September 2015
Volume 63
Number 5

United States
Department of Justice
Executive Office for
United States Attorneys
Washington, DC
20530

Monty Wilkinson
Director

Contributors' opinions and statements should not be considered an endorsement by EOUSA for any policy, program, or service

The United States Attorneys' Bulletin is published pursuant to 28 CFR § 0 22(b)

The United States Attorneys' Bulletin is published bimonthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201

Managing Editor
Jim Donovan

Associate Editor
Carmel Matin

Internet Address
www usdoj gov/usao/
reading_room/foiamanuals
html

Send article submissions to Managing Editor, United States Attorneys' Bulletin, National Advocacy Center, Office of Legal Education, 1620 Pendleton Street, Columbia, SC 29201

Wildlife Trafficking II

In This Issue

An Introduction to the Federal Animal Protection Laws

Varu Chilakamarri
Senior Counsel
Office of the Assistant Attorney General
Environment and Natural Resources Division

Ethan Eddy
Trial Attorney
Environmental Crimes Section
Environment and Natural Resources Division

The prevention of animal cruelty is a value that has been codified in law since the earliest days of our nation. In 1641, for example, the Massachusetts Bay Colony made it unlawful to "exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use." Collections of the Massachusetts Historical Society 232 (Charles C. Little & James Brown eds., 1843). Many states' animal cruelty laws date to the 19th century, and all states now have at least one felony animal cruelty prohibition. State courts of general jurisdiction hear most animal cruelty cases, but Congress has also given the Federal Government an important role to play with respect to certain types of activities involving animals. Indeed, federal involvement in animal welfare goes back more than 100 years, with the enactment of the Twenty-Eight Hour Law in 1873, which addresses animal welfare issues associated with long-distance animal transport. *See* 49 U.S.C. § 80502 (2015).

In the intervening decades, Congress acted to protect animals in a host of settings—from dog fighting to horse shows to slaughterhouses. Some of these laws are backed by felony penalties and detailed regulations. None authorize citizen-suit enforcement, so enforcement by U.S. Attorneys' offices and the Department of Justice gives meaning to the criminal and civil penalty schemes provided by Congress. This article will provide an introduction to the five primary federal animal protection statutes: (I) the animal fighting venture prohibition statute, (II) the animal Crush Video Statute, (III) the Animal Welfare Act, (IV) the Horse Protection Act, and (V) the Humane Methods of Livestock Slaughter Act. The laws surveyed here parallel, and occasionally overlap with, the federal wildlife protection statutes that may be more familiar to readers of this issue of the Bulletin, such as the Endangered Species Act. In 2014 the Department of Justice added these laws to the portfolio of the Environment and Natural Resources Division (ENRD). *See* UNITED STATES ATTORNEY'S MANUAL §§ 5-10.120 (civil enforcement assigned to the Wildlife and Marine Resources Section), 5-11.101(c) (criminal enforcement delegated to the Environmental Crimes Section) (2015).

This article will first address the laws governing conduct that is outright criminal in nature. Prohibitions of whole classes of activity—such as dog fighting—have driven certain conduct and markets underground. These violations are difficult to detect and often associated with other criminal activities. We will then turn to the laws governing animal welfare enforcement in more prominent, commercial settings, such as exhibitions, laboratories, and slaughterhouses. While these laws also contain criminal prohibitions, they provide a more complex administrative framework for regulated entities that deal with animals. Although animal welfare issues arise in a variety of contexts, all of the laws discussed in this article reflect a cohesive national policy that is aimed at ensuring the humane treatment of animals.

I. Animal fighting venture prohibition: 7 U.S.C. § 2156

A. Animal fighting in the United States

Animal fighting is surprisingly prevalent in the United States. State and national animal control associations estimate that upwards of 40,000 people participate in dog fighting in the United States at a professional level, meaning that dog fighting and its associated gambling are their primary or only source of income. *See United States v. Berry*, No. 09-CR-30101-MJR, 2010 WL 1882057, at *3–4 (S.D. Ill. May 11, 2010). An unknown, but potentially larger, number of people participate in dog fighting on a more occasional basis. Cockfighting is thought to be similarly widespread, and a 2007 estimate valued the U.S. game fowl industry at $2–$6 billion annually. *See United States v. Gibert*, 677 F.3d. 613, 625 (4th Cir. 2012). Dog fighting and cockfighting are the two most common forms of animal fighting in the United States. Other less common forms of animal fighting include: (1) hog-dog fighting, involving one or more dogs being turned loose on a domesticated farm pig or captured wild boar, and (2) bear-baiting, in which captive black bears, often tethered, are set upon by packs of hunting dogs. This article will focus on dog fighting and cockfighting, although the federal statute, 7 U.S.C. § 2156(g)(4), criminalizes all of these forms of animal fighting.

Gambling is the driving force behind these unlawful practices. Participants can also make large sums of money from the breeding and sale of fighting animals. A high volume of illegal commerce in fighting animals occurs brazenly on the Internet and in magazines that function as animal fighting industry trade journals. The street value of successful fighting dogs can reach into the five figures. Some animal fighters operate and conduct commerce in extensive networks that span across state lines, constituting organized crime in the traditional sense of that phrase. The association between animal fighting and other forms of serious crime, such as drug and weapons trafficking and interpersonal violence, is well documented.

In addition to the hazards it poses to community safety, animal fighting is an extreme form of cruelty to animals. Not only do animals suffer grave injuries and frequently die during the fights, but they are also mistreated before and after the fights. Dogs used for fighting typically live their entire lives tethered outside to a stake by a heavy chain, with inadequate or no protection from the elements. It is not uncommon for authorities to discover dogs that have died from thirst, starvation, exposure, or untreated injuries or illness, in the possession of animal fighters. Similarly, roosters used for fighting have their waddles, combs, and spurs crudely "dubbed," or amputated, for the purposes of facilitating fights.

If a losing animal does not die in the ring, the handler will often brutally kill the animal out of embarrassment or as punishment for causing a loss of reputation or gambling funds. Among other documented atrocities, a theme frequently seen in federal dog fighting cases is for dog fighters to electrocute losing dogs. *See, e.g.*, *United States v. Courtland*, 642 F.3d 545, 549 (7th Cir. 2011) (noting defendant's electrocution of a dog); *United States v. Hackman*, 630 F.3d 1078, 1081 (8th Cir. 2011) (observing that defendant attempted electrocution of losing dog after dog became "incapacitated" well over an hour into a fight). Michael Vick and his associates admitted to electrocuting, hanging, drowning, and fatally beating underperforming dogs. *United States v. Peace*, 3:07-cr-274, Statement of Facts, at *9 (E.D. Va. Aug. 24, 2007) (ECF No. 46).

B. Prohibited acts

Congress amended the federal animal fighting statute in 2007, 2008, and 2014, each time strengthening it. It is now a federal crime to "exhibit" or "sponsor" an animal in, be a spectator at, or bring a minor under the age of 16 to, an animal fight, or to possess, purchase, sell, receive, transport, deliver, or train an animal for purposes of participation in an animal fight. 7 U.S.C. § 2156(a), (b) (2015). Commerce in the blades that cockfighters strap to the legs of roosters is also prohibited, *id.* § 2156(e), as is using the mail or other interstate instrumentality to advertise fighting animals or cockfighting knives.

Id. § 2156(c). In effect, Congress has criminalized every aspect of the animal fighting industry. It is not necessary to raid a fight in progress to charge under this section.

Congress also recently broadened the scope of animal fights that are federalized under this provision. Prior to 2008, interstate movement of people or animals was an element of the offense. Now, any of the acts listed above are federally criminalized if the animal fighting venture merely "affect[s]" interstate commerce. *Id.* § 2156(g). One application of the statute to a cockfighting operation without interstate movement of animals or people was upheld in the Fourth Circuit in *United States v. Gibert*, 677 F.3d 613, 618–621 (4th Cir. 2012), based, in part, on the defendants' purchase of equipment that had been manufactured out of state, and on gambling wagers for their cockfighting operation.

The animal fighting statute authorizes the Secretary of the U.S. Department of Agriculture (USDA), who acts through the Department's Office of the Inspector General, to investigate violations of the statute and to seek the assistance of "the Federal Bureau of Investigation, the Department of the Treasury, or other law enforcement agencies of the United States." *Id.* § 2156(f). The FBI has played an important role in recent animal fighting cases. *See, e.g.*, *United States v. Anderson*, 3:13-cr-100 (M.D. Ala. Aug. 23, 2013). Federal cases are also sometimes generated by local investigations. In light of the statute's recent expansion, many cases that are pursued in state court could also be charged in federal court. Therefore, U.S. Attorneys' offices that are interested in pursuing animal fighting cases may find it beneficial to reach out to state or local animal cruelty task forces, as well as animal control offices within their jurisdiction, for investigative leads.

C. Sentencing and forfeiture

Sentencing: It is a felony punishable by up to 5 years in prison and a $250,000 fine to engage in any of the acts listed above—except causing a minor to attend, a 3-year felony, and attending as a spectator, a 12-month misdemeanor. 18 U.S.C. §§ 49(c), 3571(b) (2015). Although there has been no animal fighting prosecution that tests the proposition, the statutory text could be read to permit charging on a per-animal basis, given that the prohibitions refer to actions involving "an animal."

As of the publication date of this article, the U.S. Sentencing Guidelines Manual assigns these violations to a gambling offense guideline, § 2E3.1, which has a base offense level of 10. Courts routinely depart upward or apply an upward variance in dog fighting cases, as envisioned in note 2 to the guideline, for cases involving "extraordinary cruelty," which is arguably present in every animal fighting case. *See, e.g.*, *Anderson*, ECF No. 583 (sentencing primary defendant to 8 years in prison on animal fighting charges); *United States v. Hargrove*, 701 F.3d 156, 164–65 (4th Cir. 2012) (affirming 60-month sentence where guidelines range was 0–6 months, in light of defendant's "cruel and barbaric treatment of the dogs"); *United States v. Courtland*, 642 F.3d 545, 554 (7th Cir. 2011) (affirming upward departures for several co-defendants, including one for the electrocution of a dog that did not perform well at the fight).

Forfeiture: Another important component of the statute is its forfeiture and restitution provision, 7 U.S.C. § 2156(f). Live animals are recovered from nearly every animal fighting operation, and the statute authorizes their seizure and forfeiture. *See id*. The purpose of forfeiting the animals is to ensure that they are not returned to their abusers and to perfect the Government's property interest in the animals so that they can be adopted through local animal shelters or placed with a rescue organization, if appropriate, rather than languishing in temporary custody at the expense of humane societies or the state, local, or Federal Government. Forfeiture of live animals can be accomplished both criminally and civilly. *See id.* § 2156(f), (j).

Civil forfeiture may be preferable in some instances because, if pursued swiftly, it has the potential to conclude more quickly than a federal criminal case. This option is beneficial in a matter involving live animals. In cases involving the seizure of hundreds of animals, the costs of housing, food, staffing, and veterinary care, can escalate quickly. Most local animal shelters do not have the ability to

house that many animals at once, resulting in the need to build or rent temporary housing (for example, at a state fairgrounds), or to coordinate placement at numerous shelters across a large geographic area. Even where shelters are able to house some or all seized animals, extended placement can tie up kennel runs and result in increased euthanasia rates in the general shelter population.

To best avoid these consequences, obtain a final order of forfeiture as soon as possible. Other advantages of civil forfeiture include a lower standard of proof, an increased likelihood that there will be no claimants, and that forfeiture can be obtained in an uncontested proceeding. This is especially true now that mere possession of fighting animals has been made a federal crime and, thus, criminal defendants are often reluctant to file a claim for seized dogs. In some states, it may be more advantageous to obtain civil forfeiture of the animals under state law if state prosecutors will pursue such an action. This is due to the shorter litigation deadlines and because state law provisions require defendants to post a bond for the costs of care of the animals in order to contest the forfeiture proceeding.

Prosecutors from the Environmental Crimes Section and civil litigators from the Wildlife and Marine Resources Section can help assess the relative advantages or disadvantages of state versus federal seizure, bonding, and forfeiture. If federal forfeiture is pursued, the statute authorizes courts to order that defendants make restitution payments for the costs of care of seized animals, *id.*, and the Assets Forfeiture Fund may also be available to pay certain expenses. *See* 28 U.S.C. § 524(c)(1) (2015). In one recent case, the court ordered the defendants to pay $2 million in restitution as part of judgments entered in the criminal case. *Anderson*, ECF Nos. 668, 670, 674, 681–684. The highly successful outcome in *Anderson* is part of a trend toward greater federal involvement in animal fighting cases. In 2014 the Department pursued 10 dog fighting cases and charged 49 defendants.

II. Animal crush videos: 18 U.S.C. § 48

A. Prohibited acts

There unfortunately exists a market for sexual fetish videos in which animals are brutally harmed. In 1999 Congress passed the "Crush Video Statute," 18 U.S.C. § 48, to prevent the production of these videos and images. One common variant of these videos and images, from which the statute derives its name, is films in which people impale and crush small animals, such as mice, kittens, and puppies, to death by stepping on them in high-heeled shoes. An earlier version of this law made it a crime to engage in the commerce of videos or images depicting acts of cruelty to animals, if the cruelty depicted was unlawful either where it occurred or where the video surfaced in commerce. However, the Supreme Court in *United States v. Stevens*, 559 U.S. 460, 463 (2010), struck down this version of the law as overbroad. Congress immediately responded, passing a substantially narrowed statute with the explicit purpose of "clos[ing] the gap in the enforcement of State and Federal animal cruelty laws left open by the Supreme Court's decision." H.R. Rep. No. 111-549, at 2 (2010), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt549/pdf/CRPT-111hrpt549.pdf.

The current version of 18 U.S.C. § 48 bears little resemblance to the version struck down in *Stevens*, and was recently upheld against a First Amendment challenge in *United States v. Richards*, 755 F.3d 269, 272 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1546 (Mar. 23, 2015). In the current version, Congress substantially reworked the scope of what comprises a prohibited video or image, which is now defined as "any photograph, motion-picture film, video or digital recording, or electronic image" that:

> (1) depicts actual conduct in which 1 or more living non-human mammals, birds, reptiles, or amphibians is intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury (as defined in section 1365 and including conduct that, if committed against a person and in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 [of Title 18]); and

(2) is obscene.

18 U.S.C. § 48(a) (2015).

Section 2241 of Title 18 prohibits "knowingly caus[ing] another person to engage in a sexual act [] by using force. . . ." 18 U.S.C. § 2241(a)(1) (2015). Section 2242 prohibits "knowingly . . . engag[ing] in a sexual act with another person if that other person is [] incapable of appraising the nature of the conduct; or [] physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." *Id.* § 2242(2). Images depicting the acts prohibited by sections 2241 and 2242 are considered "animal crush videos" when those acts are committed against an animal. 18 U.S.C. § 48 (2015). Accordingly, this part of the Crush Video Statute criminalizes bestiality videos, along with images of torture and bodily injury.

The statute makes several acts unlawful with respect to such videos. First, it is unlawful for any person to "knowingly create" such a video if "the person intends or has reason to know that the animal crush video will be distributed in, or using a means or facility of, interstate or foreign commerce; or [] if the animal crush video is distributed in, or using a means or facility of, interstate or foreign commerce." *Id.* § 48(b)(1). It is also "unlawful for any person to knowingly sell, market, advertise, exchange, or distribute an animal crush video in, or using a means or facility of, interstate or foreign commerce." *Id.* § 48(b)(2).

It is commonly understood that the Internet is a "facility or means of interstate or foreign commerce." *See, e.g.*, *United States v. Fuller*, 77 F. App'x 371, 378–79 (6th Cir. 2003). A violation of the Crush Video Statute is a felony with a statutory maximum penalty of 7 years in prison and up to a $250,000 fine. 18 U.S.C. §§ 48(d), 3571 (2015). For U.S. Sentencing Guidelines purposes, violations of the statute are treated similarly to obscenity violations. U.S. SENTENCING GUIDELINES MANUAL § 2G3.1 (2014).

B. Recent case law

The *Richards* case highlights the heinous nature of these videos. A grand jury in the Southern District of Texas indicted Ashley Richards and Brent Justice for producing animal torture videos in violation of the Crush Video Statute. Even when recited dryly, the facts are appalling. As summarized by the Fifth Circuit:

> Generally, the videos portray Richards binding animals (a kitten, a puppy, and a rooster), sticking the heels of her shoes into them, chopping off their limbs with a cleaver, removing their innards, ripping off their heads, and urinating on them. Richards is scantily clad and talks to both the animals and the camera, making panting noises and using phrases such as "you like that?" and "now that's how you [expletive] a [expletive] real good."

Richards, 755 F.3d at 272. The district court initially invalidated the statute as facially unconstitutional in violation of the First Amendment, and dismissed the charges. *United States v. Richards*, 940 F. Supp. 2d. 548, 558–59 (S.D. Tex. 2013). The Fifth Circuit reversed, finding that the obscenity element of the offense rendered the so-called "speech" at issue categorically unprotected. *Richards*, 755 F.3d at 277–79. The Supreme Court recently denied certiorari in this case, and it is presently on remand.

Since Congress re-enacted the statute in 2010, the distribution of animal torture videos like those in *Richards* has retreated back underground and is hard to detect. However, there are still a handful of Web sites that operate brazenly and are dedicated to the production and distribution of bestiality videos. Most, but not all, states specifically criminalize the underlying bestiality conduct. Other states' bestiality laws are framed narrowly and do not reach all of the types of acts seen on these Web sites. The federal definition is broad and encompasses most sexual acts. Investigators and prosecutors working on child

pornography cases may come across bestiality or animal torture videos, and vice versa, as the two are frequently found together.

III. The Animal Welfare Act: 7 U.S.C. §§ 2131–2159

The next set of statutes covers areas in which the Federal Government has a large regulatory presence, including exhibitions, commercial sales, research, and agriculture. The Animal Welfare Act and the Horse Protection Act regulate the treatment of animals outside the context of food production, whereas the Humane Methods of Slaughter Act regulates the treatment of animals within the agricultural setting. Common features of each of these statutory schemes include a licensing or inspection mechanism that is administered by the USDA; a set of prohibited conduct, as well as standards and other guidelines relating to animal care; associated administrative penalties; and a multilayered administrative enforcement process that includes a notice and opportunity to be heard. In addition to the administrative enforcement processes, each of these statutes contains some measure of civil and criminal enforcement mechanisms for which Department of Justice prosecutors and civil litigators have responsibility.

A. Statutory and regulatory background

Originally enacted in 1966 as the Laboratory Animal Welfare Act, the Animal Welfare Act (AWA) sought to: (1) protect dog and cat owners from having their pets stolen and sold for research, and (2) ensure the humane treatment of certain animals actually used in research. Pub. L. No. 89-544, § 1, 80 Stat. 350, 350 (1966). Over the years, the AWA has been amended to more broadly regulate research facilities (for example, commercial laboratories and universities), exhibitors (for example, circuses and zoos), dealers (for example, commercial breeders and animal brokers), and certain carriers (for example, commercial airline carriers). 7 U.S.C. §§ 2131–59 (2015). The AWA's coverage is far-reaching and goes well beyond domesticated animals, to include wild and exotic animals as well as marine mammals. The AWA defines "animal" as any live or dead dog, cat, monkey, guinea pig, hamster, rabbit, or any other warm-blooded animal that is used or intended to be used for research, teaching, exhibition, or as a pet. *Id.* § 2132(g); 9 C.F.R. § 1.1 (2015). However, birds, rats and mice bred for research, horses not used for research, and farm animals used for food or fiber (or research related to food or fiber production), are categorically excluded from this definition. 7 U.S.C. § 2132(g) (2015).

Flowing from its initial purpose, the AWA contains several specific requirements protecting dogs and cats, such as mandating holding periods to limit the quick sale of these pets, prohibiting research facilities from purchasing dogs and cats from unauthorized entities, and limiting the importation of dogs. *Id.* §§ 2135, 2137, 2138. But to effectuate its broader policy of systematically ensuring the humane treatment of animals in commerce, the AWA goes further and establishes a comprehensive enforcement scheme to be administered by the USDA.

First, the AWA requires the USDA to create a licensing system for animal dealers and exhibitors, and prohibits these entities from conducting various commercial activities—including selling or transporting animals for exhibition, research, or use as a pet—without having a valid license. *Id.* §§ 2133, 2134.

Second, the USDA must promulgate standards governing the humane handling, care, treatment, and transportation of animals by dealers, exhibitors, and research facilities—standards that in many ways reflect the core substantive purpose of the Act. *Id.* § 2143. Section 2143 directs that these standards include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extreme temperatures, veterinary care, and separation of species, as well as other issues arising in the research context. *Id.* § 2143(a)(2) & (3). The USDA has, in turn, promulgated fairly extensive species-specific humane handling standards. *See* 9 C.F.R. §§ 3.1–3.142 (2015) (providing standards of care for dogs, cats, guinea pigs, hamsters, rabbits, nonhuman primates, marine mammals, and other warm-blooded animals). These regulations set forth many detailed requirements pertaining to the animals' life in

captivity—from minimum feeding times, to positive physical human contact and play for dogs, to housing social marine mammals with a companion. *Id.* §§ 3.8, 3.109, 3.129.

Finally, the AWA empowers the USDA with investigative authority to detect violations. Dealers and exhibitors are not only required to create and retain certain records relating to the sale, transportation, identification, and ownership of their animals, but must also make these records available for inspection. 7 U.S.C. §§ 2140, 2141 (2015). Among its investigative tools, the USDA has the ability to conduct regular inspections and to confiscate animals that are found to be suffering as a result of a violation of the statute or regulations—all supported by separate criminal penalties for interference with these functions. *Id.* § 2146. Investigations of potential AWA violations are conducted by USDA's Animal and Plant Health Inspection Service's (APHIS) Investigative and Enforcement Services (IES), which employs field investigators who support AWA enforcement, along with a number of other statutory programs, including the Horse Protection Act and the Lacey Act.

B. Enforcement

When there is evidence of a violation of the AWA or the rules, regulations, or standards thereunder, the USDA engages in a familiar multistep enforcement process, which may progress and escalate as the facts warrant. In certain instances, IES may resolve the matter through a pre-litigation settlement agreement, which may include a monetary penalty or other sanction. In other circumstances, IES will refer a violation to the USDA's Office of General Counsel (OGC), which may consult with the Office of Inspector General (OIG) for potential criminal matters and the Department of Justice for potential judicial enforcement actions. In many instances, depending upon the nature of the violations, OGC will institute an administrative enforcement action, which will entail an administrative complaint, motions practice and responsive pleadings, and a hearing before an Administrative Law Judge (ALJ). The ALJ's decision may be appealed to the USDA's Judicial Officer, whose decision becomes the final agency action. The respondent may obtain review of the final agency decision in the appropriate U.S. court of appeals. 7 U.S.C. § 2149 (2015). The culmination of the administrative enforcement process may be the issuance of civil penalties (up to $10,000 per violation per day), a cease and desist order, and/or a suspension or revocation of an AWA license. *Id.*

In conjunction with, and sometimes separate and apart from, the administrative enforcement process, the AWA provides specific judicial mechanisms relating to the misconduct of animal dealers, exhibitors, auction operators, and research facilities. On the civil enforcement side, the Government (through the Attorney General or his delegate) can institute a civil action in district court to collect unpaid administrative penalties, as well as civil penalties for failure to obey a final cease and desist order. *Id.* § 2149(b). An application for a temporary restraining order or injunction may also be sought in district court where there is reason to believe that the health of an animal is in serious danger. *Id.* § 2159. Finally, the AWA imposes criminal penalties of up to 1 year in prison and a $2,500 fine (subject to adjustment under the Alternative Fines Act) for knowing violations of the statute. *Id.* § 2149(d). Intimidation or interference with USDA inspections and enforcement constitutes a felony offense, punishable by up to 3 years in prison and a $5,000 fine (subject to adjustment under the Alternative Fines Act). *Id.* § 2146(b). There is currently no sentencing guideline assigned to the AWA. In such circumstances, an analogous guideline should be used. U.S. SENTENCING GUIDELINES MANUAL § 1B1.2(a) (2014). Other laws surveyed in this article may provide analogous guidelines, depending on the circumstances.

C. Litigation under the AWA

Litigation under the AWA has generally fallen into four categories: (1) defense of agency adjudications, (2) defense of agency rulemakings, (3) affirmative civil enforcement, and (4) criminal prosecution. The majority of cases fall within the first category, where final administrative orders are challenged directly in the courts of appeals. *See, e.g.*, *Horton v. Dep't of Agric.*, 559 F. App'x. 527, 527–

28, 536 (6th Cir. 2014) (affirming agency imposition of civil penalties against petitioner who sold dogs without a license); *ZooCats, Inc. v. Dep't of Agric.*, 417 F. App'x 378, 380, 383 (5th Cir. 2011) (denying petition for review of agency's cease and desist order and revocation of exhibitor's license where exhibitor of tigers, lions, and other wild animals had been found to violate animal housing, feeding, and veterinary care regulations).

A much smaller segment of cases include facial and as-applied challenges to the rules and regulations promulgated under the AWA. *See, e.g.*, *Associated Dog Clubs of New York State, Inc. v. Vilsack*, No. 1:13-cv-01982, 2014 WL 5795207, at *1, *8 (D.D.C. Nov. 7, 2014) (rejecting challenge to a USDA rule that redefined "retail pet stores" (which are exempted from the AWA) to include only face-to-face and not online sellers); *Animal Legal Defense Fund, Inc. v. Glickman*, 204 F.3d 229, 236 (D.C. Cir. 2000) (upholding regulations promulgated under the AWA regarding psychological well-being of nonhuman primates held by exhibitors and researchers). And while there have also been some constitutional challenges to the AWA itself, recent activity in this area has focused on the animal fighting amendments discussed above.

On the affirmative enforcement side, the Government has successfully sought to enforce civil penalties where administrative actions have been unavailing. *See United States v. Felts*, No. C11-4031-MWB, 2012 WL 124390, at *5 (N.D. Iowa Jan. 17, 2012) (granting summary judgment and ordering payment of civil administrative penalties that were imposed by USDA for various violations of humane handling regulations by a dog kennel and dealer). A survey of AWA cases reveals that prosecutors have often been able to charge other Title 18 offenses, including identity theft, mail fraud, false statements, and conspiracy, in connection with underlying animal welfare offenses. A number of these cases have been brought against defendants who fraudulently obtained and sold random source dogs and cats to research facilities without notifying owners that their pets might be used for research. *See, e.g.*, Indictment, *United States v. Martin*, No. 11-cr-54 (M.D. Pa. 2011); Felony Information, *United States v. Baird*, No. 05-cr-002224 (E.D. Ark. 2005); Indictment, *United States v. Davis*, No. 98-60125 (D. Or. 1998). Charges have also been brought directly under the AWA's provisions where, for example, a dealer or exhibitor sells or transports animals for exhibition without a valid USDA license. *See, e.g.*, Information, *United States v. Mazzola*, No. 09-08005 (N.D. Ohio 2009) (alleging counts under 7 U.S.C. § 2149(d) for transporting wild and exotic animals, including wolves, tigers, and bears, for an exhibition without a valid AWA license).

D. Potential intersections between the AWA, wildlife statutes, and other laws

At the national level, the AWA is perhaps the most wide-ranging statute pertaining to animal care. By design, however, the AWA is non-preclusive in nature, and thus may serve as a helpful tool that can be used in conjunction with other state and local law enforcement efforts, as well as with other federal wildlife statutes. For example, the AWA leaves ample room for complementary state and local regulation of animal welfare. *See* 7 U.S.C. § 2143(a)(8) (2015) (stating that the federal humane handling regulations "shall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the Secretary"); *see also id.* § 2145(b) ("The Secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject."). Thus, where state and local laws prohibit inhumane treatment of animals, or otherwise proscribe conduct relating to domestic or wild animals, there may be opportunities for cooperative enforcement. *See, e.g.*, Response to Defendant's Motion to Dismiss Indictment, *United States v. Davis*, No. 98-60125, at 3 (D. Or. 1999) (noting that the prosecution of defendants for improperly obtaining and selling random source dogs was conducted in two phases, the first of which involved prosecution by the state for theft of a companion animal); *cf. DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) (finding that a local ordinance prohibiting the possession of wild animals or animals capable of inflicting serious physical harm or death to humans was not preempted by the AWA).

At the federal level, the intersection between the AWA and wildlife statutes may provide additional mechanisms for deterring and reducing criminal activity. As discussed above, many aspects of the transport (or trafficking) of wild animals may also trigger the AWA because the AWA provides a mandatory framework for entities to legitimately engage in the commerce of animals—from puppies to tigers. Thus, if a dealer or exhibitor attempts to sell or transport a wild or exotic animal without obtaining an AWA license, he or she may be subject to the Act's criminal provisions. On the other hand, if a licensed dealer or exhibitor is otherwise engaged in conduct that violates the Endangered Species Act, Lacey Act, or other federal or state laws that implicate the transport, ownership, or welfare of animals, such conduct may serve as independent grounds for the termination of an AWA license. *See* 9 C.F.R. § 2.11(a)(4) (2015) (providing that a license will not be issued to any applicant who has been found to have violated any federal, state, or local laws or regulations pertaining to animal cruelty within 1 year of application); *id.* § 2.11(a)(6) (providing the same for any applicant who has been found to have violated any federal, state, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals).

IV. Horse Protection Act: 15 U.S.C. §§ 1821–1831

A. Statutory and regulatory background

Among those animals excluded from the AWA are "horses not used for research purposes." 7 U.S.C. § 2132(g) (2015). There are only a handful of statutes that regulate the care of horses, and they apply in fairly specific contexts. In addition to the Twenty-Eight Hour law, which restricts the transport of horses and other animals, *see* 49 U.S.C. § 80502 (2015), Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (2015), which was designed to protect and manage wild horses and burros on public lands. By contrast, the Horse Protection Act (HPA), 15 U.S.C. §§ 1821–1831, was enacted to prevent a very specific practice of animal cruelty on captive horses—a practice known as horse "soring," which is prevalent in the walking horse show industry.

Soring is the practice of injuring a horse's limbs in order to cause the horse to have the type of exaggerated, high-stepped gait that is prized in walking horse show competitions. Soring can occur in a number of ways, including by burning, cutting, lacerating, or applying chemical irritants, spikes, or screws into the horse's legs. 15 U.S.C. § 1821 (2015). In the HPA, Congress declared that the practice of soring was "cruel and inhumane" and gave an unfair competitive advantage to those engaged in this conduct. *Id.* § 1822. The HPA does not directly ban soring itself, instead limiting its reach to activities connected to the movement of sored horses in commerce. Using this framework, the HPA seeks to deter soring by imposing civil and criminal liability for certain actions of horse show managers, horse owners, and those who sore horses. *See* H.R. Rep. No. 91-1597 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4875. The HPA first prohibits the showing, exhibition, sale, and transport of horses known to be sore. 15 U.S.C. § 1824(1)–(2) (2015). The HPA also prohibits horse owners from allowing their horses to be shown, exhibited, or sold while sore. *Id.* § 1824(2). Finally, the HPA imposes liability on managers of horse shows who fail to disqualify sored horses or prohibit the sale of such horses. *Id.* §§ 1823(b), 1824(3)–(4).

The inspection scheme that is contemplated by the HPA is somewhat atypical. The HPA provides for a system of both public and private inspectors to detect and diagnose sored horses at shows and exhibitions. USDA inspectors are authorized to examine horses at shows and exhibitions, *id.* § 1823(e), but because of APHIS's limited resources, the primary means of enforcement is through a private inspection system. *See* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF AGRICULTURE, AUDIT REP. 33601-2-KC 1 (2010), *available at* http://www.usda.gov/oig/webdocs/33601-02-KC.pdf. The HPA requires the USDA to regulate the appointment of private inspectors. 15 U.S.C. § 1823(c) (2015). The USDA thus established its Designated Qualified Person (DQP) Program, through which it certifies private Horse Industry Organizations (HIOs), who, in turn, license DQPs to inspect horses. 9 C.F.R. § 11.7

(2015). Under the private system, routine inspections are not mandatory but there is an incentive for horse show managers to voluntarily hire private inspectors. If a manager of a horse show opts to hire a DQP, then the manager will only be liable for showing a sored horse if he or she is notified that the horse is, in fact, sore. 15 U.S.C. § 1824 (2015). On the other hand, if the management declines to hire a DQP, then the management is strictly liable for HPA violations, and thus would be liable for failing to disqualify a sored horse, regardless of whether the manager knew that the horse was sore. *Id*.

B. Enforcement

Investigations and administrative enforcement of HPA violations are conducted by USDA's APHIS, through an administrative process that is structured similarly to that under the AWA. Thus, USDA's APHIS may refer violations to OGC, OIG, and the Department of Justice, as the circumstances warrant. In many instances, OGC will institute an administrative enforcement action, which will entail an administrative complaint, motions practice and responsive pleadings, and a hearing before an ALJ. The ALJ's decision can be appealed to the USDA's Judicial Officer, whose decision is the final agency action, appealable to a U.S. court of appeals. *See* 15 U.S.C. § 1825 (2015). Through this administrative enforcement process, USDA can issue civil penalties (up to $2,200 per violation), as well as orders of disqualification of horse exhibitors and show managers. *Id*. § 1825(b), (c) (2015); 7 C.F.R. § 3.91(b)(2)(vii) (2015).

In addition to the administrative enforcement process, the HPA provides for certain judicial measures. The Government can institute a civil action in district court to collect unpaid civil administrative penalties, *see* 15 U.S.C. § 1825(b)(3) (2015), as well as a forfeiture action against property (that is, equipment and devices) used in violations of the HPA or its regulations. *Id.* § 1825(e)(2). The HPA also criminalizes knowing violations of § 1824, which include the prohibited conduct by horse owners, exhibitors, and managers relating to the transporting, showing, and exhibiting of sored horses. *Id*. § 1825(a). Such violations are misdemeanors, with a maximum penalty of 1 year of imprisonment and a $3,000 fine (subject to adjustment under the Alternative Fines Act). Intimidation or interference with official duties under the HPA constitutes a felony offense, punishable by up to 3 years in prison and a $5,000 fine (subject to adjustment under the Alternative Fines Act). *Id.* § 1825. There is currently no sentencing guideline assigned to the HPA. In such circumstances, an analogous guideline should be used. U.S. SENTENCING GUIDELINES MANUAL § 1B1.2(a) (2014). Other laws surveyed in this article may provide analogous guidelines, depending on the circumstances.

C. Litigation under the HPA

The vast majority of litigation under the HPA has included: (1) defense of agency adjudications, *see, e.g.*, *Derickson v. Dep't of Agric.*, 546 F.3d 335, 347 (6th Cir. 2008) (denying petition for review of agency's order disqualifying exhibitor for 2 years and imposing civil penalties for transporting and entering a sored horse in a show), (2) defense of agency rulemaking, *see, e.g.*, *Contender Farms, LLP v. Dep't of Agric.*, 779 F.3d 258, 270–71 (5th Cir. 2015) (finding that the HPA did not authorize a regulation that would require HIOs to impose mandatory suspensions), and (3) criminal prosecutions. Recent criminal cases have involved charges against defendants who trained, transported, and entered sored horses in shows, as well as falsified entry forms. *See, e.g.*, Indictment, *United States v. McConnell*, No. 12-cr-9 (E.D. Tenn. 2012); Indictment, *United States v. Davis*, No. 11-cr-11 (E.D. Tenn. 2011).

D. Concurrent authorities

Although the HPA is a much narrower statute than the Animal Welfare Act, Congress displayed a similar intent to leave this area of regulation wide open for states and localities. The HPA explicitly disclaims any intent to "occupy the field" on this issue, *see* 15 U.S.C. § 1829 (2015), making way for the imposition of local anti-cruelty statutes. This is particularly noteworthy given that the HPA does not

directly prohibit soring itself. Thus, enforcement of the HPA and its regulations may, in some circumstances, be coupled with state prosecutions for soring and other animal cruelty violations. *See, e.g.*, Sentencing Memorandum, *McConnell* , No. 12-cr-9 (noting that the State of Tennessee had also prosecuted the defendant for animal cruelty violations and seized his horses).

V. Humane Methods of Livestock Slaughter Act: 7 U.S.C. §§ 1901–1907

A. The statute

Images of inhumane slaughter occasionally make headlines in print and television news. The Supreme Court recently affirmed that the acts depicted in such images, if proven, may constitute a crime under federal law. *See National Meat Ass'n v. Harris*, 132 S. Ct. 965, 974 (2012). The Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601–625, regulates the handling and slaughter of livestock for human consumption at slaughterhouses producing meat for interstate and foreign commerce. First enacted in 1906, the FMIA established a system of inspecting live animals and carcasses in order to prevent the shipment of unwholesome meat products.

In 1958 Congress passed the Humane Methods of Livestock Slaughter Act (HMSA), which requires that all meat purchased through federal procurement and price support programs be slaughtered humanely. Specifically, the HMSA requires that such livestock be:

> (a) . . . rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or
>
> (b) . . . slaughter[ed] in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.

7 U.S.C. § 1902 (2015). In 1978 Congress extended the HMSA to all slaughterhouses engaged in interstate commerce by amending the FMIA to require that meat inspected and approved under the FMIA be produced "only from livestock slaughtered in accordance with humane methods." Pub. L. No. 95-445, Stat. 1069 (1978).

Specifically, Congress directly required slaughterhouses to comply with the HMSA by amending 21 U.S.C. § 610 to prohibit the slaughter of livestock in a manner other than as allowed by the HMSA:

> No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines . . . slaughter or handle in connection with slaughter any such animals in any manner not in accordance with the Act of August 27, 1958 [the HMSA].

21 U.S.C. § 610 (2015) (listing "prohibited acts"). Pursuant to 21 U.S.C. § 676(a), most violations are a misdemeanor punishable by 1 year in prison and a fine of $100,000 for individuals, or $200,000 for a corporation (as adjusted under the Alternative Fines Act). *See* 18 U.S.C. §§ 3571(b)(5), (c)(5) (2015); *National Meat Ass'n*, 132 S. Ct. at 974 ("A violation of those standards is a crime, see § 676 . . . ."). The FMIA also makes it a felony punishable by up to 3 years in prison if any such violation either "involves intent to defraud" or results in the "distribution or attempted distribution of an article that is adulterated." 21 U.S.C. § 676(a) (2015). The sentencing guideline for all violations of the FMIA, including both humane slaughter and public health violations, is § 2N2.1. This guideline has a base offense level of 6. Administrative enforcement is also authorized. *Id.* § 676(b).

B. The regulations

USDA has promulgated regulations further delineating which slaughtering and handling methods are deemed to be humane, as that term is used in the HMSA and FMIA. *See* 9 C.F.R. §§ 309.1–309.18; 313.1–313.90 (2015). The purpose of these regulations is to ensure that animals are not treated inhumanely at slaughterhouses, beginning at the moment of their arrival. The regulations include: (1) humane handling requirements (that is, unloading animals and driving them into chutes and pens), (2) provisions regarding the handling of disabled, injured, or otherwise non-ambulatory animals, and (3) stunning requirements (that is, rendering animals completely unconscious prior to slaughter). The Supreme Court recently held that certain elements of the HMSA and its accompanying regulations pre-empt state laws in this area. *National Meat Ass'n*, 132 S. Ct. at 975.

The federal humane handling regulations require that the "[d]riving of livestock . . . from the holding pens to the stunning area shall be done with a minimum of . . . discomfort to the animals." 9 C.F.R. § 313.2(a) (2015). Additionally, "[e]lectric prods, canvas slappers, or other implements employed to drive animals shall be used as little as possible in order to minimize . . . injury. Any use of such implements which, in the opinion of the inspector, is excessive, is prohibited." *Id.* § 313.2(b).

The statute and regulations also address non-ambulatory or "downer" animals that are unable to rise and walk after being prodded. In many instances, such animals are suffering from a broken leg(s), although some animals become downed due to illness or neurological condition, including Bovine Spongiform Encephalopathy, better known as Mad Cow Disease. USDA regulations regarding the treatment of downer livestock are designed to protect the public health, as well as the welfare of the animal. For instance, "[d]isabled livestock and other animals unable to move" must either be immediately euthanized or, in some instances, can also be "separated from normal ambulatory animals and placed in [a] covered pen" for up to 24 hours to see if they recover. *Id.* § 313.2(d)(1). Only a USDA inspector can determine whether animals in this pen are allowed to be slaughtered or whether they should be euthanized and not put into the human food supply. *Id.* § 313.1(c). The "dragging of disabled animals and other animals unable to move, while conscious, is prohibited." *Id.* § 313.2(d)(2).

With respect to the statutory requirement that animals be rendered insensible to pain (that is, unconscious) prior to slaughter, the regulations deem four methods of stunning to be acceptable, if done correctly. These include the use of a "captive bolt" gun upon the skull of the animal, electrocution, the use of a gas chamber, and discharge of gunshot into the brain by firearm. *Id.* §§ 313.5, 313.15, 313.16, 313.30. Of these methods, the most commonly used is the captive bolt gun. A captive bolt gun is an "instrument which when activated drives a bolt out of a barrel for a limited distance." *Id.* § 301.2. Regulations require that captive bolt stunners

> shall be applied to the livestock in accordance with this section so as to produce immediate unconsciousness in the animals before they are shackled [hung from one rear leg that is chained to a moving overhead conveyor line], hoisted [elevated completely off the floor by the conveyor line following shackling], thrown, cast, or cut [for purpose of exsanguination].

Id. § 313.15(a)(1). Animals "shall be stunned in such a manner that they will be rendered unconscious with a minimum of excitement and discomfort." *Id.* The regulations further mandate that "[i]mmediately after the stunning blow is delivered the animals shall be in a state of complete unconsciousness and remain in this condition through shackling, sticking [that is, piercing of carotid artery for exsanguination] and bleeding." *Id.* § 313.15(a)(3).

C. Enforcement

Most enforcement of the HMSA is conducted administratively by the USDA's Food Safety Inspection Service, which has administrative authority to, among other things, suspend operations by

withholding grants of inspection. *See, e.g.*, 9 C.F.R. §§ 500.1–500.8 (2015). In addition to administrative enforcement, U.S. Attorneys' offices have pursued criminal charges under the HMSA in some contexts. *See, e.g.*, *United States v. Curbelo*, 1:11-cr-20283 (S.D. Fla. Aug. 31, 2011). Another federal law that applies to livestock is the Twenty-Eight Hour Law. It provides that, subject to some limited exceptions, road and rail carriers "may not confine animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest." 49 U.S.C. § 80502(a) (2015). This law is enforceable only by way of modest civil judicial penalties. *Id.* § 80502(d).

VI. Conclusion

A common misperception is that animal cruelty is the sole domain of state courts and state legislatures. However, Congress has been active in this area for decades and has equipped federal prosecutors and litigators with myriad enforcement tools. Federal involvement is particularly important in instances where state or local authorities cannot or will not act, or when the criminal activity at issue spans multiple jurisdictions. Indeed, with respect to humane slaughter violations, federal enforcement may be the only enforcement avenue in light of the Supreme Court's holding in *National Meat Association* that state animal welfare laws, as applied to slaughterhouse activities, are preempted by the HMSA in some contexts.

Moreover, some criminal syndicates, such as large-scale dog fighting rings, are simply too large to effectively combat on the local level. A coordinated, nationwide law enforcement response is needed to confront this type of organized crime. ECS prosecutors and ENRD civil litigators are working on these issues. They are available to consult on and assist with, and are also authorized to pursue criminal and civil matters arising under these statutes. Assistant U.S. Attorneys and federal agents who are interested in investigating and prosecuting these matters are encouraged to contact ECS at (202) 305-0321. These cases warrant action on their own merits, but also further long-standing law enforcement interests in community safety and public health. ❖

ABOUT THE AUTHORS

❑ **Varu Chilakamarri** is an attorney in the Appellate Section of the Environment and Natural Resources Division. She is currently serving as Chief of Staff and Senior Counsel to the Assistant Attorney General. ✠

❑ **Ethan Eddy** is a trial attorney in the Environmental Crimes Section of the Environment and Natural Resources Division. He is currently serving as a Special Assistant U.S. Attorney in the Eastern District of Virginia. ✠