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What's Really at Steak: How Conflicts of Interest Within the FDA and USDA Fail to Protect Consumers

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What's Really at *Steak*: How Conflicts of Interest Within the FDA and USDA Fail to Protect Consumers

CHRISTINE BEADERSTADT*

In 2015, Chipotle shut down all of its restaurants nationwide in response to the ongoing food poisoning outbreaks. The deadly pathogen e. coli sickened people from the East coast to the West, and cost taxpayers hundreds of thousands of dollars. This Comment explores how these pathogenic outbreaks continue to happen, despite having federal agencies that are tasked with outbreak prevention.

The increase of pathogenic outbreaks like e. coli and salmonella correlates to looser enforcement of federal regulations by executive agencies like the FDA and USDA. These agencies are often staffed by former lobbyists of the meat and poultry industries, and some who are even particularly high-level appointees who had contributed heavily to political campaigns of members of Congress. With former lobbyists within the ranks of government officials, the FDA and USDA have failed to uphold what they are mandated to do: protect the American people from harmful investigation of bacteria in our food.

This Comment calls for a shut down of the “revolving door” by proposing stricter enforcement of restrictions on former executive branch employees from lobbying, as well as establishing limitations on meat industry lobbyists from serving in executive food protection agencies.

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Picture this: it is lunchtime and you are hungry. You walk into a restaurant, order your hamburger and fries, eat, then go home. A few days later, you get flu-like symptoms.¹ You do not get better, in fact, you get worse. Eventually you are hospitalized, at first for just a few days, then for weeks. You may recover, or you may not.²

This illness struck six people in September 2015 at a burger restaurant in Vermont.³ The restaurant was shut down, and *e. coli* O157:H7⁴ was

1. *Symptoms of E. Coli Infection*, ABOUT E. COLI, http://www.about-ecoli.com/ecoli_symptoms_risks#.Vwpj1sfZqf4 (last visited Mar. 10, 2016). Marler and his firm specialize in food safety litigation; see Wil S. Hylton, *A Bug In the System: Why Last Night’s Chicken Made You Sick*, THE NEW YORKER (Feb. 2, 2015), <http://www.newyorker.com/magazine/2015/02/02/bug-system>.

2. *Symptoms of E. Coli Infection*, *supra* note 1.

3. Lydia Zuraw, *Update: Six Vermont E. Coli Cases Being Linked to Undercooked Ground Beef*, FOOD SAFETY NEWS (Sept. 30, 2015),

found in the ground beef being prepared and served.⁵ Another outbreak occurred two months later, across the country in Washington and Oregon, at a Chipotle Mexican Grill where fifty people were affected.⁶ In 2015, a total of forty-three Chipotle restaurants took precautionary measures and voluntarily shut down due to the threat of food contamination.⁷

Unfortunately, this was not the first time a food borne illness in meat led to hospitalizations and fatalities.⁸ In December 1992, a meat contamination at a Jack-in-the-Box restaurant in Washington State killed four children and sickened 600 people.⁹ Meat contamination happened again, in 2006, at a dinner gathering in Minnesota.¹⁰ Two years later, in Virginia, twenty-five Boy Scouts fell ill while at camp.¹¹

In September 2015, the Food Safety and Inspection Service (FSIS), a division of the United States Department of Agriculture (USDA), issued an

<http://www.foodsafetynews.com/2015/09/5-people-sickened-with-e-coli-in-vermont/#.VhrP6LzZqf4>.

4. [Hereinafter *e.coli*]. This paper does not distinguish between varying strains of *e.coli*, for example *e.coli O157:H7* or *e.coli O26*.

5. Zuraw, *supra* note 3. *E. coli* and *salmonella* contamination is not specific to just meat, and contamination has been found in fruits and vegetables. However, the bacteria contamination comes from animals and their waste, and later spreads to produce from unsanitary supply chain transportation or in grocery stores during the stocking process.

6. *Multistate Outbreak of Shiga toxin-producing Escherichia coli O26 Infections Linked to Chipotle Mexican Grill Restaurants*, CTR. FOR DISEASE CONTROL AND PREVENTION (Dec. 4, 2015, 11:30 AM), <http://www.cdc.gov/ecoli/2015/o26-11-15/index.html>.

7. *Food Safety Update and FAQ, CHIPOTLE MEXICAN GRILL* (Dec. 21, 2015, 3:30 PM), <https://www.chipotle.com/update>. In February 2016, Chipotle instituted a nationwide shut down for a single day for a “collective check-in.” See, e.g., Jacob Brogan, *Every Chipotle Location Is Shutting Down for One Day*, SLATE.COM (Jan. 15, 2016, 11:13 AM), http://www.slate.com/blogs/moneybox/2016/01/15/chipotle_closing_all_restaurants_in_feb_after_health_crisis.html.

8. Maureen O’Hagan, *What You Eat Can Kill You If You Don’t Watch Out*, THE SEATTLE TIMES (Oct. 29, 2011, 10:00 PM), <http://www.seattletimes.com/pacific-nw-magazine/what-you-eat-can-kill-you-if-you-dont-watch-out/>. Numbers of exactly how many people were sickened varies between 500-600; see also Marler Clark Law Firm, *Jack in the Box E. coli Outbreak Lawsuits - Western States (1993)*, MARLER CLARK.COM, http://www.marlerclark.com/case_news/view/jack-in-the-box-e-coli-outbreak-western-states (last visited Apr. 10, 2016), which states that 602 people were sickened.

9. *Id.* As Representative Hall of Ohio implored, “This is not the time . . . to be weakening food inspection, especially inspection of safe meat.” 141 CONG. REC. H7017 (daily ed. July 17, 1995) (statement of Rep. Hall).

10. Marler Clark Law Firm, *Nebraska Beef E. coli O157:H7 Outbreak 2006*, ABOUT E. COLI, http://www.about-ecoli.com/ecoli_outbreaks/view/nebraska-beef-e-coli-o157h7-outbreak/#.VhrXj7zZqf4 [hereinafter *Nebraska Beef*] (last visited Mar. 10, 2016).

11. Marler Clark Law Firm, *S & S Foods - Boy Scout Camp E. coli Outbreak*, ABOUT E. COLI, http://www.about-ecoli.com/ecoli_outbreaks/view/s-s-foods-goshen-boy-scout-camp-e-coli-outbreak/#.VhrPE7zZqf4 (last visited Mar. 10, 2016).

alert regarding packaged chicken linked with *salmonella*.¹² The USDA issued a study that estimated 24% of all chicken parts had *salmonella*.¹³

Government regulatory agencies like FSIS and the USDA are established to protect the American people from food borne illnesses and contaminations, but current measures are ineffective as shown by continual public illness outbreaks.¹⁴ After peeling back the curtain behind these two agencies, namely the Food and Drug Administration (FDA) and the USDA, I found the agencies to be staffed with individuals who have a conflict of interest.¹⁵ Specifically, the very individuals in governmental agencies who are tasked with meat inspections have close and significant ties to meat lobbyists and the meat industry. These ties are contrary to public health safety and concerns.¹⁶

It is no secret that conflicts of interest are riddled throughout the government, including the FDA and USDA.¹⁷ There are significant overlaps and close contacts between food lobbyists, those in support of meat processing industries, and elected or appointed officials in government positions in charge of oversight and regulation.¹⁸ These conflicts of interest are impacting the health and well-being of the American people, sometimes fatally.¹⁹ As Michele Simon states in her book, *Appetite for Profit*, which

12. Gabrielle N. Johnston, *FSIS Issues Public Health Alert For Stuffed Chicken Products Due To Possible Salmonella Contamination*, FOOD SAFETY AND INSPECTION SERV., U.S. DEP'T OF AGRIC. (Sept. 17, 2015), <http://www.fsis.usda.gov/wps/portal/fsis/newsroom/news-releases-statements-transcripts/news-release-archives-by-year/archive/2015/pha-091715>.

13. Hylton, *supra* note 1.

14. See, e.g., Zuraw, *supra* note 3.

15. See, e.g., *Revolving Door: Search Results, Agency search: Department of Agriculture*, OPENSECRETS.ORG, https://www.opensecrets.org/revolving/search_result.php?agency=Dept+of+Agriculture&id=EAAGR (last visited Mar. 17, 2016).

16. *Id.*

17. See, e.g., *Revolving Door: Search Results, Agency search: Department of Agriculture*, *supra* note 18.

18. *Id.* See also Lloyd Hitoshi Maye, *What Is This "Lobbying" That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 520 (2008), in which Maye argues that the focus on government actors may also be explained by the fact that government actors are usually not institutionally constrained from influencing their subset of government actions. For example, members of Congress, if they choose, can have significant influence on executive branch agency actions. There is still an unresolved scholarly debate over whether such influence occurs only rarely – in response to clear agency overreaching – or is a constant and significant part of each agency's environment.

Id.

19. O'Hagan, *supra* note 8; *Nebraska Beef*, *supra* note 10.

analyzes the connection between “Big Food”²⁰ industry and government regulation of food, “[a] food lobbyist’s main goal is to provide any distraction, misdirection, or obfuscation possible to avoid talking about corporate accountability.”²¹

With this in mind, how is it permitted that former government officials once charged with implementing food safety regulations become employees and advocates of meat companies that support looser food safety regulations and policies? Because the “revolving door” between government and private employment is not uncommon, the interests of the individual employee and the meat lobbying association are now economically tied and the safety role of the FDA and USDA is weakened. This Comment examines two main ideas: first, the relationship between former employees within the meat industry who now serve on government oversight agencies such as the FDA and USDA, and the reverse of this, former FDA and USDA employees and their subsequent ties to big meat lobbying organizations. These conflicts of interest arise when individuals work for a lobbying firm, and then later serve on the FDA or USDA. The mission of agencies like the FDA or USDA is often in opposition to the interests of that lobbying firm in which the employee had previously worked. These conflicts of interest potentially weaken the safety standards established to protect the American people from contamination as the employee may later return to the meat industry following his appointment or governmental employment.

Second, this Comment will discuss several laws that try to prohibit conflicts of interest, and legislative attempts to close the revolving door between agency officials and employees of the meat industry. Later, this Comment explores how legislative enactments are, in actuality, ineffectual and allow the loopholes in the conflict of interest laws to perpetuate. The gray areas surrounding conflicts of interest permit former government employees to take advantage of loopholes and semantics.²² When big meat lobbying firms have former FDA and USDA employees on their side, or employees of these lobbying firms are appointed to positions within the FDA and USDA, they have an advantage in lobbying Congress to implement laws that are favorable to the meat industry to which they are so closely connected.²³ With industry interests, rather than that of the consumer, in

20. “Big Food” generally refers to large, national or multi-national fast food chains like McDonald’s, Wendy’s, Chick-fil-a, as well as the companies that supply them like Kraft and Coca-Cola. See Jeremy Rogers, Note, *Living On The Fat Of The Land: How To Have Your Burger And Sue It Too*, 81 WASH. U. L.Q. 859, n.17 (2003).

21. MICHELE SIMON, *APPETITE FOR PROFIT: HOW THE FOOD INDUSTRY UNDERMINES OUR HEALTH AND HOW TO FIGHT BACK* xvi (2006).

22. See Close the Revolving Door Act of 2015, S. 1959, 114th Cong. (2015).

23. See, e.g., *Revolving Door: Search Results, Agency search: Department of Agriculture*, *supra* note 18.

mind, the effect of the revolving door has led to increased meat contamination throughout the United States, resulting in severe public sickness and death.²⁴

I. MEAT CONTAMINATION AND ITS EFFECTS

Meat contamination is a serious and painful public dilemma. *E. coli* is particularly dangerous because it resists high temperatures—it can grow in conditions up to 111 degrees Fahrenheit—and can be unaffected by antibiotics.²⁵ Moreover, *e. coli* is often challenging to medically treat because it contains a toxic gene that destroys the red blood cells of the inhabitant.²⁶ Alex Donley, a kindergartener exposed to *e. coli*, suffered horribly before he died: the bacteria liquefied parts of his brain and shut down nearly all of his organs.²⁷

Shockingly, FDA inspections have drastically decreased over the last few decades.²⁸ This has resulted in an increase in deadly diseases like *e. coli* and *salmonella*.²⁹ In 1972, the FDA conducted about 50,000 food safety inspections.³⁰ Yet, in 2006, the FDA conducted only 9,164 safety inspections, less than 20% of the number of inspections in 1972.³¹ With the average American eating over 200 pounds of meat products each year, food safety inspections are essential in protecting the health and wellness of Americans.³² With such heavy consumption of meat, pathogenic inspections should increase, not decrease.³³

The effects in the decline of inspections are disturbing, resulting in significantly more serious outbreaks of *e. coli* and *salmonella* infections.³⁴

24. See, e.g., O'Hagan, *supra* note 8. Additionally, it is difficult to ascertain a specific percentage of increased outbreaks from the Center for Disease Control's 1999 figures to its 2011 estimate, as the methods in which the CDC obtained statistical data in 1999 were different from that in 2011. *Data and Methodological Differences, 2011 and 1999*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/foodborneburden/differences-in-estimates.html> (last updated Jan. 8, 2014).

25. MARION NESTLE, *SAFE FOOD: THE POLITICS OF FOOD SAFETY*, 41 (2nd ed., 2010).

26. *Id.*

27. Bob Herbert, *In America; Let Them Eat Poison*, N.Y. TIMES (July 3, 1995), <http://www.nytimes.com/1995/07/03/opinion/in-america-let-them-eat-poison.html>.

28. FOOD, INC. (Magnolia Pictures 2009).

29. *Id.*

30. *Id.*

31. *Id.*

32. Mark Bittman, *Rethinking the Meat Guzzler*, N.Y. TIMES (Jan. 27, 2008), http://www.nytimes.com/2008/01/27/weekinreview/27bittman.html?_r=0.

33. FOOD, INC., *supra* note 28.

34. The Centers for Disease Control and Prevention conducts estimates and trends of food borne illnesses and outbreaks every five to ten years. The data and methodology

In 2007 alone, 73,000 people suffered from *e. coli* illnesses.³⁵ In 1995, when little Alex Donley died, that number was 20,000.³⁶ The Center for Disease Control and Prevention estimated *salmonella* caused over 1 million illnesses and nearly 400 deaths in 2011.³⁷ The FDA estimates that food contamination overall affects 48 million people annually, and results in 3,000 deaths.³⁸

In 1995, in response to the Jack-in-the-Box *e. coli* outbreak, at a congressional hearing regarding food safety, Representative Patrick Kennedy of Massachusetts aptly noted that the American people should not have to question the safety of their food:

When contaminated food inadvertently reaches the public, these agencies have the power they need to protect the public health. The basic food safety standards were enacted into law many years ago. Today, they are relied on and taken for granted by the American public. That is absolutely how it should be. No one has to give a second thought to the safety of the food that they eat today—and they should not have to start to worry about it tomorrow . . . I wonder where the call is across the country for people that say our food is too safe?³⁹

Up until the implementation of the more reliable Hazard Analysis and Critical Control Point (HACCP) standards in 1998, meat products, prior to reaching the consumer, underwent what was unofficially called the “poke, scratch, and sniff” inspection test.⁴⁰ This was the process that remained

analyzed from the 1999 sample is different from the 2011 sample, making direct trend analysis over the years challenging. For more information, see *Data and Methodological Differences, 2011 and 1999*, *supra* note 24 and *Trends in Foodborne Illness in the United States*, CTR. FOR DISEASE CONTROL AND PREVENTION (May 8, 2014), <http://www.cdc.gov/foodborneburden/trends-in-foodborne-illness.html>.

35. *Questions & Answers: Sickness caused by E. coli*, CTR. FOR DISEASE CONTROL AND PREVENTION (Dec. 10, 2006), http://www.cdc.gov/ecoli/qa_ecoli_sickness.htm.

36. Herbert, *supra* note 27.

37. *CDC 2011 Estimates: Findings*, CTR. FOR DISEASE CONTROL AND PREVENTION (Jan. 8, 2014), <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html>.

38. William Tootle, *What's New In The FDA's 2015 Budget?*, FDA VOICE (Mar. 7, 2014), <http://blogs.fda.gov/fdavoices/index.php/2014/03/whats-new-in-the-fdas-2015-budget/>; see Hylton, *supra* note 1, in which scientists estimate that for every one reported case, twenty-eight remain unreported.

39. 141 CONG. REC. S10269 (daily ed. July 19, 1995) (statement of Rep. Kennedy).

40. Stevenson Swanson, *Scratch, Sniff No Longer Rule For Safe Food*, CHI. TRIB. (Dec. 1, 1998), http://articles.chicagotribune.com/1998-12-01/news/9812010094_1_spending-on-food-safety-meat-and-poultry-poultry-plants.

unchanged since the turn of the 20th century.⁴¹ After the *e. coli* and *salmonella* outbreaks in the early 1990s, HACCP was finally implemented, and a more scientific approach was taken to detect meat contamination.⁴² But HACCP does not prevent all contaminated meat from reaching the consumer, as the prevalence of outbreaks in recent years clearly demonstrates.⁴³ Moreover, federal regulations permit certain levels of micro-bacteria like *salmonella* to be present in food, and eventually passed on to the consumer, without issuing a warning or recommending a recall.⁴⁴

The price the American people are paying is not just with their health. Economic Research Service, an agency within the USDA, reported that the cost to society, just in regards to the pathogen *e. coli*, was over \$271 million in 2013, and estimates that it costs an additional \$200,000 to investigate each outbreak.⁴⁵ These figures do not include the cost of other pathogen outbreaks such as *salmonella*.⁴⁶ That is a tremendous amount of money gushing out of the American economy and taxpayer supported government, especially when agencies like the FDA and USDA are currently charged with prevention of pathogen outbreaks.

In 1998, the USDA implemented microbial testing for *salmonella* and *e. coli* 0157h7 to better determine if a shut down of the meat processing plant should be recommended if that plant repeatedly failed to meet acceptable test results.⁴⁷ However, despite this governmental public safety action, the FDA and USDA do not have the authority to issue a mandatory recall of food once it is in the marketplace, or to shutdown a meat processing plant.⁴⁸ After being sued by the meat and poultry associations,⁴⁹ the

41. *Id.*

42. *Id.*

43. See, e.g., *Multistate Outbreak of Shiga toxin-producing Escherichia coli O26 Infections Linked to Chipotle Mexican Grill Restaurants*, *supra* note 6.

44. Hylton, *supra* note 1; see also James Andrews, *Salmonella on Chicken: Is Zero Tolerance Feasible?*, FOOD SAFETY NEWS (Feb. 5, 2014), <http://www.foodsafetynews.com/2014/02/is-zero-tolerance-on-salmonella-feasible/#.VoSDPITZqf4>.

45. *Cost of Food Borne Illnesses*, ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC. (Oct. 7, 2014), <http://www.ers.usda.gov/data-products/cost-estimates-of-foodborne-illnesses.aspx#48448>; see also NESTLE, *supra* note 25, at 39.

46. *Id.* These figures only include medical expenses, such as cost of doctor or hospital visits, and do not factor in additional losses incurred from being unable to return to work or tangential costs to the economy.

47. Marion Burros, *New U.S. Standards for Meat Are Snared in a Court Fight*, N.Y. TIMES (Dec. 4, 1999), <http://www.nytimes.com/1999/12/04/us/new-us-standards-for-meat-are-snared-in-a-court-fight.html>. The microbial testing referred here is HACCP. Swanson, *supra* note 40.

48. The agencies can recall other non-consumer products, and the only item the FDA has the authority to recall in regards to a food product is baby formula. For more information on the debate around mandatory recall, see Michael T. Roberts, *Mandatory Recall*

USDA cannot close the plant.⁵⁰ Whether or not a food product is recalled is entirely voluntary by the private food processing company, despite the safety or quality of the product.⁵¹

Instead of stricter inspections and compulsory authority to recall contaminated and diseased food, why have the food safety regulations loosened and governmental oversight weakened? The decrease of inspections and subsequent increase in contaminated meat over the last decade is a direct result of the conflict of interests between meat lobbyists and the very agencies created to protect the American people from diseased meat.

Meat safety has become a polarizing, political issue with public consumers on one end and the meat industry on the other.⁵² The purpose of prohibiting conflicts of interest is to ensure that government agencies, like the FDA and USDA, are acting with the best interest of the public in mind, rather than fulfilling private industry agendas.

What happens when these organizations have strong ties to meat lobbyists who push for regulations that favor the meat industry over the consumer?⁵³ Conflicts of interest create a potential inability for a person to remain impartial when he or she has considerable ties to an industry that has served him or her professionally.⁵⁴

Authority: A Sensible and Minimalist Approach to Improving Food Safety, 59 FOOD & DRUG L.J. 563 (2004).

49. See, e.g., *Supreme Beef v. USDA*, 275 F.3d 432 (5th Cir. 2001).

50. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078 (9th Cir. 2005); *Ensuring Meat Safety: The HACCP System*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/meat/evaluating/ensuring.html> (last visited Mar. 21, 2016); Burros, *supra* note 47.

51. *FSIS Food Recalls*, USDA (Oct. 16, 2015), <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/fsis-food-recalls/food-recalls>.

52. See generally Steve Kay, *3 Major Beef Industry Issues – Demand, Quality, Transparency*, BEEF (Jan. 22, 2015), <http://beefmagazine.com/blog/3-major-beef-industry-issues-demand-quality-transparency>.

53. Lobbying, in general, is not a bad thing. Lobbyists oftentimes have useful scientific data that can assist government agencies in crafting reasonable laws and regulations. As Maye points out, the ability to address our government is protected by the First Amendment. I argue, however, that meat industry lobbyists have strong influences over governmental agencies that are self-serving to their particular interests and this is negatively affecting American citizens as a whole. See Maye, *supra* note 18.

54. *Close the Revolving Door Act of 2015*, S. 1959, 114th Cong. (2015).

II. REGULATORY BACKGROUND

Meat, poultry, and seafood products are regulated by two main agencies, the FDA and USDA.⁵⁵ The FSIS, overseen by the USDA, is responsible for ensuring meat and poultry products are safe for public consumption, and inter alia, properly labeled and packaged.⁵⁶

The USDA was established in 1862, and primarily oversees meat and poultry products.⁵⁷ Its importance regarding meat consumption was more widely recognized through Upton Sinclair's fictitious account in *The Jungle*, which aptly reflected the horrors of diseased meat consumption at the turn of the 20th century.⁵⁸ The influence lobbyists have on USDA regulation is long-standing and substantial: "When meat producers complain about policies that appear unfavorable to their interests, government officials listen . . . [M]eat producers make little attempt to hide their lobbying activities, and their motives are transparent and readily documented."⁵⁹ Furthermore, the USDA reports its findings to congressional agricultural committees, which are comprised of members from agriculturally dependent states.⁶⁰ One source even boldly commented, "official recommendations of the USDA are determined by the commercial interests of agribusiness."⁶¹

As a parallel to the USDA, the FDA was created in 1906 to ensure public safety protection for particular items that make their way into the American market.⁶² The FDA oversees regulations in regards to drugs, cer-

55. The division of what agency regulates what type of food is complex and confusing, and riddled with inefficiencies that are not the focus of this Comment. See Hylton, *supra* note 1.

56. *About FSIS*, FOOD SAFETY AND INSPECTION SERV., U.S. DEP'T OF AGRIC. (Nov. 24, 2015), <http://www.fsis.usda.gov/wps/portal/informational/aboutfsis/about-us>.

57. Alexandra Tarrant, *How Far Has Food Safety Come in 150 years?*, USDA BLOG (May 3, 2012, 1:06 PM), <http://blogs.usda.gov/2012/05/03/how-far-has-food-safety-come-in-150-years>.

58. *Id.*; see also Roger Roots, *Other Rising Legal Issues: A Muckraker's Aftermath: The Jungle Of Meat-Packing Regulation After A Century*, 27 WM. MITCHELL L. REV. 2413 (2001).

59. Nestle, *supra* note 25, at 65.

60. *See id.* at 64 ("90% of the members of the Senate agricultural committee came from states in which at least 20% of the entire labor force was employed in food production." Two years later, the Jack in Box outbreak happened).

61. Richard Jacoby & Raquel Baldelomar, *The FDA's Phony Nutrition Science: How Big Food and Agriculture Trumps Real Science—And Why The Government Allows It*, SALON (Apr. 12, 2015, 9:30 AM), http://www.salon.com/2015/04/12/the_fdas_phony_nutrition_science_how_big_food_and_agriculture_trumps_real_science_and_why_the_government_allows_it/.

62. *When and Why Was the FDA Formed?*, FDA (Dec. 3, 2015), <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214403.htm>; MEASURING CONFLICTS OF INTEREST AND EXPERTISE ON FDA ADVISORY COMMITTEES, E. RES. GROUP, INC. (Oct. 26, 2007), <http://www.fda.gov/oc/advisory/ergcoireport.pdf>.

tain eggs, seafood, grains, milk, fruit, and vegetables.⁶³ The FDA is comprised of fifty-one committees made up of scientific experts in the field, who are non-voting representatives, and typically hold appointed positions for four years.⁶⁴ Because committee members are non-voting, they can be exempt from the conflict-of-interest standards, and receive waivers.⁶⁵ The FDA requires disclosures of financial conflicts of interest, but this does not ultimately prevent a person who may benefit financially from serving on the committee.⁶⁶ Essentially, the FDA mandates disclosure of professional conflicts of interest, but does not necessarily bar someone from employment by the FDA or sitting on a committee.

In 2015, the annual operating budget was \$4.5 billion dollars, which reflected an increase of \$143.5 million from the previous year.⁶⁷ This included a \$27.5 million increase specifically for the Food Safety Initiative, which supports “rulemaking and guidance development, industry technical

63. *What Does the FDA Do?*, FDA (Dec. 3, 2015), <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194877.htm>; see Hylton, *supra* note 1, which sums up the complicated structure of how these agencies regulate what particular food:

In theory, the line between these two should be simple: the F.S.I.S. inspects meat and poultry; the F.D.A. covers everything else. In practice, that line is hopelessly blurred. Fish are the province of the F.D.A.—except catfish, which falls under the F.S.I.S. Frozen cheese pizza is regulated by the F.D.A., but frozen pizza with slices of pepperoni is monitored by the F.S.I.S. Bagel dogs are F.D.A.; corn dogs, F.S.I.S. The skin of a link sausage is F.D.A., but the meat inside is F.S.I.S.

Id.

Also, the Government Accounting Office is aware of shortcomings in regards to food safety; in 2014 it released a report arguing for a single food agency to coordinate management and oversight for all thirteen agencies that deal with food safety. See Marion Nestle, *GAO: USDA and FDA Need To Coordinate Food Safety Activities*, FOOD POLITICS BLOG (Dec. 22, 2014), <http://www.foodpolitics.com/2014/12/gao-usda-and-fda-need-to-coordinate-food-safety-activities/>.

64. *Advisory Committee Industry Representatives*, FDA, <http://www.fda.gov/oc/advisory/industry.html> (last visited Apr. 2, 2016).

65. *Id.*; MEASURING CONFLICTS OF INTEREST AND EXPERTISE ON FDA ADVISORY COMMITTEES, *supra* note 62. In 2007, the FDA hired ERG to assess conflicts of interests within the organization. The ERG held that it was possible to find experts within a particular field that did not have a conflict of interest, but this was improbable: “Alternative candidates might exist” and the “ability to create a conflict-free panel is speculative.”

66. MEASURING CONFLICTS OF INTEREST AND EXPERTISE ON FDA ADVISORY COMMITTEES, *supra* note 62, at 1-4. The financial interest, pursuant to 18 U.S.C. § 208(b)(1), must not be so “substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee,” but even this has exceptions. See 18 U.S.C. § 208(b)(2).

67. *Food and Drug Administration FY 2015 Operative Plan Narrative*, FDA, <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/BudgetReports/UCM433147.pdf> (last visited Mar. 21, 2016).

assistance, and increased data gathering and analytical capacity to support risk-based priority setting and resource allocation.”⁶⁸ Other monies contribute to the implementation of the Food Safety Modernization Act (FSMA), which aims to provide “preventive controls for human and animal food, produce safety, and foreign supplier verification.”⁶⁹ To put context to these figures, there has been a steady increase in funding to the FDA. In 2010, the operating budget was \$3.2 billion, which was a 19% increase from 2009, and at the time, the largest amount of money the FDA had ever received.⁷⁰ In 2013, the agency received \$3.9 billion.⁷¹

An increase in budget appropriations specifically for additional consumer protection and safety implementation could be, in part, a reaction to outbreaks over the last several years.

III. WHAT HAPPENS WHEN THERE IS AN OUTBREAK

When a person becomes ill from meat contamination, a shut down of the restaurant where the consumer last ate, or the farm from which the meat originated, is not immediate, and it can take months for consumers to be notified of an outbreak.⁷² Reasonably, it takes time to trace the contaminated meat from the sickened person to the source. “F.S.I.S. typically must find a genetic match between the *salmonella* in a victim’s body and the salmonella in a package of meat that is still in the victim’s possession, with its label still attached.”⁷³ This means that plants are still producing meat that is contaminated, despite people becoming hospitalized, and FSIS is slow to recommend a shut down.⁷⁴ Once an outbreak is identified, FSIS can only issue a recommendation.⁷⁵ The agency can use roundabout pressure tactics

68. *Id.* For a comprehensive overview of the FDA budget, see also *Budget*, FDA (Apr. 7, 2015), <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/BudgetReports/default.htm>.

69. *Food and Drug Administration FY 2015 Operative Plan Narrative*, *supra* note 72.

70. *Summary of the FDA’s FY 2010 Budget*, FDA (May 22, 2009), <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/BudgetReports/ucm153154.htm>.

71. *Food and Drug Administration FY 2014 Operative Plan Narrative*, FDA, <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/Reports/BudgetReports/UCM388299.pdf>.

72. Hylton, *supra* note 1 (“By the time Schiller became infected by salmonella, federal officials had been tracking an especially potent outbreak of the Heidelberg variety for three months—it had sent nearly forty per cent of its victims to the hospital.”).

73. *Id.*

74. *Id.* See also *Timeline for Reporting E. coli 0157 Infection*, CTR. FOR DISEASE CONTROL AND PREVENTION (Dec. 1, 2014), <http://www.cdc.gov/ecoli/reporting-timeline.html>.

75. *FSIS Food Recalls*, *supra* note 51; *NESTLE*, *supra* note 25, at 104.

like posting on their website that a particular farm, packing plant, or restaurant is contaminated as a means to effectuate a voluntary closure.⁷⁶ However, such a tactic is only effective if the public is made aware of the outbreak.

The time-consuming and slow investigations of meat contamination lead to more widespread outbreaks, as showed by the dozens of closures in Chipotle Restaurants across the United States in 2015.⁷⁷ The executive branch must be granted stronger enforcement powers and increased staff to investigate and prosecute violations of the laws and regulations. While it is important to make sure that the source of the contamination is correctly linked to the particular meat plant or restaurant, the system for sourcing contaminated meat and closures needs to be reevaluated to better protect the public.

Additionally, *salmonella* is not considered adulterated, under the USDA definition.⁷⁸ This means that meat that contains certain strains of *salmonella* can be sold, and federal law allows a certain level of this pathogen to be present before it is considered hazardous.⁷⁹ By implementing clearer definitions that do not allow the beef or poultry industry to wiggle out of a technicality, the consumer will be more protected when contamination does occur.⁸⁰

IV. WHY HAVE OUTBREAKS OF *E. COLI* AND *SALMONELLA* INCREASED WHEN WE HAVE TWO REGULATING AUTHORITIES TO PREVENT THIS?

There are many reasons that could be attributable to an increase in pathogenic outbreaks. While the FDA has received a steady increase in funding, it may not be allocated to directly preventing contamination. Inefficiencies between how the FDA, USDA, and FSIS operate also serve as an

76. Hylton, *supra* note 1.

77. See, e.g., *Multistate Outbreak of Shiga toxin-producing Escherichia coli O26 Infections Linked to Chipotle Mexican Grill Restaurants*, *supra* note 6.

78. Dana Dovey, *USDA Sued Over Sale Of Drug-Resistant Salmonella In Meat, Due To Loophole Allowing Contamination*, CONSUMER NEWS (May 29, 2014, 11:10 AM), <http://www.medicaldaily.com/usda-sued-over-sale-drug-resistant-salmonella-meat-due-loophole-allowing-contamination-285196>.

79. See also *Supreme Beef v. USDA*, 275 F.3d 432 (5th Cir. 2001) in which the company was successful in arguing that salmonella was not an adulterant because it was “naturally occurring.”

80. After the national panic caused by the *e. coli* outbreak in 1993, FSIS successfully labeled the bacterium an adulterant, so it is more strictly regulated than *salmonella*. See Hylton, *supra* note 1.

impediment to slaughterhouse-to-consumer safety.⁸¹ However, the most glaring explanation is the culture of non-enforcement by the FDA and USDA, and the prevalence of conflicts of interests within these agencies.

Conflicts of interests within food regulatory agencies like the FDA and USDA lead government officials to advocate for laws that favor and protect the interests of the food industries.⁸² When these agencies favor big meat companies over the consumer by not preventing meat contamination, pathogenic outbreaks increase.⁸³

A. WHO IS IN CONFLICT?

Decision-makers both in Congress and the executive branch are divided into categories of hierarchy. There are “principal officers,” followed by “inferior officers,” and at the bottom, “employees of the United States.”⁸⁴ These classifications of position are integral to precluding who may or may not partake in lobbying activities post-government employment.⁸⁵

One conflict exists between the elected government officials who are dependent upon political contributions and the lobbyists representing wealthy meat industry companies. Meat lobbyists contribute heavily to politicians, ensuring that through political campaign donations, their interests are kept in the forefront of the law making process.⁸⁶ There are different actors on the lobbying stage: congresspersons leave the government sector to become lobbyists, and former lobbyists move into executive agency positions, thereby creating an ever-changing flux of people moving in and out of government positions to fulfill private agendas.⁸⁷ Studies have indicated

81. “The current structure is there not because it’s what serves the consumer best . . .” (quoting Elisabeth Hagan, former head of FSIS) Hylton, *supra* note 1.

82. *Revolving Door: Search Results, Agency search: Department of Agriculture*, *supra* note 15.

83. SIMON, *supra* note 21.

84. KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW 73-81* (Thomson West, 2008). “Employees of the United States” are often referred to as “mere employees.”

85. 18 U.S.C. § 207(a)(1) (1962).

86. For example, Tyson Foods, the world’s largest meat producer, contributed more than \$17 million to campaign financing, between 1989 and 2014. *See Food Processing & Sales*, INFLUENCE EXPLORER, <http://influenceexplorer.com/industry/food-processing-sales/93b0e1ce2e904638a93eb9bbcd0bb7f8> (last visited Mar. 17, 2016). Moreover, lobbying firms saw a significant revenue increase 2015. Catherine Ho, *Lobby Firms Reap Benefits of an Active Congress*, WASH. POST (Jan. 21, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2016/01/21/lobby-firms-reap-benefits-of-an-active-congress/>.

87. Jeffrey Lazarus, *Which Members of Congress Become Lobbyists? The Ones With The Most Power. Here’s the Data*, WASH. POST (Jan. 15, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/15/which-members-of-congress-become-lobbyists-the-ones-with-the-most-power-heres-the-data/> (“The ‘revolving

that the trend from government to lobbying has generally increased since the 1970s.⁸⁸

American Meat Institute,⁸⁹ a trade association that represents the interests of the meat industry, including meat packers and slaughterhouses, raised and spent the largest monetary amounts during election years, and contributed directly to politicians and their campaigns.⁹⁰ Moreover, many meat companies are represented by powerful lobbying firms, like the National Meat Association and the National Cattlemen's Beef Association, who likewise support political campaigns favorable to their client's interests.⁹¹

In 2004, the Consumer Federation of America released a report analyzing the relationship between individuals and organizations within the meat industry that financially support politicians. The report focuses on contributions made by particular individuals during President George W. Bush's campaign and subsequent election, and were later appointed to food safety committees.⁹² The report postulates that the conflict of interest led to an increase in micro-bacteria outbreaks.⁹³

But it is not just money, in the form of contributions to politicians, which demonstrates clear conflicts of interest.⁹⁴ A second conflict also ex-

door' that brings lobbyists and high-level government officials into each other's line of work is a huge and growing part of Washington." The author is undertaking a study on the revolving door, which includes an analysis of lobbying activity of former members of Congress from 1976-2012. See Lazarus, *infra* note 88.

88. *Id.*; see also Jeffrey Lazarus, Amy McKay & Lindsey Herbel, *Who Walks Through The Revolving Door? Examining The Lobbying Activity Of Former Members Of Congress*, INTEREST GROUPS & ADVOCACY (Mar. 2016), <http://www.palgrave-journals.com/iga/journal/vaop/ncurrent/full/iga201516a.html>.

89. As of 2015, the company is now known as North American Meat Institute. *About Us*, NORTH AMERICAN MEAT INSTITUTE, <https://www.meatinstitute.org> (last visited May 18, 2016).

90. *American Meat Institute: Contributions to Federal Candidates 2008 Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/pacgot.php?cycle=2008&cmte=C00024281> (last visited Mar. 17, 2016).

91. Steve Johnson, *The Politics of Meat*, FRONTLINE (April 18, 2002), <http://www.pbs.org/wgbh/pages/frontline/shows/meat/politics>. Date confirmed by Frontline, with author.

92. Carol Tucker Former, et al., "Not Ready-to-Eat": How the Meat and Poultry Industry Weakened Efforts to Reduce *Listeria* Food-Poisoning, THE CONSUMER FED'N OF AM. (Dec. 2004), <http://www.fsis.usda.gov/OPPDE/Comments/97-013F/97-013F-6.pdf>. The report specifically focuses on *listeria*, but similar conclusions can be drawn to additional outbreaks of other bacteria, like *e. coli* and *salmonella*.

93. *Id.*

94. Known as "food governmentenomics," this conflict of interest is the "concept that describes the economic and public health effects resulting from agribusiness and food lobby influences on government agencies, such as the FDA and USDA, and federal advisory

ists between people who sit on committees of the FDA and USDA while maintaining connections to the meat industry, or former and current employees in the meat industry who presently now hold influential government positions.⁹⁵

OpenSecrets, a resource site that gathers information about lobbying firms, political contributions, and conflicts of interest, lists 180 people who are part of the “revolving door,” meaning they have a conflict of interest ties with the USDA.⁹⁶ Not everyone on this list should be precluded from holding a government position. In fact, expertise held by some of these individuals in specified areas assists the FDA and USDA in making informed, science-backed decisions. However, there needs to be a process by which individuals with potential conflicts of interests are evaluated on a case by case basis to determine if the personal interests supersede the nation’s interests.⁹⁷

Perhaps the most obvious, and most often cited, poster child for the revolving door syndrome is Michael Taylor.⁹⁸ Taylor began his career as a lawyer for the FDA, before working at a firm that represented Monsanto in the late 1970s. He returned to the FDA when he was appointed as the Deputy Commissioner in 1991.⁹⁹ After he worked for the USDA in the mid-1990s, Taylor went back to representing the interests of Monsanto.¹⁰⁰ He re-entered government employment as the Senior Advisor to the FDA Commissioner, and has served there since 2009.¹⁰¹ Taylor himself acknowledged the “cozy relationship” between the government in charge of regulating the meat industry and the meat industry itself.¹⁰² He has been critical of these conflicts of interest; when he walked into his new office at the USDA, he

committees to change their priorities of interest from private industry to consumer protection.” Steier, *infra* note 233, at n.5.

95. *Revolving Door: Search Results*, Agency search: Department of Agriculture, *supra* note 15.

96. *Id.* But see David Zaring, *Against Being Against The Revolving Door*, 2013 U. ILL. L. REV. 507 (2013) (which argues that the revolving door and its negative impacts is largely overstated).

97. See Anand, *infra* note 150.

98. Marion Nestle, *Michael Taylor Appointed to FDA: A Good Choice!*, FOOD POLITICS BLOG (July 7, 2009), <http://www.foodpolitics.com/2009/07/michael-taylor-appointed-to-fda-a-good-choice/>.

99. *Id.*

100. *Why Is A Former Monsanto Vice President Running the FDA?*, INVESTMENT WATCH BLOG (Jan. 7, 2015), <http://investmentwatchblog.com/why-is-a-former-monsanto-vice-president-running-the-fda-michael-r-taylor-was-was-promoted-to-commissioner-of-the-fda-after-spending-years-lobbying-for-the-gmo-foods-giant-the-position-affords-taylor/>.

101. *Meet Michael R. Taylor, J.D., Deputy Commissioner for Foods and Veterinary Medicine*, FDA (July 7, 2014), <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofFoods/ucm196721.htm>.

102. Johnson, *supra* note 91.

said, “[o]n the telephone there were two speed dials with names by them. And one was to the American Meat Institute and the other was to the National Cattlemen’s Association.”¹⁰³ This shows the extent to which the government is in the pockets of these meat-lobbying firms.

While no other person quite personifies the concept of the revolving door as Taylor, there are many other people who still swing through the door between private companies with specific interests and then hold a governmental position, or vice versa.¹⁰⁴ James Fitzgerald, a former beef lobbyist, was appointed by President Bush as the Chief of Staff at the USDA.¹⁰⁵ Bush appointed another lobbyist; prior to becoming head of the FDA, Lester Crawford was Vice President of the National Food Processors Association.¹⁰⁶ Crawford currently works for lobbying firm Policy Directions, Inc.¹⁰⁷ Deborah Atwood was the Vice President of the American Meat Institute (AMI) from 1992-95, worked at the National Pork Producers Council in the late 1990s, and then joined the USDA in the early 2000s.¹⁰⁸ Dale Moore, former Executive Director for Legislature Affairs at the National Cattlemen’s Beef Association, was appointed as the Chief of Staff to the Secretary of the USDA.¹⁰⁹ Moore is now the Executive Director for the American Farm Bureau Federation.¹¹⁰

These are potential conflicts of interest because the individual employee often works at the appointment of the current administration.¹¹¹ When there is a change of administration, or his term is completed or not renewed, he may seek a return to employment back in the private sector.¹¹²

103. *Id.*

104. Not everyone agrees that Taylor’s conflict of interest is necessarily a bad thing; in 2015, he spoke at STOP Foodborne Illness fundraising event; *Revolving Door: Search Results, Agency search: Department of Agriculture*, *supra* note 18.

105. FOOD, INC., *supra* note 28; *James (Jim) Fitzgerald*, LINKEDIN, <https://www.linkedin.com/pub/james-jim-fitzgerald/5a/632/175> (last visited Mar. 17, 2016).

106. FOOD, INC., *supra* note 28.

107. *Lester M. Crawford*, OPENSECRETS.ORG, https://www.opensecrets.org/revolving/rev_summary.php?id=37263 (last visited Mar. 17, 2016).

108. *Deborah M. Atwood Employment Timeline*, OPENSECRETS.ORG, https://www.opensecrets.org/revolving/rev_summary.php?id=16015 (last visited Mar. 17, 2016).

109. *Dale Moore Named Chief of Staff to Secretary Veneman*, U.S. DEP’T OF AGRIC. (Feb. 13, 2001), <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2001/02/0026.html>. It is important to note that federal agencies have not labeled these people as “experts” as defined by the Office of Government Ethics. *See Anand, infra* note 150.

110. *Dale Moore*, LINKEDIN, <https://www.linkedin.com/in/dale-moore-60976a13> (last visited Mar. 17, 2016).

111. *The Executive Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/1600/executive-branch> (last visited Mar. 17, 2016).

112. *Lazarus, supra* note 88.

Understandably, agencies like the FDA and USDA need to be staffed with people knowledgeable of the meat industry, including farming, processing, and production.¹¹³ If this were not the case, it would be like staffing a hospital board of directors with people lacking medical training and experience. The objection to conflicts of interests between those who run the FDA and USDA and their particular ties to the industries they regulate arises when the conflict impacts the American consumer negatively. The rise in meat contamination and subsequent illnesses correlates with a decrease in federal inspections, demonstrating that these conflicts of interest are in direct opposition to the health of the American people.¹¹⁴

With government officials in the pockets of lobbyists, the American people are impacted dramatically, especially when we place trust in such officials to safely monitor the foods that are raised, processed, sold, and consumed.¹¹⁵ As Michele Simon, a public health lawyer focusing on industry food regulation, pointed out,

When government gives corporations public platforms and forms partnerships with them, this conveniently places industry right where it wants to be: in the position of telling the federal government how to make policy while getting the stamp of approval from agency officials. . . . That's when government has essentially abdicated its responsibility to protect its citizens.¹¹⁶

Meat industry lobbyists are not the only ones who have been accused of serious disregard for meat safety. Politicians with strong ties to meat production and packaging plants utilize their political influences to favor the food industries, over the safety of the public consumer.¹¹⁷ In 1995, Representative James T. Walsh of New York proposed a legislative rider, known as "The Walsh Rider," that would loosen restrictions on *e. coli* and *salmonella* testing.¹¹⁸ The amendment ultimately tried to prohibit the use of funds for more scientific-based meat inspections, unnecessarily requiring the USDA to form a separate committee.¹¹⁹ The rider, drafted by Walsh and an attorney who works for the National Meat Association, was unsurpris-

113. See Anand, *infra* note 150.

114. O'Hagan, *supra* note 8; *Multistate Outbreak of Shiga toxin-producing Escherichia coli O26 Infections Linked to Chipotle Mexican Grill Restaurants*, *supra* note 6.

115. See, e.g., O'Hagan, *supra* note 8.

116. SIMON, *supra* note 21, at 164.

117. See NESTLE, *supra* note 25, at 65.

118. 141 CONG. REC. H7307 (daily ed. July 20, 1995) (statement of Rep. Walsh).

119. *Id.*

ingly, supported by the meat industry.¹²⁰ Walsh ultimately withdrew the amendment once he reached an agreement with the Secretary of the Agriculture Department.¹²¹ Even though the rider was never passed, Walsh was criticized as using the amendment as a tactic to delay meat inspections.¹²² Part of the compromise reached was that plants will do periodic bacterial inspections themselves, but government inspectors will test for *salmonella* throughout the various stages of the meatpacking process.¹²³

Interestingly, Walsh's connection with the meat industry did not end with his partnership with the National Meat Association lawyer.¹²⁴ In 1996, the year after he proposed his amendment in favor of the meat industry, he accepted \$65,000 in political contributions from meat-supported organizations.¹²⁵ He also had ties to the American Meat Institute, which contributed to his re-election campaign in 2000.¹²⁶ American Meat Institute contributed again to Rep. Walsh's re-election in 2002.¹²⁷

One of the biggest blows that affected the ability of the USDA to regulate meatpacking plants was the result of litigation in *Supreme Beef Processors Inc. v. USDA*.¹²⁸ In 2001, the USDA attempted to shut down a beef processing plant after it repeatedly tested positive for *salmonella*. The federal court determined that the USDA can only regulate "adulterated" meat, and it only has the authority to prevent the meat from being labeled as in-

120. Dan Morgan, *Industry Finds A Way Around Budget Cutters*, WASH. POST (June 26, 1995), <http://www.washingtonpost.com/archive/politics/1995/06/26/industry-finds-a-way-around-budget-cutters/ff605843-4532-4e95-ad08-88bb590b3e6f/>.

121. 141 CONG. REC. H7307, *supra* note 123. Walsh agreed to the adoption of the HACCP-based inspection system, standing for "Hazard Analysis and Critical Control Point."

122. See Johnson, *supra* note 91; *Spoiled Meat, Rotten Congress*, MOTHER JONES BLOG (Sept. 12, 1995, 3:00 AM), <http://www.motherjones.com/politics/1995/09/spoiled-meat-rotten-congress>.

123. *Upgrading the Safety of Meat*, N.Y. TIMES (July 9, 1996), <http://www.nytimes.com/1996/07/09/opinion/upgrading-the-safety-of-meat.html>.

124. Morgan, *supra* note 120.

125. See Johnson, *supra* note 91; another source reports that the Federal Election Committee says he has received \$66,000 from 1988-1995; see *Spoiled Meat, Rotten Congress*, *supra* note 122.

126. OpenSecret.org makes it clearer where the money came from: "The organizations themselves did not donate, rather the money came from the organizations' PACs, their individual members or employees or owners, and those individuals' immediate families." *James T. Walsh Top 20 Contributors 1999-2000*, OPENSECRETS.ORG, <https://www.opensecrets.org/politicians/contrib.php?cycle=2000&cid=N00001261> (last visited Apr. 25, 2016).

127. *James T. Walsh Top 20 Contributors 2001-2002*, OPENSECRETS.ORG, <https://www.opensecrets.org/politicians/contrib.php?cycle=2002&type=I&cid=N00001261&newMem=N&recs=20>.

128. *Supreme Beef v. USDA*, 275 F.3d 432 (5th Cir. 2001).

spected, and ultimately, from going to market.¹²⁹ USDA does not have the power to shut down the entire plant.¹³⁰ While the case was on appeal, big poultry company Tyson Foods bought the meat-processing plant IBP, “forming a Goliath in market share and political power.”¹³¹ According to Carol Tucker Foreman, director of the Food Policy Institute at Consumer Federation of America,¹³² senators who voted against the legislation setting *salmonella* limits were tied to the meat industry.¹³³

Politicians and meat lobbyists are not the only ones with unclean hands; the USDA has been slow to allow privatized industrial testing for micro-bacteria. In 2004, Creekstone Farms in Kansas sued the USDA when it was prevented from testing at a facility the farm had built and designed specifically to see if mad cow disease existed in their cattle.¹³⁴ Surprisingly, the government agency refused to administer the testing kits necessary to determine if the disease was present in the cattle.¹³⁵ While the farm wanted to test every cow for the disease, the USDA argued that this process undermined its own policy of randomized testing.¹³⁶ Moreover, if every cow were to be tested for the disease, the price of beef would increase.¹³⁷ The USDA, with the interest of the meat industry in mind, argued that mad cow disease is relatively rare and the agency’s policy of testing roughly 1% of cattle is

129. 21 U.S.C. § 608 (2012) (“[W]here the sanitary conditions of any such establishment are such that the meat or meat food products are rendered adulterated, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped or tagged as ‘inspected and passed.’”).

130. *FSIS Sets New Procedures for Plants That Fail Salmonella Tests*, FSIS, <http://www.fsis.usda.gov/wps/wcm/connect/fsis-content/internet/main/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/fsis-sets-new-procedures-for-plants-that-fail-salmonella-tests/fsis-sets-new-salmonella-procedures> (last updated Aug. 12, 2013). However, the USDA is not completely without power. While the USDA cannot actually close a plant, it can withdraw its inspectors, which effectively prohibits the plant from operating; see NESTLE, *supra* note 25, at 104.

131. See Johnson, *supra* note 91.

132. Carol Tucker Foreman, SOURCEWATCH, http://www.sourcewatch.org/index.php?title=Carol_Tucker_Foreman (last visited Mar. 21, 2016).

133. See Johnson, *supra* note 91.

134. *Creekstone Farms Premium Beef, LLC, v. Dep’t of Agric.*, 539 F.3d 492 (D.C. Cir. 2008); ConsumeristCarey, *USDA To Meatpackers: You Have No Right To Test For Deadly Diseases*, CONSUMERIST (May 31, 2007), <http://consumerist.com/2007/05/31/usda-to-meatpackers-you-have-no-right-to-test-for-deadly-diseases/>.

135. ConsumeristCarey, *supra* note 134.

136. *Creekstone Farms Premium Beef*, 539 F.3d 492 (the USDA has the authority to control the sales of the kits that test for mad cow disease).

137. Marc Kaufmann, *Company’s Mad Cow Tests Blocked; USDA Fears Other Firms’ Meat Would Appear Unsafe*, WASH. POST (Apr. 16, 2004), http://www.washingtonpost.com/wp-dyn/articles/A15855-2004Apr15_2.html.

sufficient.¹³⁸ Ultimately, the USDA prevailed, and the court concluded that the agency had the authority to regulate treatment of animals, which included the post-mortem testing Creekstone wanted to conduct.¹³⁹

While legislators obviously operate separately from executive agencies like the FDA and USDA, the connection between government officials in both branches and the food industry is significant, especially when these legislators depend on financial contributions.¹⁴⁰ Since conflicts of interest exist within the walls of Congress, the need for even tighter restrictions and regulations within the FDA and USDA is vital.

B. GOVERNMENT'S ATTEMPT AT PREVENTING CONFLICTS OF INTEREST AND WHY IT'S NOT WORKING¹⁴¹

The checks-and-balances system mandated by the Constitution ensures no one branch is more powerful than another, and, by effect, helps inhibit conflicts of interest. While the president holds the power to appoint senior officials, this power is limited and must be approved by the "Advice and Consent of the Senate."¹⁴² Congress's lawmaking power is subject to a presidential veto.¹⁴³ This provides some accountability in Congress.

In the executive branch, there are advisory agencies that supervise regulatory agencies.¹⁴⁴ The Federal Advisory Committee Act (FACA) was designed to oversee committees that are comprised within the FDA and USDA.¹⁴⁵ However, the FACA does not have provisions that deal with individual member's conflicts of interest.¹⁴⁶ That job falls to other laws which regulate specific agencies and the Office of Government Ethics (OGE). The purpose of FACA is to "promote the objectivity of advisory committee deliberations."¹⁴⁷ FACA does acknowledge that conflicts exists, but shrugs off responsibility: "To avoid potential conflicts, each advisory committee member should assure that he or she receives adequate information from

138. Matt Apuzzo, *Court: US Can Block Mad Cow Testing*, WASH. POST (Aug. 29, 2008, 1:42 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/29/AR2007032901795.html>.

139. *Creekstone Farms Premium Beef, LLC*, 539 F.3d 492.

140. *James T. Walsh Top 20 Contributors 1999-2000*, *supra* note 126.

141. See Nestle, *supra* note 98 (Michael Taylor, for example, was able to bypass conflict of interest laws because he never violated the one-year limit).

142. U.S. CONST. art. II, § 2, cl. 2.

143. U.S. CONST. art. I, § 7, cl. 2.

144. *U.S. Government Accountability Office*, *infra* note 199.

145. *The Federal Advisory Committee Act*, U.S. GEN. SERVICE ADMIN. (Dec. 24, 2015), <http://www.gsa.gov/portal/content/100916>; Federal Advisory Committee Act, 92 Pub. L. 463, 86 Stat. 770 (1972).

146. *FACA: Conflicts of Interest and Vaccine Development*, Statement of James L. Dean, Dir. (June 15, 2000), <http://www.gsa.gov/portal/content/101004>.

147. *FACA: Conflicts of Interest and Vaccine Development*, *supra* note 146.

the sponsoring agency and completes any required appointment papers and disclosure forms prior to service on a committee.”¹⁴⁸

One provision provides that “the advice and recommendations will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee’s independent judgment.”¹⁴⁹ That may be fitting, but the very nature of an advisory committee poses a potential problem: these committees are comprised of industry experts directly tied to a field in which they have colleagues and well-known experience. The American public is left to trust that the experts and regulators have disclosed their personal financial interests and any professional conflicts of interest as they are legally defined, and also must trust that they remain objective in reaching the committee’s goals.¹⁵⁰

One way of getting around a conflict of interest is assigning a committee member the title of “expert.” This loophole allows former meat lobbyists to serve on the FDA and USDA because they have specialized knowledge of the meat industry, and it is presumed that they are also familiar with meat safety.

However, designating someone as an expert is also not without some regulation. The Office of Government Ethics has been critical of experts serving on advisory committees, and has tightened restrictions on when an agency can grant a waiver.¹⁵¹ The OGE requires seven elements when determining if an expert is needed.¹⁵² This consists, in part, of the uniqueness of a particular expert’s knowledge and qualifications, the difficulty in locating similar experts who do not have a conflict of interest, and prior FDA experience.¹⁵³ While this is critical in ensuring conflicts of interests are kept at bay, OGE lacks the power of enforcement and does not have a system in place for recourse when a violation occurs.¹⁵⁴

148. *The Federal Advisory Committee Act (FACA) Brochure*, U.S. GEN. SERVICE ADMIN. (Dec. 1, 2014), <http://www.gsa.gov/portal/content/101010>.

149. Federal Advisory Committee Act, 92 Pub. L. 463, 86 Stat. 770 (1972).

150. *FACA: Conflicts of Interest and Vaccine Development*, *supra* note 146; see Saurabh Anand, *Using Numerical Statutory Interpretation to Improve Conflict of Interest Waiver Procedures At The FDA*, 83 S. CAL. L. REV. 649 (2010), in which the author proposes a “numerical statutory interpretation” to resolve the issue of experts tied to a particular industry who also utilized by federal agencies.

151. See Anand, *supra* note 150, at 652, 660.

152. See *id.*

153. Memorandum from Marilyn L. Glynn, General Counsel, Office of Gov’t Ethics, to Designated Agency Ethics Officials (Aug. 18, 2005) (on file with the Office of Government Ethics), [https://www.oge.gov/Web/OGEnsf/All+Advisories/04E39F5397ED0F7E85257E96005FB D36/\\$FILE/05x4_.pdf?open](https://www.oge.gov/Web/OGEnsf/All+Advisories/04E39F5397ED0F7E85257E96005FB D36/$FILE/05x4_.pdf?open). See Anand, *supra* note 150.

154. The OGE was created to prevent conflicts of interests, as opposed to investigating violations. Nevertheless, when there are ethical violations, or suspected violations, these are referred to the Department of Justice. *The Reauthorization of the Office of Government*

To oversee ethical concerns, the FDA has also taken steps to monitor and administer conflicts of interest. The Office of Management administers the FDA Ethics and Integrity program to “ensure that all FDA employees are free from conflicts of interest and do not hold prohibited interests.”¹⁵⁵ The Ethics and Integrity agenda is closely entwined with the OGE.¹⁵⁶

V. WHAT LAWS CURRENTLY EXIST AND HOW THEY ARE NOT WORKING TO PREVENT CONFLICTS OF INTEREST

A. 18 U.S.C. § 208

Conflicts of interest are criminalized and prosecuted under United States Code Title 18, which focuses primarily on employees in the executive branch.¹⁵⁷ For example, 18 U.S.C. § 208 prohibits an employee in the executive branch from participating on a committee in which he or an immediate family member has a financial interest.¹⁵⁸ However, there are exceptions to this law; if the interest of the member’s service outweighs the “potential for a conflict of interest,” the law does not apply.¹⁵⁹ This waiver and exception rule allows conflicts of interest, as long as they are acknowledged.¹⁶⁰ Moreover, the conflict of interest only applies within a twelve-month period, a relatively short period of time.¹⁶¹

B. 18 U.S.C. § 207(a)

Post-employment restrictions of government employees who leave public service for private industry are addressed under 18 U.S.C. § 207.¹⁶² The length of time covering the restrictions of non-involvement chiefly depends on whether the employee was a highly ranked official (as measured by pay grade) and how much the person participated in the activity (by

Ethics: Hearing Before the Subcomm. of Fed. Workforce and Agency Org., 109th Cong. (2006) (statement of Marilyn Glynn, Office of Government Ethics).

155. 2012 *Budget Summary*, FDA (Mar. 6, 2014), <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/BudgetReports/ucm291553.htm>.

156. United States Office of Government Ethics, *infra* note 232.

157. *See generally* 18 U.S.C. §§ 207-209.

158. 18 U.S.C. § 208 (1994).

159. *Id.*

160. 18 U.S.C. § 208(b)(1) (1962); § 208(d)(2).

161. Colleen O. Davis, Note, *Red Tape Tightrope: Regulating Financial Conflicts of Interest in FDA Advisory Committees*, 91 WASH. U. L. REV. 1591 (2014), in which the author suggests that the FDA regulates itself more heavily than Congress, and waivers are rarely granted by the FDA.

162. 18 U.S.C. § 207 (2014).

official involvement) that is the inquiry for a potential conflict.¹⁶³ The ban ranges from one to two years, up to a possible lifetime restriction.¹⁶⁴

Enacted in 1962,¹⁶⁵ this statute appears to already prohibit someone from the FDA or USDA from lobbying, as it states:

Any person who is an officer or employee . . . of the executive branch of the United States . . . who, after the termination of his or her service . . . knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department . . . in connection with a particular matter . . . in which the person participated personally and substantially as such officer or employee.¹⁶⁶

The FDA gives an example of a government employee approving a grant application and then “switching sides” after leaving her position with the government.¹⁶⁷ Under the statute, the FDA advises that this person can advise on how to “adhere to government procedures . . . [but] may not . . . sign any documents directed back to the agency.”¹⁶⁸

C. LOOPHOLES IN 18 U.S.C. § 207

18 U.S.C. § 207 falls short for three main reasons. First, while the statute aims to prevent employees who served in the executive branch from future positions that would be of a conflict of interest, the law does not prohibit former lobbyists from holding a position within the executive branch.¹⁶⁹ This is why people like Dale Moore and Deborah Atwood¹⁷⁰ can work for companies like the National Cattlemen’s Association and American Meat Institute and not be in violation of federal law when they later hold high-level positions within the USDA.¹⁷¹ Section 207 only applies to

163. *Id.*

164. *Id.*

165. *Id.*

166. 18 U.S.C. § 207 (2014). Close the Revolving Door Act seeks to change this to “Any person who is a Senator, a member of the House of Representative, or an elected officer of the Senate or the House of Representatives.”

167. *Digest Of Criminal Statutes Related To Ethics*, FDA (Aug. 13, 2015), <http://www.fda.gov/AboutFDA/WorkingatFDA/Ethics/ucm071740.htm>.

168. *Id.* See also Office of General Counsel Ethics Division, *Summary of Post-Employment Restrictions* (Oct. 2011), <http://www.fda.gov/downloads/AboutFDA/WorkingatFDA/Ethics/UCM125319.pdf>.

169. 18 U.S.C. § 207 (2014).

170. *Deborah M. Atwood Employment Timeline*, *supra* note 108.

171. 18 U.S.C. § 207 (2014).

former government employees, and not to potential governmental employees or appointees that had prior conflicts of interest.¹⁷²

Secondly, the lifetime ban is extreme and serves only to promote “stealth lobbying,” in which lobbyists are disguised and hidden through loopholes.¹⁷³ Because of this extreme ban and ability to circumvent the intention of the law, these disguised lobbyists do not have an incentive to register as lobbyists. Also, due to the lack of enforcement of the Lobbying Disclosure Act, these stealth lobbyists are not in danger of suffering any significant consequences.¹⁷⁴

Moreover, if an organization, whether it is a registered lobbyist or not, can demonstrate that it is providing the executive agency with information “solely for the purpose of furnishing scientific or technological information,” then there is not a § 207 violation.¹⁷⁵ Agencies like the FDA and USDA rely on experts to give them factual information so that they can make a prudent and informed decision to protect the consumer. This communication is abused when the relationship between the communicator (such as Deborah Atwood),¹⁷⁶ who once was a high-level employee within a lobbying firm, now represents an agency that may have interests in opposition to those of her former employer.¹⁷⁷

Thirdly, ambiguous terms create room for interpretation by the judicial branch and therefore abuse. The term “officer or employee” does not clarify whether this provision applies to members who sit on executive committees such as the FDA and USDA.¹⁷⁸ While case law has brought certain clarity to these terms, “[t]he line between ‘mere’ employees and inferior officers is anything but bright.”¹⁷⁹ Moreover, it is not always reasonable to define every particular term in statutes; the flexibility and adaptability of terms, if applied in good faith, can still be implemented as they were originally intended, without having to be reevaluated by Congress.

172. 18 U.S.C. § 207(a)(1) (2014).

173. William Luneburg, Symposium, *The Law of Lobbying: Anonymity and Its Dubious Relevance to the Constitutionality of Lobbying Disclosure Legislation*, 19 STAN. L. & POL’Y REV. 69, n.109 (2008);

Nat’l Ass’n of Mfrs. v. Taylor, 549 F. Supp. 2d 33 (D.C. Cir. 2008).

174. *Id.*

175. 18 U.S.C. § 207(j)(5) (2014).

176. *Deborah M. Atwood Employment Timeline*, *supra* note 108.

177. See Allen B. Coe, 18 U.S.C. § 207(A)(1) “Lifetime Representation Ban” *Opinions: A Lifetime’s Work for Agency Ethics Officials and Advisors*, 63 A.F. L. REV. 129 (2009).

178. 18 U.S.C. § 207(a)(1) (2014); *see also* U.S. CONST. art. II, § 2, cl. 2. The Appointments Clause states that there are two kinds of officers: “principals” and “superiors” are nominated by the president and confirmed by the Senate, whereas Congress can vest appointment in others if they are “inferior officers.”

179. *Landry v. FDIC*, 204 F.3d 1125, 1132 (D.C. Cir. 2000) (acknowledging the Supreme Court’s difficulty in defining “officer”).

Of course, § 207 is in place to prevent conflicts of interests, but in reality merely restricts a person from participating “personally and substantially,” which are terms that remain undefined.¹⁸⁰ This is one reason why there are several officials on advisory committees for the FDA and USDA who are not in violation of § 207. Furthermore, “intent to influence” is not defined within the statute, and the lack of case law has not established its meaning.¹⁸¹

Additionally, the absence of Supreme Court authority interpreting 18 U.S.C. § 207 serves only to enhance the statute’s abuse.¹⁸² The Seventh Circuit Court of Appeals has interpreted § 207(a) to “disqualif[y] only [those people] from particular cases where Congress could rationally make the judgment that participation would be evil as a result of an individual’s previous activity as a government employee in the same matter.”¹⁸³ “Evil” is a subjective word that cannot reasonably serve as the standard for violating the statute. A conflict of interest can have a negative effect, as we have seen within the FDA and USDA, without necessarily being “evil.”

Reexamining § 207 and better outlining the actions of current and former members of executive agencies will decrease the potential for conflicts of interests, and further ensure that the interests of the American public are served.

D. LOBBYING DISCLOSURE ACT OF 1995¹⁸⁴

The Lobbying Disclosure Act (LDA) was designed to tighten restrictions between lobbyists and the government.¹⁸⁵ “[E]xisting lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance”¹⁸⁶ The Act was in response to loopholes identified

180. 18 U.S.C. § 207 (a)(1), which prohibits former and current members who hold, or have held, positions within the executive or legislative branches from “knowingly making, with the intent to influence, any communication . . . on behalf of another person”

181. Randall E. Ravitz & Nicholas Sanservino, *Federal Criminal Conflict of Interest*, 35 AM. CRIM. L. REV. 709 (1998); Allen B. Coe, *18 U.S.C. § 207(A)(1) “Lifetime Representation Ban” Opinions: A Lifetime’s Work For Agency Ethics Officials And Advisors*, 63 A.F. L. REV. 129 (2009).

182. The Court has reviewed two cases regarding this statute, one in 1946 and other almost forty years later in 1984, both of which do not pertain to the subject matter in this article. *United States v. Lovett*, 328 U.S. 303 (1946); *Dixson v. United States*, 465 U.S. 482 (1984).

183. *United States v. Nasser*, 476 F.2d 1111 (7th Cir. 1973).

184. 2 U.S.C. § 1601 (1996).

185. *Id.*

186. 2 U.S.C. § 1601(2) (1996).

within the Federal Regulation of Lobbying Act of 1946.¹⁸⁷ With the LDA of 1995, companies who previously were not required to register now had to do so under new clarified definitions.¹⁸⁸

While commendable, the Act is not as effective as it should be, as demonstrated by the relationship between lobbying entities and the FDA and USDA, subsequent regulations that favor the meat industry, and continuous outbreaks of contaminated meat.¹⁸⁹ Noticeably, the Lobbying Disclosure Act does not place a ban on lobbying, but merely requires disclosure if the government employee acted as a lobbyist within a two-year period.¹⁹⁰ As author Kathryn Plemmons pointed out in her article on lobbying activities, “The lack of judicial interpretation of the Act, coupled with criticism that the law merely asks lobbying organizations to engage in self-policing of their own activities, has [led to] the opinion that the LDA’s effectiveness [is unknown and] still remains to be seen.”¹⁹¹

One of the major failures of the LDA is the built-in ambiguity. Despite pledging to reduce loopholes from the previous Act of 1946, the LDA leaves wiggle room for lobbyists to continue to have a relationship with government contacts. LDA defines lobbyist as “any individual who is employed . . . by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20% of the time engaged in the services provided by such individual to that client over a six month period.”¹⁹² So, as long as someone spends less than 20% of his time and less than \$20,000 in a six-month period on lobbying activities, he does not have to register as a lobbyist.¹⁹³

187. One criticism of the Act of 1946 was that it did not specifically define “lobbyist.” Federal Regulation of Lobbying Act of 1946, 79 Pub. L. No. 601, 60 Stat. 812 (1946). “Lobbyist” was clarified with the enactment of the LDA, *supra* note 184. The Federal Regulation of Lobbying Act of 1946 only applied to the legislative branch.

188. Lobbying Disclosure Act of 1995, 2 U.S.C. 1603 (2007); Kathryn L. Plemmons, “Lobbying Activities” and Presidential Pardons: Will Legislators’ Efforts to Amend the LDA Lead to Increasingly Hard-Lined Jurisprudence?, 18 BYU J. PUB. L. 131, 137 (2003).

189. O’Hagan, *supra* note 8.

190. 2 U.S.C. § 1603 (4)(b)(6) (2007). LDA, perhaps obviously, requires disclosure whereas 18 U.S.C. § 207 places restrictions on lobbying with the “intent to influence.”

191. See Plemmons, *supra* note 188, at 142.

192. Lobbyist is defined as

any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period.

Lobbying Disclosure Act of 1995, 104 Pub. L. No. 65, 109 Stat. 695 (1995).

193. 2 U.S.C. § 1603(a)(3)(ii), amended by 2 U.S.C. § 434 (2008).

Another criticism of the LDA is the lack of significant enforcement power.¹⁹⁴ For example, violation of the Act includes a fine up to \$200,000, which is hardly a deterrent punishment for lobbying firms earning tens of millions of dollars annually. Moreover, a relatively small number of people have ever been charged with a violation, making the risk of prosecution unlikely. Furthermore, the majority of suits filed for violations have resulted in quiet unpublicized settlements.¹⁹⁵

The Government Accountability Office (GAO) handles violations for failure to disclose conflicts of interest.¹⁹⁶ Considering the number of people using the revolving door,¹⁹⁷ the GAO surprisingly settled only three violations between 1995 and 2008.¹⁹⁸ Lack of enforcement can be due to a shortage of personnel. There are simply not enough people employed to enforce violations. The United States Attorney's Office, the sole office with the authority to charge a lobbyist or lobbying entity with a United States Code violation, employed only seven people nationwide to handle such violations as of 2014.¹⁹⁹

Recognizing that mere disclosure of lobbying activities is not enough, and that the Lobbying Disclosure Act does not solve the problem of conflicts of interest, 18 U.S.C. § 207 aims to ban lobbying from certain officials dependent upon their role with the government.²⁰⁰

E. THE HONEST LEADERSHIP AND OPEN GOVERNMENT ACT OF 2007²⁰¹

The Honest Leadership and Open Government Act supplemented the LDA by requiring lobbyists to disclose financial contributions quarterly, as

194. Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, n.36 (2007). Note that the Honest Leadership and Open Government Act of 2007 amended the LDA's originally fine of \$50,000 to \$200,000. See 2 U.S.C. § 1606 (2007).

195. William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 123 (2009), relying on Kenneth P. Doyle, *Justice Department Reveals First Cases Settled Under Lobbying Disclosure Statute*, 157 BNA, INC. DAILY REP. FOR EXECUTIVES, Aug. 16, 2005, at A-18.

196. *About GAO, U.S. GOV'T ACCOUNTABILITY OFF.*, <http://www.gao.gov/about/index.html> (last visited Mar. 17, 2016).

197. *Revolving Door: Search Results, Agency search: Department of Agriculture*, *supra* note 18.

198. See Luneburg, *supra* note 195, at n.224, relying on U.S. Gov't Accountability Office, *Lobbying Disclosure: Observations on Lobbyists' Compliance with New Disclosure Requirements* GAO-08-1099, 18 (Sept. 2008).

199. U.S. Government Accountability Office, GAO 15-310 (2015).

200. 18 U.S.C. § 207(a)(1) (2014).

201. 2 U.S.C. § 1601 (1996).

opposed to twice a year.²⁰² It prohibits former senators from lobbying for two years since the end of their service, and former Representatives are prohibited from lobbying for one year.²⁰³ This amended provision does not really solve the problem, as it simply encouraged “stealth lobbying” and discouraged people from becoming registered lobbyists.²⁰⁴ But again, the Open Government Act provides greater transparency to the legislative process, and not the executive process, which fails to include organizations like the FDA and USDA.

F. CLOSE THE REVOLVING DOOR ACT OF 2015²⁰⁵

The Close the Revolving Door Act of 2015 (CRDA) offers the most hope in closing the gap between conflicts of interest among politicians and the meat industry, and attempts to take the politics out of the public’s expectation for safe meat consumption. The CRDA seeks to amend sections of the Lobbying Disclosure Act of 1995, and small portions of 18 U.S.C. § 207.²⁰⁶

Proposed in 2010 by Senator Michael Bennet of Colorado, CRDA has never made it past the Senate.²⁰⁷ Bennet has continued to introduce the bill each year; most recently it was reintroduced in August 2015 and is in session at time of publication.²⁰⁸ If the Act does not pass this year, this Comment urges Senator Bennet to reintroduce it with significant changes. With the suggested changes (discussed later in Section VI) to include executive agencies that govern meat regulation, and cutting down on conflicts of interest, this Act could have a significant effect on reducing meat contamination.

202. Rebecca L. Anderson, *The Rules in the Owners’ Box: Lobbying Regulations in State Legislatures*, 40 URB. LAW. 375 (2008), proposing that the “Act’s primary focus is on the financial relationship between the Legislative Branch and outside influences. It amends existing law to strengthen oversight of lobbyist activity and to reach the major funders of lobbying and advocacy.”

203. 2 U.S.C. § 1601 (1996).

204. Luneburg, *supra* note 173; Michael Hiltzik, *The Revolving Door Spins Faster: Ex-Congressmen Become ‘Stealth Lobbyists’*, L.A. TIMES (Jan. 6, 2015, 9:51 AM), <http://www.latimes.com/business/hiltzik/la-fi-mh-the-revolving-door-20150106-column.html>.

205. As of February 2016, currently in legislation; Close the Revolving Door Act of 2015, S. 1959, 114th Cong. (2015).

206. Close the Revolving Door Act of 2010, S. 3272, 111th Cong. § 5 (2010). The bill was referred to the Senate committee on Homeland Security and Governmental Affairs and was never passed.

207. *Id.*

208. The bill was first introduced in 2006 by Representative Peter DeFazio, then again by Senator Bennett in 2010, 2014, and 2015.

The Close the Revolving Door Act proposes a lifetime ban on any former member of Congress from lobbying.²⁰⁹ Currently the ban is two years for former Senators and one year for former Representatives.²¹⁰ Specifically, the bill calls for a lifetime ban on a member of Congress from becoming a lobbyist, or a former lobbyist from holding a government position, something author Dennis Thompson encouraged twenty years ago.²¹¹

Because § 207(a) does not define “personally and substantially,” this ambiguity leaves room for lobbyists to take advantage of this loophole.²¹² To close this potential for abuse, the Close the Revolving Door Act attempts to define “substantial lobbying contact” by looking at the whole picture.²¹³ Such factors to determine substantial contact include, whether or not those contacts were involved in any current legislation or if those contacts were related to some sort of governmental funding.²¹⁴ However, reluctant to draw a firm line, it includes the provision: “Simple social contacts with the Member or committee of either House of Congress and staff, shall not by themselves constitute substantial lobbying contacts.”²¹⁵

CRDA also seeks to change all one-year bans to six years. If this provision passes, executive branch personnel are forbidden, for six years, from contacting government personnel who work in the same department that they did.²¹⁶

It similarly prohibits a former lobbyist from working in Congress within six years of being a registered lobbyist, which is a step in ensuring that personal interests do not affect legislation or regulatory authorities.²¹⁷

The Close the Revolving Door Act also amends a section to the LDA, which tightens financial reporting by registered lobbyists.²¹⁸ Specifically, a “substantial lobbying entity”²¹⁹ must report an individual who has provided paid consulting work to the lobbying firm. This individual must have been a

209. Close the Revolving Door Act of 2015.

210. 18 U.S.C. § 207(e)(1).

211. Dennis F. Thompson, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL TO INSTITUTIONAL CORRUPTION*, 59 (1995), “The surest way to sustain a sharp division between legislating and lobbying would be to prohibit former members from ever engaging in lobbying. . . . It is not unreasonable to ask public officials, as part of their public service, to give up some opportunities that other citizens enjoy.”

212. 18 U.S.C. § 207(a)(1)(B).

213. Close the Revolving Door Act of 2015.

214. *Id.*

215. *Id.*

216. Close the Revolving Door of 2015, S. 1959, 114th Cong. (2015); *see* 18 U.S.C. § 207.

217. Close the Revolving Door Act of 2010, 111 S. 3272 § 5(b) (2010).

218. *Id.*

219. Defined as an “incorporated entity that employs more than 3 registered lobbyists during a filing period.” Close the Revolving Door Act of 2010, S. 3272, 111th Cong. § 6(e) (2010).

former Senator or member of the House, an official who was paid more than \$100,000 in a single year, worked in the legislative branch for less than four years, or held a highly ranked position.²²⁰

VI. THE STRENGTHS AND LIMITATIONS OF THE CLOSE THE REVOLVING DOOR ACT ON CONFLICTS OF INTERESTS: PROPOSED CHANGES

A. THE ACT SHOULD BE AMENDED TO INCLUDE EXECUTIVE AGENCIES AND MEMBERS

If passed by Congress, the Close the Revolving Door Act would begin an effective advancement toward protection of the public food safety regulations. What is needed is a provision that serves the executive branch, much like Title 18, but closes loopholes and further restricts conflicts of interest.

The Close the Revolving Door Act largely focuses on the legislative branch,²²¹ and chiefly ignores the abuse that occurs in the executive committees, like in the FDA and USDA. In order to be effective in protecting consumers from meat contamination, the CRDA needs to be amended to include regulatory agencies and fill in the gaps that exist in Title 18.

I propose that in addition to the mandatory disclosures outlined in the LDA, the Close the Revolving Door Act should be expanded in the following ways.

First, it needs to include executive branch employees; second, implement stricter fines for violations; and third, implement a larger regulatory authority that currently exists within the Government Accounting Office.

B. INCREASING THE BAN FROM SIX TO TEN YEARS

The FDA and USDA rely on experts in the meat industry to inform them of particularities to which they are unaware.²²² However, as we have seen, this reliance has been abused, and results in looser regulations on food, thereby sickening the American public.²²³ By implementing a longer ban between the length of time a former lobbyist can serve on a government agency, the chances of conflicting interests decreases. By preventing former lobbyists from serving on agencies like the FDA and USDA, which will

220. Highly ranked position specifically means “chief of staff” “legislative director” “counsel” “press secretary,” Close Revolving Door Act of 2010.

221. Close the Revolving Door Act of 2010, S. 3272, 111th Cong. § 5 (2010).

222. See Anand, *supra* note 150.

223. See, e.g., *Multistate Outbreak of Shiga toxin-producing Escherichia coli O26 Infections Linked to Chipotle Mexican Grill Restaurants*, *supra* note 6.

effectively close the revolving door, the American people can be assured that these agencies have their best interests in mind, rather than those of the meat industry to which they have professional ties.²²⁴

C. LESS AMBIGUOUS TERMINOLOGY

The analysis used to define “substantial lobbying contact” outlined in the Close the Revolving Door Act should be expanded to include executive branch employees under 18 U.S.C. § 207.²²⁵

Furthermore, “personally and substantially” also should be defined and given parameters. The statute states that any “officer or employee” of the executive branch is permanently prohibited from participating in matters in which he or she “participated personally and substantially as such officer or employee.”²²⁶ The vague meaning of this term of art has led to abuse within the FDA and USDA. The CRDA needs to include particular factors used to determine what it means to participate “personally and substantially.” Factors to be considered could be depth and degree of involvement of the individual’s past employment within a lobbying firm, the level of command of the position at the government agency, whether or not the individual has executive authority to enforce particular agency regulations, and management powers associated with the individual’s position.

VII. A MORE PRODUCTIVE AND EXPANSIVE ENFORCEMENT AGENCY

There are several departments in place that monitor and enforce conflicts of interests, but many are inadequate. While the GAO is tasked with overseeing violations in regards to financial disclosures, it is understaffed and lacks consistent enforcement.²²⁷ The Office of Government Ethics (OGE) is also tasked with preventing conflicts of interest, specifically within the executive branch.²²⁸ Following OGE, each agency like the FDA and USDA must have a Designated Agency Ethics Official, who oversees the

224. Moreover, the Close the Revolving Door’s proposed lifetime ban on senators from lobbying may just encourage “stealth lobbying.” Luneburg, *supra* note 173.

225. 18 U.S.C. § 207 (2014).

226. 18 U.S.C. § 207(b)(2) (2014).

227. See Luneburg, *supra* note 195.

228. *About OGE*, U.S. OFF. OF GOV’T ETHICS, <https://www2.oge.gov/web/oge.nsf/About%20OGE?openview> (last visited Mar. 17, 2016). The OGE also created General Standards of Ethical Conduct for Executive Branch Employees (General Standards) which outlines standards of conduct.

conduct of agency employees.²²⁹ The OGE releases advisory opinions each year with the goal of preventing ethical violations.²³⁰

While these checks-and-balances for ethical concerns are meant to resolve conflict of interest issues, the GAO and OGE are lacking in efficiency and effectiveness, especially in light of those individuals using the revolving door.²³¹ In 2014, the OGE held eleven people accountable for criminal conflict of interest violations, but not a single person from the FDA or USDA was prosecuted for a violation.²³²

VIII. CONCLUSION

Too many conflicts of interests are interwoven between regulatory agencies like the FDA and USDA and the private meat, poultry, and seafood processing industries.²³³

While federal law and ethic committees aim at precluding conflicts of interests, current laws are not effective in preventing or resolving the prevalence of these conflicts of interests within the FDA and USDA. Conflicts of interests between individuals serving on executive agencies designed to protect the consumer, and their relationship to lobbying organizations, has led to weakened enforcement of regulations and a more ineffective FDA and USDA.²³⁴ An obvious consequence of this is the heightened instances of meat contamination, resulting in an unacceptable number of illnesses and fatalities. While American meat regulation has made considerable strides over the last hundred years, the recent rise of pathogenic illnesses requires immediate change in policies and the agencies regulating the industry. Ex-

229. *Ethics and Integrity Staff Contact Information*, FDA, <http://www.fda.gov/AboutFDA/WorkingatFDA/Ethics/ucm071641.htm> (last visited Mar. 21, 2016).

230. Grant Dawson, *Conflict Of Interest: Working Guidelines For Successive Conflicts Of Interest Involving Government and Private Employment*, 11 GEO. J. LEGAL ETHICS 329 (1998).

231. See, e.g., Lester M. Crawford, *supra* note 107.

232. Walter M. Shaub, Jr., Dir., United States Government of Ethics, to Designated Agency Ethics Officials (July 27, 2015), [https://www2.oge.gov/Web/OGE.nsf/All+Advisories/1C3D07B39FDE132B85257EC3003C34A/\\$FILE/LA-15-10.pdf?open](https://www2.oge.gov/Web/OGE.nsf/All+Advisories/1C3D07B39FDE132B85257EC3003C34A/$FILE/LA-15-10.pdf?open) (on file with the Office of Government Ethics).

233. *Revolving Door: Search Results, Agency search: Department of Agriculture*, *supra* note 18. Conflicts of interests between government agencies and private companies is not new; the FDA and USDA rely on data developed by scientists employed by Big Food companies like Pepsi and Kraft; Gabriela Steier, *Dead People Don't Eat: Food Governmentomics and Conflicts-of-Interest in the USDA and FDA*, 7 PITT. J. ENVTL. PUB. HEALTH L. (2012).

234. Political financial contributions to influential congressional members from interested industries further erodes the barriers to public health and safety. See *Spoiled Meat, Rotten Congress*, *supra* note 122.

panded scientific research is further needed to identify, isolate, and eradicate newer strains of food-borne illnesses to combat resistant pathogenic bacteria.

By implementing the proposed changes to the Close the Revolving Door Act, in addition to closing loopholes in 18 U.S.C. § 207, conflicts of interests will decrease and the interests of the consumer will be placed where they belong—at the forefront.