

I. Hypothetical 1:

Federal Meat Inspection Act

Section 1: Adulterated or Misbranded Meat:

- a. No person may sell, transport, or offer for sale any meat or meat food products that are adulterated or misbranded.
- b. No person may sell, transport, or offer for sale any meat or meat food products except in compliance with the inspection standards of this Act.

Section 2 : Regulations: The Secretary of Agriculture may establish regulations to implement and administer Section 1 of this Act.

Section 3: Enforcement Orders: The Secretary of Agriculture may issue orders imposing fines on any person who violates Section 1 of this Act and requiring persons to comply with Section 1. The fines imposed under this Section shall not exceed \$25,000 per violation per day of violation.

Section 4: Judicial Review: Any person may challenge any order issued under Section 3 in the federal district court in which the person resides or transacts business.

- A. The Secretary promulgates regulations that define when meat is "adulterated" or "misbranded," and that establish an inspection program to ensure that adulterated or misbranded meat is not sold, transported, or offered for sale.
- B. Assume that there is no other provision in the statute that addresses judicial review.

Assume also that during the debates on the legislation, (a) Senator Smith argued that the statute should not authorize any judicial review of regulations adopted by the agency; and (b) Senator Jones stated that she was concerned that if the statute prohibited review of regulations, it would be an unconstitutional delegation of legislative authority to the agency, but that she would vote for the law even without an express provision authorizing judicial review of regulations because persons could probably challenge the regulations under other statutes that give courts jurisdiction to hear challenges to federal agency actions.

- C. Assume that the trade association that represents cattle ranchers submitted comments on the regulations and the Secretary did not address their comments, so they want to challenge the regulations in a lawsuit, on the

grounds that the agency's failure to respond to the comments was arbitrary and capricious and a violation of the procedural requirements of the APA (failure to provide a concise, general statement of the basis and purpose of the rule). On what grounds would they allege that the regulations were reviewable, and what statute would they allege provided jurisdiction for their lawsuit, if they wanted the court to enjoin the agency from enforcing the regulation and declare it to be invalid? On behalf of the agency, how would you argue that the regulations are not reviewable, and what is your likelihood of success? Do you have any precedent that would be relevant? How would the trade association respond?

II. Hypothetical 2:

- A. Assume the same facts as in hypothetical 1, but assume that Section 2 of the statute also requires the Secretary to work with producers of meat and meat food products and with consumer groups and environmental health and safety groups to develop the regulations that the Secretary will promulgate under that section.
- B. In addition, assume that Section 4, the judicial review provision of the statute, also provides that any person who was not involved in the development of regulations under Section 2 may challenge the regulations adopted by the Secretary under that Section.
- C. Assume that a food safety organization was part of the working group that drafted the regulations that were described in the first hypothetical. Although the food safety group was involved in drafting the regulations, the agency made changes to the regulations at the end of the comment period, so the food safety organization wants to challenge the regulations as arbitrary and capricious.

If the food safety organization sues the Secretary in U.S. district court, relying on the presumption of reviewability in the APA and 28 U.S.C. § 1331 for jurisdiction and the organization seeks a declaratory judgment that the regulations are invalid, how would the Secretary argue that the food safety organization's claim is not reviewable? Would the Secretary succeed?