data supporting the agency's chosen diagnostic technique.¹⁵¹

The court concluded that Sherman and Young presented substantial evidence calling into question the reliability of the test.¹⁵² The testimony of the many veterinarians cast doubt over the reliability of digital palpation, sufficient to establish that the USDA's documents were not adequate to support a finding that the horse was sore.¹⁵³ The Fifth Circuit reversed the decision of the JO and entered judgment in favor of Sherman and Young.¹⁵⁴

The Fifth Circuit's decision in *Young v. USDA* broke from a line of administrative and court decisions that unceasingly defended the validity of a flawed process of proving soreness. The validity of documents prepared by USDA veterinarians in anticipation of litigation that relied solely on digital palpation to determine soreness was appropriately scrutinized by the Fifth Circuit's decision.

D. *The Aftermath of Young*

Since *Young*, the Fifth Circuit has not published an opinion in a Horse Protection Act case. However, the Fifth Circuit has upheld *Young*. In an unpublished order without opinion in *Bradshaw v. USDA*, the Fifth Circuit recently reversed an administrative judgment against the appellant for

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.* (footnote omitted).

¹⁵² *Id.* at 732.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

violation of the Horse Protection Act.¹⁵⁵ Reports of the *Bradshaw* case indicate that the Fifth Circuit reversed based on *Young*, after the appellant was found in violation of the Act based solely on reports of digital palpation.¹⁵⁶

Other circuits, however, have declined to follow the Fifth Circuit's decision in *Young*. The Sixth Circuit has unequivocally stated that digital palpation is a reliable method of determining whether a horse is sore, but their only authority for this conclusion seems to be the passionate insistence of the USDA and VMOs who produce no medical data in support of their position. In *Martin v. USDA*,¹⁵⁷ the Sixth Circuit emphatically said: "We emphasize that we have no quarrel with whether palpation is effective to determine whether a horse's feet experience pain."¹⁵⁸ In *Reinhart v. USDA*, the Sixth Circuit affirmed a finding of a violation of the Horse Protection Act, stating simply that "Reinhart's and Stepp's evidentiary challenge lacks merit."¹⁵⁹ In a case that was not based on the Horse Protection Act, the Sixth Circuit criticized the *Young* opinion's ruling on the reliability of reports prepared in anticipation of litigation.¹⁶⁰ Other circuits that have heard cases following the decision in *Young* have ignored the Fifth Circuit's precedent, continuing to insist on the reliability of VMO reports of digital palpation for proving soreness.¹⁶¹

The *Young* decision, however, has elicited a profoundly more vehement rejection in USDA administrative opinions. *In re Bennett* was an appeal of a decision finding a horse not sore under the Horse Protection Act based on the possible unreliability of digital palpation.¹⁶² This appeal was heard and ruled upon by Judicial Officer Donald Campbell, the same JO who reversed

¹⁵⁵ *Bradshaw v. Dep't of Agric.*, No. 00-60582, 2001 U.S. App. LEXIS 11461 (5th Cir. Mar. 14, 2001).

¹⁵⁶ See David L. Howard, *Federal Court of Appeals Says Digital Palpation Not Sufficient*, WALKING HORSE REP., June 18, 2001, at 6.

¹⁵⁷ *Martin v. Dep't of Agric.*, No. 94-3394, 1995 U.S. App. LEXIS 13606 (6th Cir. May 31, 1995) (per curiam).

¹⁵⁸ *Id.* at *18 n.3.

¹⁵⁹ *Reinhart v. USDA*, No. 98-3765, 1999 U.S. App. LEXIS 19756, at *4 (6th Cir. Aug. 13, 1999).

¹⁶⁰ See *Hodgins v. USDA*, No. 97-3899, 2000 U.S. App. LEXIS 29892, at *31 (6th Cir. Nov. 20, 2000).

¹⁶¹ *E.g.*, *Lewis v. Sec'y of Agric.*, 73 F.3d 312, 314 (11th Cir. 1996) (holding that the evidence was sufficient when the two VMOs used digital palpation as the inspection technique despite the fact that the DQPs found no pain response).

¹⁶² *In re Bennett*, 55 Agric. Dec. 176, 177 (1996).

the decision of the ALJ in *In re Young*,¹⁶³ only to be himself reversed by the Fifth Circuit in *Young v. USDA*.¹⁶⁴ In a blistering sixty-nine page opinion, Judge Campbell took great pains to emphatically establish his—and, presumably, the USDA’s—vigorous rejection of the *Young* opinion.¹⁶⁵ Judge Campbell systematically answered every portion of the Fifth Circuit’s opinion in *Young*, establishing that the USDA’s position is not based on past precedent alone,¹⁶⁶ that the Atlanta Protocol,¹⁶⁷ which is a medical report questioning the reliability of digital palpation, is not reliable and will not be followed by the USDA or any department JO,¹⁶⁸ and that the reports by VMOs of soreness based on digital palpation are completely reliable and free from the possibility of any bias.¹⁶⁹ Though Judge

¹⁶³ *In re Young*, 53 Agric. Dec. 1232 (1994), *rev’d sub nom. Young v. USDA*, 53 F.3d 728 (5th Cir. 1995).

¹⁶⁴ See *Young*, 53 F.3d at 728, discussed *supra* notes 128-54 and accompanying text.

¹⁶⁵ See *In re Bennett*, 55 Agric. Dec. at 177-243.

¹⁶⁶ Judge Campbell writes:

As shown below, my view is not based simply on “the agency’s policies and the agency’s prior decisions,” as suggested by the Court in *Young* . . . but, rather, on the accumulated knowledge gained from reading the testimony of a large number of veterinarians, many of whom had 10 to 20 years of experience in examining many thousands of horses for soreness under the Horse Protection Act.

Id. at 181.

Judge Campbell’s statement seems to substantiate the Fifth Circuit’s apprehension that prior findings, policy, and experience dictate the current course of evidentiary determinations in the administrative proceedings of the USDA. See *Young*, 53 F.3d at 731-32, discussed *supra* note 128.

¹⁶⁷ See discussion *infra* notes 197-99 and accompanying text for a discussion of the Atlanta Protocol.

¹⁶⁸ *Bennett*, 55 Agric. Dec. at 182-206. This portion of the opinion is largely a reproduction of the discussion and rationales driving Judge Campbell’s findings in *In re Young*, 53 Agric. Dec. at 1267-83, discussed *supra* note 163.

¹⁶⁹ *Bennett*, 55 Agric. Dec. at 205-37. Judge Campbell states his reason for establishing the objectiveness of VMO reports as follows:

In the 75 cases that I have reviewed under the Horse Protection Act, I have not detected the slightest basis for inferring or suspecting that the Department’s veterinarians have been trained to be anything but completely objective in their enforcement of the Horse Protection Act. In fact, they have stated again and again in case after case that they give the benefit of the doubt to the horse trainer and owner, and only bring cases where both veterinarians are convinced that artificial means have been used to sore the horse.

Campbell eventually affirmed the dismissal of the complaint because the ALJ had retired,¹⁷⁰ the dicta of *Bennett* clearly indicates the USDA's distaste of the *Young* decision. Judge Campbell wrote:

The views quoted above from my decision in [*In re*] *Bill Young* will be followed by this Department notwithstanding the split decision by the [Fifth Circuit] Court of Appeals reversing [*In re*] *Bill Young*. The "expert testimony and a written protocol [i.e., the Atlanta Protocol]" relied on by the Court in *Young* . . . is devoid of merit, for the reasons quoted above. One Circuit Judge dissented in *Young*, . . . and only one Circuit Judge reversed, since a District Judge sitting by designation was the third Judge on the panel. Hence the case is not a strong precedent even in the Fifth Circuit.¹⁷¹

However strongly various denizens of the judiciary and administrative agencies may disagree, it seems that declaration of weak precedent based on the rank of judges sitting on a circuit court of appeals panel is thoroughly without the support of positive law.¹⁷² Nevertheless, such specula

Id. at 209-10.

¹⁷⁰ Judge Campbell states:

If the ALJ had not retired, I would have issued a Second Remand Order, since it seems to me that the ALJ did not comply with the First Remand Order. However, inasmuch as a Second Remand Order is not possible, and I do not believe that . . . [the USDA's] case is quite strong enough to justify remanding the case for a new trial before a different ALJ, I am dismissing the Complaint.

Id. at 177.

¹⁷¹ *Id.* at 205 (alteration in original).

¹⁷² A reading of 28 U.S.C. § 292(a) indicates no weakening of precedent caused by a district judge sitting by appointment on a panel issuing an opinion:

The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.

28 U.S.C. § 292(a) (1994). Moreover, the author suspects that more than a few opinions where district judges were sitting by designation and cast the deciding vote are considered widely to be strong precedent and, perhaps, even landmark opinions. Judge Campbell, himself, cites *Bobo v. USDA*, 52 F.3d 1406 (6th Cir. 1995) five times in *In re Bennett* to establish the Sixth Circuit's position that reports of digital palpation were reliable, notwithstanding the fact that Judge Charles Joiner, United States District Judge for the Eastern District of Michigan,

tions as to the potency of *Young* are indicative of the USDA's position on the split between the federal circuit courts of appeals as to the sufficiency of digital palpation.

The Fifth Circuit's decision in *Young v. USDA*, however, is the correct stance on an unreliable inspection method that has subjected the Walking Horse industry to uncertainty under the Horse Protection Act for more than three decades. There are a myriad of practical and legal rationales for courts to reject the sufficiency of digital palpation.

III. THE UNRELIABILITY OF DIGITAL PALPATION

A. *The Patent Unreliability of Digital Palpation*

The reasonable lay person can easily appreciate and recognize the open door for bias, unfairness, and gross discrimination that is created by relying solely on digital palpation to determine whether a horse is sore.¹⁷³ While the methods of determining the soreness of a horse have been the focus of considerable scientific debate in the veterinarian community,¹⁷⁴ a modest examination of the process of digital palpation exposes the fallacies inherent in using palpation as the lone method for determining soreness.

At the onset of this discussion, perhaps it would be most helpful to consider the process by which the DQPs and VMOs examine the horse before and after exhibition in a show or sale. The Regulations dictate the inspection procedures for DQPs, with the following provision describing the digital palpation techniques used by both DQPs and VMOs:¹⁷⁵

The DQP shall digitally palpate the front limbs of the horse from knee to hoof, with particular emphasis on the pasterns and fetlocks. The DQP shall examine the posterior surface of the pastern by picking up the foot and examining the posterior (flexor) surface. The DQP shall apply

was sitting by designation on the panel and joined in the opinion in *Bobo*. See generally *In re Bennett*, 55 Agric. Dec. 176 (1996).

¹⁷³ The author emphasizes lay person for this section because the argument is based on common sense, an analysis of digital palpation as it is conducted at the Walking Horse shows, and a plain language analysis of the method as it is described in 9 C.F.R. § 11.21(a)(2) (2001).

¹⁷⁴ See discussion *infra* notes 197-99 and accompanying text for an example of the scientific debate over digital palpation.

¹⁷⁵ The Regulations at 9 C.F.R. § 11.1-11.41 reflect no specific provision as to the digital palpation technique to be used by the VMOs. Therefore, 9 C.F.R. § 11.21(a)(2) is the sole codification of the digital palpation technique.

digital pressure to the pocket (sulcus), including the bulbs of the heel, and continue the palpation to the medial and lateral surfaces of the pastern, being careful to observe for responses to pain in the horse. While continuing to hold onto the pastern, the DQP shall extend the foot and leg of the horse to examine the front (extensor) surfaces, including the coronary band. The DQP may examine the rear limbs of all horses inspected after showing, and may examine the rear limbs of any horse examined preshow or on the showgrounds when he deems it necessary, except that the DQP shall examine the rear limbs of all horses exhibiting lesions on, or unusual movement of, the rear legs.¹⁷⁶

In practice, both the DQPs and VMOs follow this procedure exactly.¹⁷⁷ To elaborate on the practice of this inspection, the horse is first brought to the examination station in the warm-up area designated at the show, where it is then checked in and led around a traffic cone to regard its freeness of movement.¹⁷⁸ After watching how the horse moves, the examiner asks the handler to stop the horse and loosen his grip on the horse's reins so as not to inhibit the horse from a pain response to digital palpation.¹⁷⁹ Thereafter,

¹⁷⁶ 9 C.F.R. § 11.21(a)(2).

¹⁷⁷ Based on the author's attendance at numerous Tennessee Walking Horse Shows and witnessing hundreds of VMO examinations, it is true that the VMO's follow the same procedure to examine horses.

¹⁷⁸ 9 C.F.R. § 11.21(a)(1) describes the process:

During the preshow inspection, the DQP shall direct the custodian of the horse to walk and turn the horse in a manner that allows the DQP to determine whether the horse exhibits signs of soreness. The DQP shall determine whether the horse moves in a free and easy manner and is free of any signs of soreness.

Id.

¹⁷⁹ *Id.* § 11.21(a)(4) reads as follows:

The DQP shall instruct the custodian of the horse to control it by holding the reins approximately 18 inches from the bit shank. The DQP shall not be required to examine a horse if it is presented in a manner that might cause the horse not to react to a DQP's examination, or if whips, cigarette smoke, or other actions or paraphernalia are used to distract a horse during examination. All such incidents shall be reported to the show management and the DQP licensing organization.

Id.

This provision mandates giving a horse free rein, as no tight grip can be taken on a horse if the reins must be held eighteen inches from the bit shank. The process of allowing the horse free rein while in the warm-up area at a horse show is, in the author's own experience, an ill-advised mandate.

the examiner goes to one of the horse's front legs and forces the horse to pick his leg up off the ground.¹⁸⁰ The examiner then bends the horse's leg back, curling the hoof beneath the horse and toward its back legs. Resting the horse's knee against the examiner's leg, the examiner uses one of his thumbs to press between the horse's hoof and ankle, an area known as the posterior surface of the pastern.¹⁸¹ After pressing his thumb over the entire back area of the lower pastern, the examiner then turns—continuing to hold the horse's leg up—and stretches the leg to the front.¹⁸² Resting the leg over his bent knee, the examiner reaches down and presses his thumb or his thumb and index finger against the front portion of the lower pastern.¹⁸³ When he has finished applying pressure with his fingers on the front side of the lower pastern, the examiner allows the horse to return its leg to the ground. The same process is then repeated on the other front leg.¹⁸⁴

It is the horse's reaction to the above process on which the USDA entirely, in most cases, bases its actions under the Horse Protection Act.¹⁸⁵ If a horse jerks its foot, arches its back, stretches out its neck, or shifts its weight upon the pressing of an examiner's thumb against the lower pastern, the VMOs can fill out a report supporting a finding that the horse was sore under the Horse Protection Act.¹⁸⁶

The questions raised by this process and the Regulation are readily apparent. First and foremost, the Regulation itself possesses a patent ambiguity. The relevant parts reads: "The DQP shall digitally palpate the front limbs of the horse from knee to hoof . . . [and] shall apply digital pressure to [the anterior and posterior surfaces of the pasterns]."¹⁸⁷ This is the only mention of the digital palpation process in the entirety of the regulations, but the conspicuously absent directive is the amount of pressure the examiner is to apply to the horse's pasterns. "[S]hall apply digital pressure"¹⁸⁸ is an artful way of saying examiners should press their fingers or thumb against the horse's pastern. How hard should examiners press? For how long should the digital pressure be applied? Should examiners press only with the pads on the end of their fingers or thumb, or

¹⁸⁰ *Id.* § 11.21(a)(2).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* While 9 C.F.R. § 11.21(a)(2) gives the DQP authority to inspect the back legs of the horse, the author has never witnessed such an examination.

¹⁸⁵ See 15 U.S.C. § 1825(d)(5) (2000).

¹⁸⁶ See *id.*

¹⁸⁷ 9 C.F.R. § 11.21(a)(2).

¹⁸⁸ *Id.*

should they use the entire length of their digits? Are examiners required to wear gloves, or even allowed to wear gloves, and, if so, what type of gloves? Each of the above questions and more *must* be answered if any degree of clarity and fairness are to be introduced to the USDA's practiced procedure of digital palpation.

However, any attempt to make this Regulation appropriately precise may be inherently futile. Adding the word "light," "moderate," "heavy," "reasonable," "feathery," or "miniscule" to describe the amount of "digital pressure" that the examiner is to apply would hardly remedy the Regulation's affliction. Each person interprets these words in different ways and there is no way to measure the appropriate pressure. Further, the variance of digital strength in the several billion humans upon this planet renders an attempt at clarification of this Regulation far too devoid of certainty to be afforded reliability.

The USDA's ambiguous Regulation, giving a skeletal procedure for digital palpation, also opens the door to unbridled bias. DQPs and VMOs are sent forth to police the Tennessee Walking Horse shows, armed with boundless discretion in determining how hard to squeeze their fingers against the pastern of the horse they are examining. Certainly, there is room for a VMO to press his fingers against the horse of Owner A lightly to ensure that the horse not move its foot or display any other pain response. Then, the VMO could dig his thumbs deep into the soft skin of the pastern on the horse of Owner B, causing the horse to exhibit a pain response even though the horse would have normally passed examination. Many VMOs have been examining horses in the Tennessee Walking Horse industry for many years. Naturally, there is the possibility that they have made friends and enemies. Clearly, this occurs in the socio-legal dynamic of any person enforcing any law. Still, this dynamic jogs to mind the possibility of gross bias, given the impotence of the Regulation's description of digital palpation.

As a practical matter, it is questionable whether one of the famed ponies of Chincoteague Island,¹⁸⁹ whose fabled mystique revolves on the fact that the ponies have been untouched by human hands, would pass an examination by digital palpation. A VMO applying digital pressure to one of the Chincoteague ponies—if, in fact, the VMO could cause a wild pony to stand still long enough under free rein—might press enough to cause a pain reaction, thus raising the presumption of soreness under the Horse Protection Act.

¹⁸⁹ See generally MARGUERITE HENRY, *MISTY OF CHINCOTEAGUE* (1947) (the book which made the ponies of Chincoteague Island famous).

Congress has repeatedly voiced its disapproval of finding a violation of the Horse Protection Act solely on digital palpation. Congress has stated that no money allotted to the USDA should be paid to VMOs who use digital palpation as their sole method of determining soreness under the Horse Protection Act.¹⁹⁰ With the exception of the *Young* court,¹⁹¹ this provision has been ignored by the USDA and the courts alike.¹⁹²

A practical review of the procedures and Regulations governing digital palpation reveals the facial unreliability of this analysis of soreness. A VMO, unfettered by the bounds of regulatory guidance as to the pressure of digital palpation, has the power in his hands to cause a pain reaction with vehement digital pressure and thus create evidence of soreness, the reliability of which only the Fifth Circuit will deny. The fallacies on the face of the digital palpation process and the governing Regulations call into grave question whether digital palpation should ever be considered substantial evidence on review by the federal circuit courts of appeals.

¹⁹⁰ See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-341, 106 Stat. 873, 882 (1992). The relevant portions are as follows:

Provided further, That none of these funds shall be used to pay the salary of any . . . [USDA] veterinarian or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

Id. Further, congressional reports state:

Amendment No. 48: Deletes Senate language providing that APHIS veterinarians may not use digital palpation as the only diagnostic test used to determine horse soring. The House bill contained no similar provision. Funding provided in the bill to carry out activities of the Horse Protection Act includes an increase of \$120,000. The conferees agree that these additional funds should be used to purchase thermograph machines and to provide additional training and evaluation. *Neither these machines nor digital palpation should be used as the sole means to determine whether soring has occurred*, but they should be used as additional diagnostic tools.

H.R. REP. No. 212, at 22-23 (1993).

¹⁹¹ See *Young v. USDA*, 53 F.3d 728, 732 (5th Cir. 1995).

¹⁹² See, e.g., *Bobo v. USDA*, 52 F.3d 1406, 1411-13 (6th Cir. 1995) (holding that the provisos in the appropriation bills did not detract from the sufficiency of digital palpation as a valid indicator of soreness); *In re Bennett*, 55 Agric. Dec. 176, 237-243 (1996) (same).

B. The Failure of Substantial Evidence under Substantial Evidence Review

The Horse Protection Act dictates that “[t]he findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.”¹⁹³ The controlling standard for substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁹⁴ The decisions of the USDA that digital palpation alone is sufficient to support a finding of soreness under the Horse Protection Act should fail the substantial evidence test before the federal circuit courts of appeals. While litigants in numerous Horse Protection Act cases have proffered expert testimony refuting the validity of digital palpation as the sole method of determining soreness, the vast majority of the federal circuit courts have not accepted the validity of this evidence.¹⁹⁵ Only the Fifth Circuit in *Young* has found that the substantial evidence standard was not met by reports of digital palpation.¹⁹⁶

The most prominent and widely used scientific evidence against the reliability of digital palpation is the Atlanta Protocol, which was created in 1991 as a “Recommended Protocol for DQP Examinations.”¹⁹⁷ Ultimately,

¹⁹³ 15 U.S.C. §1825(b)(2) (2000).

¹⁹⁴ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

¹⁹⁵ See *supra* note 94 and accompanying text.

¹⁹⁶ See *Young*, 53 F.3d at 728, discussed *supra* notes 128-54 and accompanying text.

¹⁹⁷ *In re Bennett*, 55 Agric. Dec. 176, 182 (1996). The Atlanta Protocol is not available in published form. However, much of the testimony of Dr. Raymond C. Miller, a veterinarian who helped author the Atlanta Protocol, is reproduced in *Bennett*. It supplies a relevant overview of the protocol’s pertinent points:

Q. There has been within the Walking Horse area of observing horses a document that’s been called the Atlanta Protocol, has it not?

A. Yes.

Q. What is that?

A. It was a group of veterinarians made up of myself [Dr. Raymond C. Miller], Dr. Joe Tom Vaughan, who is the Dean of the Veterinary School at Auburn University, Dr. Ram Purohit, who is a Staff Veterinarian at Auburn University, who did the research to write—to help train the VMO’s in the early ‘70’s for the purpose of training VMO’s, sending them out to detect sore horses, Dr. John Ragan, State Veterinarian for the State of Tennessee, Dr. Dewitt Owen, Keeneland yearling sale veterinarian, private practitioner in Franklin, Tennessee and past president of the Equine Practitioners Association, and Dr. D. L. Proctor, past president of the Equine Practitioners Association and world renown recognized equine

the group of veterinarians determined and agreed upon several specific

expert, and Dr. Joan Arnoldi, the Deputy Director of APHIS in charge of the Horse Protection Act at that time.

We met in Atlanta to try to come up with a protocol that could be followed to systematically detect the sore horse, primarily for instruction of DQP's in the Walking Horse Commission.

[Q.] And as part of that protocol, that is a systematic way to determine whether or not a horse is sore, did you conclude that digital palpation, in and of itself, by way of agreement of all the veterinarians, was a legitimate basis for determining whether or not a horse is sore.

A. We concluded that it, in and of itself, was not. Each individual veterinarian agreed, as did all of the past literature written, agreed that it was not the sole basis for diagnosing a sore horse.

Q. Is movement important to determine whether or not a horse is sore?

A. Movement is very important.

Q. If a horse can turn freely in both directions, what does that indicate?

A. It indicates to me if he stops, leads, turns freely, starts normally, that he can't be—in my opinion he can't be in violation of the Horse Protection Act based on, not only my opinion, what the literature says, what the USDA's research indicates, that there has to be some loss of function in movement. And if you don't have that, then he can't be in violation, he can't be sore as Deconlers defined the sore horse or as Nelson defined the sore horse, either, and that's the only two definitions written that I know of of [sic] a sore horse. But they both demand that he have some loss of function.

Q. Who is Nelson?

A. Nelson is a [sic] Iowa researchist employed by USDA that did a lot of the sore horse research in the '70's, and the basis for a lot of, if not most of your pain detection techniques.

...

Q. And you did you—you watched this horse move before you palpated it?

A. I watched him before and afterwards.

Q. Did you make a determination before you palpated the horse that it was not sore?

A. I made a determination that he had no ascertainable gait dysfunction.

Q. And does a horse—and I think you testified the horse needs to have a gait deficit to be sore?

A. The law dictates that.

Q. Okay. And that's your understanding too—

A. That's—

Q.—of the law?

A. That's my understanding, all of the literature's understanding, and the experts that met in Atlanta's understanding.

...

aspects of detection of soreness under the Horse Protection Act. First, the Atlanta Protocol determined that digital palpation, in and of itself, was not a conclusive indicator of soreness in a horse.¹⁹⁸ Second, it determined that “gait dysfunction,” or visible pain and retardation of movement while walking, is required to show that a horse was sore under the Horse Protection Act.¹⁹⁹ The offering of the Atlanta Protocol into evidence, often along with the testimony of various veterinarians involved in the creation of the protocol, is precisely the type of evidence that should be considered on appeal in the calculus of substantial evidence.

In considering the substantial evidence review of Horse Protection Act decisions based on digital palpation, the current trend of courts and commentators leads to analysis of the famous Supreme Court doctrine established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁰⁰ Although *Daubert*, at its conception, applied to admissibility of scientific evidence under Rule 702 of the Federal Rules of Evidence,²⁰¹ judges and scholars have recently argued that the *Daubert* doctrine should extend to the weight and reliability of all evidentiary considerations, specifically including the review of administrative agency determinations for substantial evidence.²⁰²

Q. Oh, okay. Does the Act—the Act doesn’t specify any level of pain, does it?

A. Yes and no. What the Act specifies is there has to be enough pain to indicate that there is dysfunction in motion. And Nelson, the USDA researchist, when he was defining a sore horse, used the term severe pain even on standing. So the two definitions of a sore horse that I know about, both of them address that there will be dysfunction in movement.

Id. at 182-84.

¹⁹⁸ *Id.* at 183.

¹⁹⁹ *Id.* at 183-84.

²⁰⁰ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

²⁰¹ *See generally id.*

²⁰² *See Donahue v. Barnhart*, No. 01-2044, 2002 U.S. App. LEXIS 978, at *9-10 (7th Cir. Jan. 25, 2002) (holding that “the idea that experts should use reliable methods does not depend on Rule 702 alone, and it plays a role in the administrative process because every decision must be supported by substantial evidence.”); *Elliott v. Commodity Futures Trading Comm’n*, 202 F.3d 926, 934 (7th Cir.), *cert. denied*, 531 U.S. 1010 (2000) (noting that “*Daubert* and *Kumho* were decided in the context of admissibility, but the principle for which they stand—that all expert testimony must be reliable—should apply with equal force to the weight a factfinder accords expert testimony” and that, in administrative proceedings, “a factfinder should employ the reliability benchmark in situations . . . in which unreliable expert testimony somehow makes it in front of the factfinder, and assign the unreliable testimony little if any weight”); *Libas, Ltd. v. United States*, 193 F.3d

In *Libas, Ltd. v. United States*,²⁰³ the Court of Appeals for the Federal Circuit gave the following rationale for applying the *Daubert* doctrine to the review of a proceeding not governed by the Federal Rules of Evidence:

Daubert and *Kumho* were decided in the context of determining standards for the admissibility of expert testimony under the Federal Rules of Evidence, which are not at issue here. We agree with *Libas*, however, that the proposition for which they stand, that expert testimony must be reliable, goes to the weight that evidence is to be accorded as well as to its admissibility. Neither the plain language of the relevant Supreme Court opinions nor the underlying principles requiring reliability for expert testimony are narrowly confined in application to questions of admissibility. The difference between weight and admissibility, moreover, is in many instances a close question.²⁰⁴

This trend of extending the *Daubert* analysis is soundly based on the judicial policy of subjecting scientific expert testimony to the highest scrutiny in order to sustain the efficient, orderly, and just determination of facts in the face of complex scientific issues. The Federal Rules of Evidence do not apply to administrative proceedings under the Horse Protection Act.²⁰⁵ However, invocation of the policy and law of *Daubert* to the review of Horse Protection Act proceedings provides courts an

1361, 1366 (Fed. Cir. 1999) (stating that the *Daubert* reliability analysis should apply to considerations of the weight given to the evidence in addition to consideration of its admissibility); Paul S. Miller & Bert W. Rein, "Gatekeeping" Agency Reliance on Scientific and Technical Materials After *Daubert*: Ensuring Relevance and Reliability in the Administrative Process, 17 *TOURO L. REV.* 297, 315 (2000) (arguing that *Daubert* and its progeny fit readily into a substantial evidence argument, especially when one considers that "[i]f an expert opinion is not shown to be both relevant and reliable, then it has not been shown to be more than speculation" and that courts have held decisions based on speculation are not made with substantial evidence); D. Hiep Truong, *Daubert and Judicial Review: How Does An Administrative Agency Distinguish Valid Science from Junk Science?*, 33 *AKRON L. REV.* 365, 389 (2000) (arguing, in the context of environmental risk regulation, that "reviewing courts should subject the agency decision maker to the exact same standards a federal litigant is subjected to when he or she proposes to admit scientific testimony: namely, the *Daubert* standards.").

²⁰³ *Libas*, 193 F.3d at 1361.

²⁰⁴ *Id.* at 1366 (citation omitted).

²⁰⁵ See 9 C.F.R. § 12.1 (2001) (stating that the administrative adjudicative proceedings under the Horse Protection Act follow the Uniform Rules of Practice for the Department of Agriculture).

analytical framework with which to determine whether the decision below was supported by substantial evidence.²⁰⁶

In *Daubert*, the Supreme Court eliminated the use of the “general acceptance” standard as the sole consideration for admissibility of scientific evidence.²⁰⁷ Instead, the Court held that the admissibility of expert testimony under the Federal Rules of Evidence should be subjected to broader scrutiny and weighed against additional factors, including the reliability of the scientific evidence, the subjecting of the scientific methods to peer review, the probative value of such scientific information, and the methodology of determining the accuracy of the scientific approach proffered by expert witnesses.²⁰⁸ This standard has been extended to other types of expert testimony, such as those involving “technical” or “other specialized knowledge.”²⁰⁹

In Horse Protection Act cases, when one considers the VMO testimony of digital palpation reactions (which is scientific insofar as the VMOs are trained and certified veterinarians of the USDA) against conflicting scientific testimony such as the Atlanta Protocol,²¹⁰ the *Daubert* analysis casts a dark shadow over the evidentiary weight and probative value of digital palpation reports. As to *Daubert*’s reliability standard, digital palpation proffered as evidence by the VMOs is questionable on its face, since it is unclear how much pressure must be applied and whether a pain response is truly caused by prohibited soring.²¹¹ As to the second factor, digital palpation has repeatedly failed peer review. Only the USDA and its veterinarians have embraced the notion that digital palpation alone is scientifically indicative of soreness in horses.²¹² Other scientific research, reflected in the Atlanta Protocol, evidences a need for determinations

²⁰⁶ Although the Fifth Circuit found that reports of digital palpation alone were not substantial evidence on review, the court did not apply the *Daubert* doctrine to its analysis. See *Young v. USDA*, 53 F.3d 728 (5th Cir. 1995), discussed *supra* notes 128-54 and accompanying text. However, *Young* was decided in 1995, while *Daubert* was still in its infancy and many years passed before any trend suggested application of *Daubert* and its progeny to the calculus of substantial evidence review. See discussion *supra* note 202.

²⁰⁷ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U. S. 579, 585-89 (1993).

²⁰⁸ *Id.* at 594-95.

²⁰⁹ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

²¹⁰ See discussion *supra* notes 197-99 and accompanying text.

²¹¹ See discussion *supra* notes 187-92 and accompanying text.

²¹² See *Young v. USDA*, 53 F.3d 728, 732 (5th Cir. 1995), discussed *supra* notes 128-54 and accompanying text.

beyond reaction to digital palpation.²¹³ Third, the probative value of digital palpation reactions, given the unreliability and criticism of the technique, becomes extremely limited considering the vast expanse of error possible in the process.²¹⁴ Finally, the VMOs offer no methodology for determining the scientific value of digital palpation. The only rationales cited by VMOs in case after case for their reliance on digital palpation are the USDA's use of the test since the passage of the Horse Protection Act and the VMOs' own opinions.²¹⁵ Never do the VMOs proffer scientific methodology for the determination of the test.²¹⁶ Never do the VMOs explain the scientific reasons for certainty of soreness upon reaction to digital palpation.²¹⁷

Given the application of testimony regarding digital palpation to the *Daubert* analysis, the unreliability of digital palpation becomes apparent. For the most part, the circuit courts of appeals, when considering the substantiality of the evidence, err toward the reliability of digital palpation.²¹⁸ The tenor of the rationale for this position is based primarily on a general acceptance standard of reviewing the scientific expert testimony and policy of the USDA, which the sole reliance upon is expressly discarded by the *Daubert* doctrine in favor of a multi-factor analysis.²¹⁹ When the weight and reliability of digital palpation evidence is properly reduced under the *Daubert* standards, then the substantial evidence standard fails as digital palpation alone is not adequate to support the presumption of soreness,²²⁰ especially when considered against the countervailing arguments and evidence.²²¹

CONCLUSION AND SOLUTION

Based upon the above considerations, one truth is clear above all: There is grave need for reform and unification in the USDA's regulatory enforcement of the Horse Protection Act. Effective reform could be based

²¹³ See discussion *supra* notes 197-99 and accompanying text.

²¹⁴ See discussion *supra* notes 187-92 and accompanying text.

²¹⁵ See, e.g., *In re Bennett*, 55 Agric. Dec. 176 (1996), discussed *supra* notes 162-72 and accompanying text.

²¹⁶ See *In re Bennett*, 55 Agric. Dec. at 176.

²¹⁷ See *id.*

²¹⁸ See discussion *supra* note 94 and accompanying text.

²¹⁹ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993), discussed *supra* notes 200-08.

²²⁰ See *supra* notes 193-96 and accompanying text.

²²¹ See discussion *supra* notes 197-99 and accompanying text.

on any number of alternatives, but this Note presents a solution that would remedy the current confusion and inequity in enforcement of the Horse Protection Act.

First, the USDA must thoroughly reevaluate the examination techniques for soreness under the Horse Protection Act.²²² Exhaustive and authoritative scientific research must be conducted to determine the most efficient, quickest, and fairest method of recognizing soreness. This Note does not call for the displacement of digital palpation entirely, for the procedure does have the merits of simplicity and efficiency. However, digital palpation *cannot* stand as the sole test of soreness, lest the inequity and uncertainty continue.²²³ With respect to digital palpation, the USDA must promulgate more precise regulations describing and controlling the procedure.²²⁴ But further, the USDA must establish additional soreness detection techniques that are mandatory to the finding of soreness, such as impaired movement or the like.²²⁵ It would seem that the USDA will not accomplish this on its own. Therefore, Congress or the Supreme Court must force recognition of the need for change. Simply put, if digital palpation is to continue to be a test of soreness, the principles of equity, justice, and common sense demand that it not be the *only* test.

As one possible catalyst to USDA reform, the Supreme Court of the United States needs to resolve the conflict between the circuits on the reliability and the probative value of digital palpation.²²⁶ The uncertainty of the current scheme of examination for soreness is suffocating the industry of the Tennessee Walking Horse. Further, an owner and trainer domiciled in the Fifth Circuit, regardless of where the examination takes place, have at their disposal the likely reversal of any decision against them based solely on digital palpation under the Horse Protection Act.²²⁷ Needless to say, those domiciled in the other circuits are not afforded this protection.²²⁸ Thus, the Supreme Court must resolve the issue by finding that digital palpation alone does not constitute substantial evidence of soreness under the Act. Such a finding would force the USDA to reform its procedures for detecting soreness.

²²² See discussion *supra* notes 173-92 and accompanying text.

²²³ See discussion *supra* note 3 and accompanying text.

²²⁴ See discussion *supra* notes 173-92 and accompanying text.

²²⁵ See discussion *supra* notes 197-99 and accompanying text.

²²⁶ See discussion *supra* note 79 and notes 89-172 and accompanying text.

²²⁷ See *Young v. USDA*, 53 F.3d 728 (5th Cir. 1995), discussed *supra* notes 128-54 and accompanying text.

²²⁸ See discussion *supra* note 94 and accompanying text.

As an alternative catalyst, Congress should amend the Horse Protection Act to dictate the need for the above reform to the USDA. Provisos in appropriations bills are not sufficient,²²⁹ but a limited number of clarifying provisions in the Act would guide the USDA's reform.

This Note does *not* advocate the invalidation of the Horse Protection Act, or the relaxation of the federal government's regulation of the industry to ensure the safety, comfort, and well being of each and every Tennessee Walking Horse. No animal deserves cruel or inhumane treatment. No animal deserves to exist in discomfort for the sake of enhanced performance. However, the practiced enforcement of the Horse Protection Act must be reevaluated to ensure that the above goals of horse protection are met with equity to the trainers and owners who are also interested in protecting the comfort and welfare of the horses they love.

²²⁹ See discussion *supra* notes 190-92 and accompanying text.