

MARYA TORREZ\*

## Meatless Monday: Simple Public Health Suggestion or Extremist Plot?

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### INTRODUCTION

On July 23, 2012, the United States Department of Agriculture (USDA) posted an internal newsletter on its website detailing steps the agency was taking and suggesting steps employees could take to

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\* Marya Torrez is an LL.M. student in the program on Law & Government at American University Washington College of Law and has a J.D. from Georgetown University Law Center. She would like to thank Professor William S. Eubanks, II for his guidance, inspiration, and comments on previous drafts.

lessen their environmental impact.<sup>1</sup> One of the suggestions was participating in “Meatless Monday” at USDA cafeterias. Meatless Monday is a public health campaign intended to encourage people to reduce their consumption of animal products one day a week in order to decrease their risk of chronic disease and their environmental impact.<sup>2</sup> By Wednesday, two days later, the animal agriculture industry and the senators and representatives who blatantly championed their cause in Congress had attacked the USDA for purportedly failing in its duty to American agriculture. J.D. Alexander, the president of the National Cattlemen’s Beef Association, called Meatless Monday an “animal rights extremist campaign,”<sup>3</sup> and the USDA immediately capitulated, removing the newsletter from its website and indicating publicly that it does not support Meatless Monday.<sup>4</sup>

The USDA’s decision to bow to pressure from the animal agricultural industry raises a number of questions about the role of the USDA in promoting certain foods and whether consumers are adequately protected by current law and existing USDA duties, obligations, and practices. Part I of this article examines the background of the Meatless Monday campaign and how the environment and public health are impacted by producing and eating animal products. Part II looks at the duties of the USDA, including its duties to promote both agriculture and good nutrition, and argues that the USDA’s decision to succumb to the pressure from the beef industry, rather than being an isolated or unrelated incident, reveals how the agency fulfills (or fails to fulfill) its duties to promote nutrition, accomplished largely through development and dissemination of the *U.S. Dietary Guidelines*. Part III will make

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<sup>1</sup> *Food Service Updates*, GREENING HEADQUARTERS UPDATE (USDA, Washington, D.C.), July 23, 2012, at 2–3, available at [http://moran.senate.gov/public/index.cfm/files/serve?File\\_id=668d6da1-314c-4647-9f17-25edb67bb2f2](http://moran.senate.gov/public/index.cfm/files/serve?File_id=668d6da1-314c-4647-9f17-25edb67bb2f2).

<sup>2</sup> *Id.*; *Why Meatless?*, MEATLESS MONDAY, <http://www.meatlessmonday.com/about-us/why-meatless/> (last visited Oct. 12, 2013).

<sup>3</sup> Press Release, Nat’l Cattlemen’s Beef Ass’n, USDA Supports Meatless Monday Campaign: NCBA Question’s [sic] USDA’s Commitment to US Cattlemen (July 25, 2012), available at <http://www.beefusa.org/newsreleases1.aspx?NewsID=2560>.

<sup>4</sup> See Amy Harmon, *Retracting a Plug for Meatless Mondays*, N.Y. TIMES, July 25, 2012, <http://www.nytimes.com/2012/07/26/us/usda-newsletter-retracts-a-meatless-mondays-plug.html>; see Amanda Peterka, *‘Meatless Mondays’ Language To Be Dropped from House Cafeterias under Pressure from Livestock Industry*, E&E DAILY, June 18, 2013, <http://www.eenews.net/stories/1059983016> (referencing a similar situation in which the U.S. House of Representatives backed down on its promotion of Meatless Monday because of pressure from the animal agriculture industry).

recommendations for a new federal agency that is dedicated to consumer protection and can better advocate for good nutrition and for public health.

## I

### WHAT IS MEATLESS MONDAY? PUBLIC HEALTH AND ENVIRONMENTAL IMPLICATIONS OF RAISING ANIMALS FOR FOOD

Meatless Monday was originally started during World War I and was revived during World War II as one of a myriad of campaigns urging Americans to forgo certain agricultural products to preserve resources as part of the war effort.<sup>5</sup> In 2003, Meatless Monday was reinvigorated by a public health advocate who worked with the Johns Hopkins Bloomberg School of Public Health to develop a campaign urging people to eliminate animal flesh from their diets one day a week.<sup>6</sup> The architects of Meatless Monday believed that eliminating meat from the diet one day a week could reduce intake of saturated fat and cholesterol closer to a recommended level that was not so damaging to individual health.<sup>7</sup> Meatless Monday has since spread to twenty-three countries<sup>8</sup> and is supported and promoted by thirty schools of public health,<sup>9</sup> hospitals,<sup>10</sup> restaurants,<sup>11</sup> local governments,<sup>12</sup> and more. The emphasis of Meatless Monday is primarily on the public health implications of eating animal products, but also focuses on the grave environmental impacts of raising animals for food. It makes sense that schools of public health would endorse an effort concerned not only with the health consequences of

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<sup>5</sup> *History*, MEATLESS MONDAY, <http://www.meatlessmonday.com/about-us/history/> (last visited Oct. 11, 2013).

<sup>6</sup> See Reuben Varzea, *Meatless Mondays: My Conversation with Founder Sid Lerner*, BEHIND THE PASS (Aug. 6, 2012), <http://behindthepass.com/blog/2012/08/06/meatless-mondays-my-conversation-with-founder-sid-lerner>.

<sup>7</sup> *Id.*

<sup>8</sup> *Meatless Monday Goes Global!*, MEATLESS MONDAY, <http://www.meatlessmonday.com/the-global-movement/> (last visited Oct. 11, 2013).

<sup>9</sup> *Meatless Monday School Programs*, MEATLESS MONDAY, <http://www.meatlessmonday.com/meatless-monday-school-programs/> (last visited Oct. 19, 2013).

<sup>10</sup> *Meatless Monday Food Service Programs*, MEATLESS MONDAY, <http://www.meatlessmonday.com/meatless-monday-in-food-service/> (last visited Oct. 11, 2013).

<sup>11</sup> *Meatless Monday Restaurants*, MEATLESS MONDAY, <http://www.meatlessmonday.com/meatless-monday-restaurants/> (last visited Oct. 11, 2013).

<sup>12</sup> Betty Hallock, *Food FYI: L.A. City Council Approves Meatless Monday*, L.A. TIMES, Nov. 12, 2012, <http://articles.latimes.com/2012/nov/12/news/la-dd-food-fyi-la-city-council-approves-meatless-monday-20121112>.

eating animals, but also with the environmental consequences of raising them. Environmental factors can have an enormous impact on public health.

### *A. Public Health Consequences of Eating Animals*

The negative health consequences of eating animal products have been well-documented for decades. “The first scientific statement urging a reduction in dietary fat as a way to prevent heart disease, signed by eight prominent physicians and 106 members of the American Society for the Study of Arteriosclerosis, was issued in 1958 by a private group called the National Health Education Committee.”<sup>13</sup> Subsequent research has tied consumption of animal products to most chronic diseases including heart disease, cancer, and diabetes.

One of the most comprehensive studies of nutrition ever conducted, the so-called China Study, funded by Cornell University, Oxford University, and the government of China, built on previous research and documented that eating animal products increased the risk of cancer and other chronic diseases substantially.<sup>14</sup> In his book detailing the China Study and other related research, one of the study’s authors points to the significant data connecting animal product consumption and heart disease, obesity, diabetes, cancer, autoimmune diseases, and effects on bone, kidney, eye and brain health.<sup>15</sup>

More recent findings have built upon that research. Just in the last few years, numerous peer-reviewed studies have been published showing the negative health consequences of eating animal products. Last year, a study led by the Harvard School of Public Health found that “one daily serving of unprocessed red meat . . . was associated with a 13% increased risk of mortality, and one daily serving of processed red meat . . . was associated with a 20% increased risk.”<sup>16</sup>

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<sup>13</sup> Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?*, 57 *FOOD & DRUG L.J.* 371, 385 (2002).

<sup>14</sup> JUNSHI CHEN ET AL., *DIET, LIFE-STYLE AND MORTALITY IN CHINA* (1990).

<sup>15</sup> T. COLIN CAMPBELL & THOMAS M. CAMPBELL, *THE CHINA STUDY* (2005).

<sup>16</sup> Press Release, Harvard Sch. of Pub. Health, Red Meat Consumption Linked to Increased Risk of Total, Cardiovascular, and Cancer Mortality (Mar. 12, 2012), available at <http://www.hsph.harvard.edu/news/press-releases/red-meat-consumption-linked-to-increased-risk-of-total-cardiovascular-and-cancer-mortality/>; see also An Pan et al., *Red Meat Consumption and Mortality: Results from 2 Prospective Cohort Studies*, 172 *ARCHIVES INTERNAL MED.* 555 (2012).

Other studies have also tied consumption of animal products to greater mortality rates: “Red and processed meat intakes, as well as a high-risk meat diet, were associated with a modest increase in risk of total mortality, cancer, and [cardiovascular disease] mortality in both men and women.”<sup>17</sup> Meat consumption has been tied to several types of cancer, including colon, lung, esophagus, and liver.<sup>18</sup> Still other studies have tied meat consumption to obesity, which is itself associated with cardiovascular disease, diabetes, and certain types of cancer.<sup>19</sup> Moreover, a recent National Institutes of Health study tied pollutants in animal products to infertility issues, and couples trying to conceive are urged to avoid “the fat of meat and fish, and . . . [limit] the consumption of animal products.”<sup>20</sup> While much of the research has focused on red meat, consumption of other animal products has similarly been shown to have negative health implications. Recent studies have tied egg consumption to prostate cancer<sup>21</sup> and to cardiovascular disease.<sup>22</sup> Dairy consumption has also been tied to health issues including an increased ovarian cancer risk.<sup>23</sup>

At the same time, reducing animal product consumption and increasing the consumption of plant-based foods has been shown to have a positive impact on health. For example, replacing saturated fat (found mostly in animal products) with polyunsaturated fat (found

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<sup>17</sup> Rashmi Sinha et al., *Meat Intake and Mortality: A Prospective Study of Over Half a Million People*, 169 ARCHIVES INTERNAL MED. 562, 570 (2009).

<sup>18</sup> Amanda J. Cross et al., *A Prospective Study of Red and Processed Meat Intake in Relation to Cancer Risk*, 4 PLOS MED. 1973 (2007).

<sup>19</sup> Anne-Claire Vergnaud et al., *Meat Consumption and Prospective Weight Change in Participants of the EPIC-PANACEA Study*, 92 AM. J. CLINICAL NUTRITION 398 (2010).

<sup>20</sup> Press Release, Nat’l Inst. of Health, PCBs, Other Pollutants May Play Role in Pregnancy Delay (Nov. 14, 2012), available at <http://www.nih.gov/news/health/nov2012/nichd-14.htm>; see also Germaine M. Buck Louis et al., *Persistent Environmental Pollutants and Couple Fecundity: The LIFE Study*, 2 ENVTL. HEALTH PERSP. 231 (2012), available at [http://ehp.niehs.nih.gov/pdf-files/2013/Feb/ehp.1205301\\_508.pdf](http://ehp.niehs.nih.gov/pdf-files/2013/Feb/ehp.1205301_508.pdf).

<sup>21</sup> Erin L. Richman et al., *Egg, Red Meat, and Poultry Intake and Risk of Lethal Prostate Cancer in the Prostate-Specific Antigen-Era: Incidence and Survival*, 4 CANCER PREVENTION RES. 2110 (2011).

<sup>22</sup> J. David Spence et al., *Egg Yolk Consumption and Carotid Plaque*, 224 ATHEROSCLEROSIS 469 (2012).

<sup>23</sup> See Mette T. Faber et al., *Use of Dairy Products, Lactose, and Calcium and Risk of Ovarian Cancer—Results from a Danish Case-Control Study*, 51 ACTA ONCOLOGICA 454 (2012).

only in plants) has been shown to reduce coronary heart disease.<sup>24</sup> Early findings from a study of Seventh Day Adventists, many of whom eat a mostly plant-based diet, found that:

[L]evels of cholesterol, diabetes, high blood pressure, and the metabolic syndrome all had the same trend—the closer you are to being a vegetarian, the lower the health risk in these areas. In the case of type 2 diabetes, prevalence in vegans and lacto-ovo vegetarians was half that of non-vegetarians, even after controlling for socioeconomic and lifestyle factors.<sup>25</sup>

Researchers analyzing the data from this study further concluded that plant-based diets have a positive impact on blood pressure and that “[m]any Americans may benefit from a diet containing more plant foods to prevent hypertension.”<sup>26</sup> Additional research shows that completely plant-based diets confer protection against overall cancer incidence and incidence of female-specific cancers, and that ovo-lacto vegetarian diets confer protection against cancers of the gastrointestinal tract.<sup>27</sup> A recent study, which analyzed data from a number of other studies, determined that vegetarians had an 18 percent reduced risk of overall cancer incidence and a 24 percent reduced risk of death from ischemic heart disease compared to meat-eaters.<sup>28</sup>

In 2007, the World Cancer Research Fund and the American Institute for Cancer Research conducted a systematic review of cancer research and made a number of recommendations aimed at reducing cancer incidence. Among those recommendations were to avoid meat, particularly processed meat, and to eat primarily plant-based foods.<sup>29</sup>

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<sup>24</sup> Dariush Mozaffarian et al., *Effects on Coronary Heart Disease of Increasing Polyunsaturated Fat in Place of Saturated Fat: A Systematic Review and Meta-Analysis of Randomized Controlled Trials*, 7 PLOS MED. 1 (2010).

<sup>25</sup> *Adventist Health Studies-AHS-2 Results: Lifestyle, Diet and Disease*, LOMA LINDA U. SCH. PUB. HEALTH, [http://www.llu.edu/public-health/health/lifestyle\\_disease.page](http://www.llu.edu/public-health/health/lifestyle_disease.page) (last visited Oct. 12, 2013).

<sup>26</sup> Betty J. Pettersen et al., *Vegetarian Diets and Blood Pressure Among White Subjects: Results from the Adventist Health Study-2 (AHS-2)*, 15 PUB. HEALTH NUTRITION 1909, 1915 (2012).

<sup>27</sup> Yessenia Tantamango-Bartley et al., *Vegetarian Diets and the Incidence of Cancer in a Low-risk Population*, 22 CANCER EPIDEMIOLOGY BIOMARKERS & PREVENTION 286 (2012); see also Polly Walker et al., *Public Health Implications of Meat Production and Consumption*, 8 PUB. HEALTH NUTRITION 348, 348 (2005).

<sup>28</sup> Tao Huang et al., *Cardiovascular Disease Mortality and Cancer Incidence in Vegetarians: A Meta-Analysis and Systematic Review*, 60 ANNALS NUTRITION & METABOLISM 233, 237–38 (2012).

<sup>29</sup> WORLD CANCER RESEARCH FUND & AMER. INST. FOR CANCER RESEARCH, FOOD, NUTRITION, PHYSICAL ACTIVITY, AND THE PREVENTION OF CANCER: A GLOBAL

According to a report from the Center for Science in the Public Interest, vegetarians live an average of three years longer than non-vegetarians and suffer a 24 percent reduced rate of fatal heart attacks.<sup>30</sup> Therefore, the consequences of eating animal products are significant and well-documented. But raising animals for food also has significant public health consequences due to the severe environmental impact.

### ***B. Environmental Consequences of Raising Animals for Food***

Raising animals for food, particularly on concentrated animal feeding operations (CAFOs) is a major cause of air, soil, and water pollution. Additionally, using land and water to feed animals intended for human consumption is incredibly inefficient and exacerbates global food and water shortages. Moreover, animal agriculture is a major cause of global climate change. Animal agriculture is estimated to cost the United States as much as \$739 million per year in expenses due to water, soil, and air pollution; destruction of wildlife; and human health implications (not counting the health impacts of eating animal products detailed above).<sup>31</sup>

A number of studies have looked at the negative environmental impact of industrial animal agriculture, including a 2008 study from the Pew Commission on Industrial Farm Animal Production and John Hopkins Bloomberg School of Public Health.

Agricultural runoff laden with chemicals . . . and nutrients is suspected as a major culprit responsible for many “dead zones” in both inland and marine waters . . . . Animal farming is also estimated to account for 55% of soil and sediment erosion, and more than 30% of the nitrogen and phosphorous loading in the nation’s drinking water resources . . . . [W]aterborne chemical contaminants associated with [industrial farm animal production] facilities include pesticides, heavy metals, and antibiotics and hormones . . . . It is also recognized that ammonia emissions from livestock contribute significantly to the eutrophication and acidification of soils and waters . . . . Air quality degradation is also a problem . . . because of localized release of significant quantities

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PERSPECTIVE 373 (2007), available at [www.dietandcancerreport.org/cancer\\_resource\\_center/downloads/Second\\_Expert\\_Report\\_full.pdf](http://www.dietandcancerreport.org/cancer_resource_center/downloads/Second_Expert_Report_full.pdf).

<sup>30</sup> MICHAEL F. JACOBSON, CTR. FOR SCI. IN THE PUB. INTERESTS, SIX ARGUMENTS FOR A GREENER DIET 23, 25 (2006).

<sup>31</sup> Erin M. Tegtmeier & Michael D. Duffy, *External Costs of Agricultural Production in the United States*, 2 INT’L J. AGRIC. SUSTAINABILITY 1, 1 (2004).

of toxic gases, odorous substances, and particulates and bioaerosols that contain a variety of microorganisms and human pathogens.<sup>32</sup>

Researchers estimate that the drinking water sources for over a million people in the United States are contaminated due in part to the heavy application of animal waste to land.<sup>33</sup> Exposure to toxins in the air or water created by animal agriculture has deleterious effects on human health.<sup>34</sup> Furthermore, animal agriculture negatively affects human health because of the development of antibiotic resistance and spread of diseases.<sup>35</sup> These issues led the American Public Health Association to issue a policy statement in 2003 urging against the creation of any additional CAFOs, particularly due to the harmful impact on workers and the surrounding communities.<sup>36</sup>

Raising animals for food is also incredibly inefficient. Nearly 40 percent of land in the world not covered by ice is dedicated to agriculture, the single largest use of land.<sup>37</sup> Recent estimates suggest that of this total, 75 percent is used for raising animals for food, either for animal grazing or for growing food to feed animals.<sup>38</sup> Commentators have noted that “using highly productive croplands to produce animal feed, no matter how efficiently, represents a net drain on the world’s potential food supply.”<sup>39</sup> In the United States, the “livestock population consumes more than [seven] times as much grain as is consumed directly by the entire American population. The amount of grains fed to U.S. livestock is sufficient to feed about 840

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<sup>32</sup> PEW COMM’N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 25–27 (2008) (internal citations omitted) [hereinafter *Putting Meat on the Table*], available at [http://www.ncifap.org/\\_images/PCIFAPFin.pdf](http://www.ncifap.org/_images/PCIFAPFin.pdf).

<sup>33</sup> *Id.* at 29.

<sup>34</sup> See Dick Heerderik et al., *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, 115 ENVTL. HEALTH PERSP. 298 (2007); JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 ENVTL. HEALTH PERSP. 308 (2007).

<sup>35</sup> See Tegtmeier and Duffy, *supra* note 31, at 1; Walker, *supra* note 27, at 348; see also DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOs UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS, (2008), available at [http://www.ucsusa.org/assets/documents/food\\_and\\_agriculture/cafos-uncovered.pdf](http://www.ucsusa.org/assets/documents/food_and_agriculture/cafos-uncovered.pdf).

<sup>36</sup> Am. Pub. Health Ass’n, *Policy Statement Database: Precautionary Moratorium on New Concentrated Animal Feed Operations* (Nov. 18, 2003), <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1243>.

<sup>37</sup> Jonathan A. Foley et al., *Solutions for a Cultivated Planet*, 478 NATURE 337, 337 (2011).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 338.



million people who follow a plant-based diet.”<sup>40</sup> Moreover, approximately thirty-nine calories of fossil fuel are required to produce one calorie of eggs or beef.<sup>41</sup>

Similarly, animal agriculture uses a tremendous amount of water. Producing a kilogram of animal protein requires about 100 times more water than a kilogram of plant protein.<sup>42</sup> A recent report written as part of 2012 World Water Week in Stockholm detailed the severe consequences to the food supply for a growing human population if animals continue to be a major food source.<sup>43</sup> The report concluded:

[T]here will not be enough water available on current croplands to produce food for the expected population in 2050 if we follow current trends and changes towards diets common in Western nations . . . . There will, however, be just enough water, if the proportion of animal based foods is limited to [5 percent] of total calories and considerable regional water deficits can be met by a well organised and reliable system of food trade.<sup>44</sup>

Finally, raising animals for food is one of the most significant contributors to global climate change. A landmark study by the United Nations Food and Agriculture Organization found that 18 percent of all man-made global warming gasses come from animal agriculture, more than the entire transportation sector.<sup>45</sup> Other experts have argued that animal agriculture likely contributes as much as 51 percent of total greenhouse gases.<sup>46</sup> Cows in particular release significant amounts of methane and nitrous oxide, incredibly potent greenhouse gases. Methane is about 23 times more potent than carbon

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<sup>40</sup> David Pimentel and Marcia Pimentel, *Sustainability of Meat-based and Plant-based Diets and the Environment*, 78 AM. J. CLIN. NUTR. 660S, 661S (2003) (footnotes omitted).

<sup>41</sup> *Id.* at 662S.

<sup>42</sup> *Id.*

<sup>43</sup> Malin Falkenmark, *Food Security: Overcoming Water Scarcity Realities*, in FEEDING A THIRSTY WORLD: CHALLENGES AND OPPORTUNITIES FOR A WATER AND FOOD SECURE FUTURE (Anders Jägerskog & Torkil Jønch Clausen eds., 2012), available at [http://www.siwi.org/documents/Resources/Reports/Feeding\\_a\\_thirsty\\_world\\_2012\\_worldwaterweek\\_report\\_31.pdf](http://www.siwi.org/documents/Resources/Reports/Feeding_a_thirsty_world_2012_worldwaterweek_report_31.pdf).

<sup>44</sup> *Id.* at 14.

<sup>45</sup> HENNING STEINFELD ET AL., U.N. FOOD & AGRIC. ORG, LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS xxi (2006).

<sup>46</sup> Robert Goodland & Jeff Anhang, *Livestock and Climate Change: What if the Key Actors in Climate Change are . . . Cows, Pigs, and Chickens?*, WORLD WATCH MAGAZINE 10, 11 (Nov./Dec. 2009), available at <http://www.worldwatch.org/files/pdf/Livestock%20and%20Climate%20Change.pdf>.

dioxide, and nitrous oxide is 296 times more potent.<sup>47</sup> Recent studies have suggested that either agricultural efficiencies must be substantially increased, or per capita meat consumption in the developed world must be reduced by 50 percent from 1980 levels to reduce nitrous oxide enough to avoid climate disaster.<sup>48</sup> In addition to the impact of greenhouse gases emitted directly by animals, animal agriculture contributes to climate change through methane released from fertilizer and manure decomposition; clear cutting of rain forests; land use changes for grazing and to produce food for the animals; land degradation; and fossil fuels burned for fertilizer, animal food production, and transportation.<sup>49</sup> Global climate change has and will continue to have a profound effect on human society, with the impacts falling most heavily on the poor and inhabitants of the global south. Effects include an increase in the number and intensity of hurricanes and other severe weather events, a spread of infectious diseases, and water and food shortages.<sup>50</sup> Climate change is also projected to lead to escalating war and conflict.<sup>51</sup>

Therefore, the evidence shows that, contrary to the condemnation of the animal agriculture industry, Meatless Monday is a laudable campaign designed principally to encourage small steps to address the deadly impacts of raising animals for food. But the question remains regarding the USDA's duties and whether the agency's decision to back down from its promotion of Meatless Monday was an aberration or an example of its inability to balance conflicting duties to animal agriculture producers and to the American public. These questions are explored in the next section.

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<sup>47</sup> DOUG GURIAN-SHERMAN UNION OF CONCERNED SCIENTISTS, RAISING THE STEAKS: GLOBAL WARMING AND PASTURE-RAISED BEEF PRODUCTION IN THE UNITED STATES 1 (2011), available at [http://www.ucsusa.org/assets/documents/food\\_and\\_agriculture/global-warming-and-beef-production-report.pdf](http://www.ucsusa.org/assets/documents/food_and_agriculture/global-warming-and-beef-production-report.pdf).

<sup>48</sup> Eric A. Davidson, *Representative Concentration Pathways and Mitigation Scenarios for Nitrous Oxide*, 7 ENVTL. RES. LETTERS 1, 5 (2012).

<sup>49</sup> STEINFELD ET AL., *supra* note 45, at 86.

<sup>50</sup> See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf); STEINFELD ET AL., *supra* note 45.

<sup>51</sup> See Gowri Koneswaran & Danielle Nierenberg, *Global Farm Animal Production and Global Warming: Impacting and Mitigating Climate Change*, 116 ENVTL. HEALTH PERSP. 578, 580 (May 2008).

## II

### WAS THIS AN ANOMALY? THE USDA'S ROLE IN CRAFTING THE U.S. DIETARY GUIDELINES AND PROMOTING PUBLIC HEALTH

According to the USDA's mission statement, the agency essentially has seven core duties: supporting American farmers and ranchers; using "the Nation's agricultural abundance" to advance health and nutrition; ensuring food safety; marketing U.S. agricultural products; protecting natural resources and the environment; stimulating rural development; and conducting research.<sup>52</sup> A number of these duties could be classified as promoting agriculture, while others could be classified as protecting consumers, including through the promotion of good nutrition and public health. There is no reason why these duties necessarily need to conflict. As the Dean of Johns Hopkins Bloomberg School of Public Health said in a letter to Secretary of Agriculture Tom Vilsack regarding the Meatless Monday hullabaloo, "Meatless Monday is not 'anti-agriculture,' as stated in the criticism by the industry. There are many types of producers involved in agriculture, not just meat producers."<sup>53</sup> Moreover, these duties may not have conflicted at the time that the USDA's agricultural marketing program began in earnest during the Great Depression.<sup>54</sup> At that time, along with supporting struggling farmers, ensuring enough food for Americans was the primary objective of the agency, and the health consequences of eating animal products were largely unknown.

However, these multiple duties have come into conflict in recent years because of the way in which the American food system has developed to promote the production of only certain agricultural products. For example, the Secretary of Agriculture is specifically required by Congress to promote and develop markets for meat, dairy, and other animal products.<sup>55</sup> As a result, the USDA does not promote

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<sup>52</sup> *USDA Mission Areas*, U.S. DEP'T OF AGRIC., [http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA\\_MISSION\\_AREAS](http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA_MISSION_AREAS) (last visited Oct. 19, 2013).

<sup>53</sup> Letter from Michael J. Klag, Dean of Johns Hopkins Bloomberg Sch. of Pub. Health, to Tom Vilsack, U.S. Sec'y of Agric. (July 27, 2012), *available at* [http://www.jhsph.edu/news/news-releases/2012/\\_pdfs/Vilsack%20Meatless%20Monday%20letter%20FINAL.pdf](http://www.jhsph.edu/news/news-releases/2012/_pdfs/Vilsack%20Meatless%20Monday%20letter%20FINAL.pdf).

<sup>54</sup> See Schaffer, *supra* note 13, at 382–84; see also Emily Buchanan Buckles, Comment, *Food Fights in the Courts: the Odd Combination of Agriculture and First Amendment Rights*, 43 HOUS. L. REV. 415 (2006).

<sup>55</sup> 7 U.S.C. § 1622 (2012); 7 U.S.C. § 1626 (2012).

all agricultural products equally. At the same time, the negative impacts of raising animals for food have come to light, as explained in detail above. Therefore, the USDA cannot both promote the agricultural products that the U.S. food system has come to see as important and, at the same time, promote good public health. As early as 1973, nutritional experts identified irreconcilable conflicts and an inability of the USDA to adequately promote good nutritional science.<sup>56</sup> This article deals in particular with the conflict that arises between the USDA's duties to promote agriculture and to give nutritional advice, as done through the *U.S. Dietary Guidelines (Guidelines)*.

### ***A. What are the Dietary Guidelines and Why Do They Matter?***

The *Guidelines* are developed by the USDA, in conjunction with the Department of Health and Human Services (HHS) and are intended to be "evidence-based Federal recommendations designed to prevent and reduce diet-related chronic diseases, while promoting good health and healthy weight among Americans ages two and older. [They] form the basis for government nutrition initiatives and nutrition education and consumer outreach used by consumers, industry, and health professionals."<sup>57</sup> They are designed to help "Americans to live longer, healthier, and more active lives."<sup>58</sup> They must be published every five years and are supposed to be based on the "preponderance of the scientific and medical knowledge which is current at the time the report is prepared."<sup>59</sup> The Secretaries appoint a committee to suggest changes and then use the committee's suggestions to amend the *Guidelines*, as well as whatever visual depiction (such as the food pyramid) is currently being used to represent the *Guidelines*.<sup>60</sup>

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<sup>56</sup> Jean Mayer, *USDA: Built in Conflicts*, in U.S. NUTRITION POLICIES IN THE SEVENTIES 206–07 (Jean Mayer ed. 1973); see also Schaffer, *supra* note 13.

<sup>57</sup> U.S. DEP'T OF AGRIC. & DEP'T OF HEALTH & HUMAN SERVS., QUESTIONS AND ANSWERS ON THE 2010 DIETARY GUIDELINES ADVISORY COMMITTEE REPORT 1 (2010), available at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/DGAC/Report/QandA-DGACReport.pdf>

<sup>58</sup> U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH AND HUMAN SERVS., DIETARY GUIDELINES FOR AMERICANS 2010 i (2010) [hereinafter DIETARY GUIDELINES], available at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PolicyDoc.pdf>.

<sup>59</sup> 7 U.S.C. § 5341 (2012).

<sup>60</sup> Jeff Herman, *Saving U.S. Dietary Advice From Conflicts of Interest*, 65 FOOD DRUG L.J. 285, 286 (2010). A number of visual interpretations have been used over the years,

Every federal agency is required to promote the *Guidelines* when carrying out food, nutrition or health programs.<sup>61</sup> The *Guidelines* also determine how billions of federal dollars are spent in programs such as the School Lunch Program, the School Breakfast Program, the Supplemental Nutritional Assistance Program, and the program for Women, Infants, and Children.<sup>62</sup> Therefore, beyond just the objective of providing Americans with good nutritional advice, they serve as parameters for the nutritional needs of some of our most vulnerable citizens. When the *Guidelines* fail to reflect good nutritional science, only reflect some of the science, or portray the science in a way that is not comprehensible to the average American, it has a real impact on public health. Examples from other countries have shown that decisions by the government regarding good nutrition can have a significant impact on behavior and on health.<sup>63</sup>

***B. Whose Health?—Promotion of Animal Agriculture in U.S. Policy and the Dietary Guidelines Process***

For decades, due to pressure from the animal agriculture industry and other industrial agricultural interests, the USDA and Congress have ignored nutritional science and have continued to promote animal products, despite adverse public health implications. As information about the public health concerns of eating animal products came to light,

Not only did USDA continue to administer policies that no longer made sense in light of changing nutrition concerns, it also took on the administration of newly-passed laws that clearly favored the food industry at the expense of public health. As the consumption of certain agricultural commodities began to decline (perhaps due to raised awareness of the health risks associated with cholesterol and saturated fat), the government came to the rescue with legislation intended to help the food industry by boosting sales. Between 1974 and 1983, Congress authorized the Egg Research and Consumer Information Act; the Beef Research and Information Act; . . . and the Dairy Production Stabilization Act of 1983. Each of these acts was strongly supported by the respective industries, and each was

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including the four food groups and the food pyramid. In the most recent guidelines in 2010, the Secretaries adopted a new representation: MyPlate, which divides portion sizes of different food groups (grains, fruits, vegetables, protein, and dairy) onto a plate. MyPlate can be found at <http://www.choosemyplate.gov/>.

<sup>61</sup> 7 U.S.C. § 5341(a)(1) (2012).

<sup>62</sup> Herman, *supra* note 60, at 286.

<sup>63</sup> *See id.* at 293.

passed over the opposition of groups concerned with the implications of the legislation on public nutrition.<sup>64</sup>

The USDA currently works within an agricultural system that has come to promote the production and consumption of certain foods, including meat and dairy, over all others.<sup>65</sup> The American food system promotes production of just a few crops, so-called “commodities,” including the soybeans and corn fed to farmed animals.<sup>66</sup> These products are heavily subsidized by the federal government, resulting in very low costs to animal agriculture operations and subsequently cheap animal products for human consumption.<sup>67</sup> There are also direct subsidies to animal agriculture, including to entities raising cows for milk production.<sup>68</sup> Subsidies to the animal agriculture industry totaled \$3.7 billion between 1995 and 2011, according to the Environmental Working Group.<sup>69</sup> More than 60 percent of all agricultural subsidies go directly or indirectly to the meat and dairy industries.<sup>70</sup> And, as noted above, the USDA has a statutory duty to engage in campaigns promoting the consumption of dairy, meat, and eggs (campaigns that American consumers are intimately familiar with).<sup>71</sup> Moreover, industrial agriculture

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<sup>64</sup> Schaffer, *supra* note 13, at 392 (internal citations omitted).

<sup>65</sup> See William Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213 (2009); *What Does the 2007 U.S. Farm Bill Have to Do with Public Health?*, JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, <http://www.dialogue4health.org/pdfs/wf1/farm-bill-roswell.pdf> (last visited Sept. 14, 2013); *Agriculture and Health Policies in Conflict: How Food Subsidies Tax Our Health, Government Support for Unhealthy Foods*, PHYSICIANS COMM. FOR RESPONSIBLE MED., <http://www.pcrm.org/health/reports/agriculture-and-health-policies-unhealthy-foods> (last visited Sept. 14, 2013) [hereinafter *Government Support for Unhealthy Foods*].

<sup>66</sup> R. DENNIS OLSON, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, *BELOW-COST FEED CROPS: AN INDIRECT SUBSIDY FOR INDUSTRIAL ANIMAL FACTORIES* (2006), available at [http://www.nffc.net/Learn/Reports/BelowCost6\\_06.pdf](http://www.nffc.net/Learn/Reports/BelowCost6_06.pdf).

<sup>67</sup> See GURIAN-SHERMAN, *supra* note 35.

<sup>68</sup> Env'tl. Working Grp., *Dairy Program Subsidies*, EWG FARM SUBSIDIES, <http://farm.ewg.org/progdetail.php?fips=00000&progcode=dairy> (last visited Oct. 19, 2012); *Government Support for Unhealthy Foods*, *supra* note 65.

<sup>69</sup> Env'tl. Working Grp., *Livestock Subsidies*, EWG FARM SUBSIDIES, <http://farm.ewg.org/progdetail.php?fips=00000&progcode=livestock> (last visited Oct. 19, 2012).

<sup>70</sup> *Agriculture and Health Policies in Conflict: How Food Subsidies Tax Our Health, Agricultural Policies Versus Health Policies*, PHYSICIANS COMMITTEE FOR RESPONSIBLE MEDICINE, <http://www.pcrm.org/health/reports/agriculture-and-health-policies-ag-versus-health> (last visited Oct. 19, 2012).

<sup>71</sup> See Michele Simon, *Protein Propaganda: It's What's for Dinner*, GRIST (1 Feb 2012 7:05 AM), <http://grist.org/food/protein-propaganda-its-whats-for-dinner/> (discussing USDA's “Beef: It's What's for Dinner” campaign); Chris Woolston, *Milk: How Much*

proponents spend millions of dollars to ensure that their interests are represented in Congress and executive agencies. According to the Center for Responsive Politics, agribusiness, including animal agriculture, spent almost \$80 million in the 2012 election cycle and more than \$600 million since 1990.<sup>72</sup> As a result, the animal agriculture industry wields considerable power within the American regulatory and legislative system, including within the USDA, and there is evidence that the USDA often capitulates to industry demands rather than protecting consumers and public health.<sup>73</sup>

Observers have long argued that the USDA has been captured by the meat and dairy industries.<sup>74</sup> Regulatory capture occurs when an agency, rather than policing the industry it is supposed to police, comes to identify with and be controlled by the industry.<sup>75</sup> Discussing the issue of food safety, commentators have stated that:

For a short while after the 1993 E. coli outbreaks, . . . [p]eople became informed about the problem and put enough pressure on [the Food Safety and Inspection Service] to get better meat inspection standards and procedures passed. However, the meat and poultry industry simply waited for the media to turn its attention to other scandals . . . . Having far more resources than any public interest group, the industry simply had to delay the regulations and wait until the public had completely forgotten about contaminated meat. Once it did, they pushed the FSIS to modify the regulations to best suit their interests, while still appearing to support better meat inspection rules.

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*Should You Drink?*, L.A. TIMES, July 12, 2010, <http://articles.latimes.com/2010/jul/12/health/la-he-milk-amount-20100712> (discussing USDA “Got Milk?” campaign); Emily Buchanan Buckles, Comment, *Food Fights in the Courts: the Odd Combination of Agriculture and First Amendment Rights*, 43 HOUS. L. REV. 415 (2006).

<sup>72</sup> *Agribusiness: Long-Term Contribution Trends*, OPENSECRETS.ORG: CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/industries/totals.php?cycle=2012&ind=A> (last visited Oct. 19, 2013).

<sup>73</sup> See, e.g., Brian Daluiso, “*Is the Meat Here Safe?*” *How Strict Liability for Retailers Can Lead to Safer Meat*, 92 B.U.L. REV. 1081 (2012).

<sup>74</sup> See *id.*; Dion Casey, *Agency Capture: The USDA’s Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB POL’Y 142 (1998); Neal D. Fortin, *The Hang-Up with HACCP: The Resistance to Translating Science into Food Safety Law*, 58 FOOD & DRUG L.J. 565 (2003); Kerri Machado, Comment, “*Unfit for Human Consumption*”: *Why American Beef is Making Us Sick*, 13 ALB. L.J. SCI. & TECH. 801 (2003).

<sup>75</sup> See Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL’Y 203 (2006), available at [http://red.ap.teacup.com/inouekoji/html/regulatory\\_capture\\_published.pdf](http://red.ap.teacup.com/inouekoji/html/regulatory_capture_published.pdf).

This *episode* demonstrates how regulated industries capture the agencies that purport to regulate them.<sup>76</sup>

Each of the policies and pressures discussed above is also in play as the USDA develops the *Guidelines*, making it nearly impossible for the USDA to promote good nutritional science.

The USDA's failure to promote public health over animal agriculture can be seen not only in the recommendations of the *Guidelines* themselves but in the appointment of the *Guidelines* Committee. The appointed committee tends to have a high representation of individuals with corporate ties, including ties to the animal agriculture industry, the pharmaceutical industry, and other industries that benefit directly from Americans' continuing consumption of animal products.<sup>77</sup> The USDA and HHS have often been reluctant to reveal information about the affiliations of committee members.<sup>78</sup> Eleven of the thirteen 2005 committee members, for example, had ties to animal agriculture and other corporate food interests—including the American Egg Board, the National Dairy Council, Kraft Foods, and M&M Mars—or to pharmaceutical companies.<sup>79</sup> Nine of thirteen members of the 2010 Committee had corporate ties, including to the pharmaceutical industry and the soy industry.<sup>80</sup> These are both industries that benefit substantially from animal agriculture. As other critics have noted, "drugs are in direct competition with diet and lifestyle for preventing or treating chronic diseases."<sup>81</sup> These relationships have the potential to impact the committee members' impartiality and ability to objectively evaluate the scientific data. The committee is also directly pressured by industry. According to nutrition expert Marion Nestle, who served on the 1995 committee, "We received five feet of documents from lobbyists wanting us not to say anything negative about their food products."<sup>82</sup> The consequences of these pressures, both on the committee and USDA, are evident in the *Guidelines* that result.

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<sup>76</sup> Casey, *supra* note 74, at 156.

<sup>77</sup> See Herman, *supra* note 60, at 295–96.

<sup>78</sup> See Physicians Comm. for Responsible Med. v. Glickman, 117 F. Supp. 2d 1 (D. D.C. 2000).

<sup>79</sup> See Herman, *supra* note 60.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 296.

<sup>82</sup> Schaffer, *supra* note 13, at 378.



***C. What do the Guidelines Committee and the Dietary Guidelines Actually Recommend?***

Not surprisingly, over the years, the *Guidelines* have relied heavily on research reinforcing the consumption of animal products while giving short shrift to research documenting the dangers of animal product consumption and the benefits of vegan and vegetarian diets. Other commentators have discussed the USDA's handling of its incompatible duties:

The USDA has sometimes responded to this conflict by choosing industry over science. For example, in 1977, the U.S. Senate's *Dietary Goals for the United States* recommended that Americans "decrease consumption of meat." Over time, the USDA effectively reversed that recommendation; it now advises most Americans to eat 5 to 6.5 ounces of meat or beans a day. Also, in 1991 the USDA delayed publishing the Eating Right Pyramid after the meat and dairy industries demanded it be withdrawn. When finally released in 1992, the Pyramid had 33 changes, including the highest recommended daily intake of meat ever. Further, the Departments have contradicted basic recommendations in order to protect agricultural products. For example, in the 1990 Guidelines, following advice to reduce consumption of fat, saturated fat, and cholesterol, the Guidelines added that "[s]ome foods that contain fat, saturated fat, and cholesterol, such as meats, milk, cheese, and eggs, also contain high-quality protein and are our best sources of certain vitamins and minerals." These statements provide reasons to both consume and not consume agricultural products, resulting in no real advice at all. This is what can happen when the USDA tries to fulfill two conflicting duties.<sup>83</sup>

While the 2010 *Guidelines* are somewhat improved over previous versions, they nevertheless fail to provide specific and consistent information about reducing animal products. The more than 700-page report from the 2010 *Guidelines* Committee does provide some discussion of the dangers of cholesterol and fat and the benefits of increased fruit, vegetable, and grain intake. The report also reviews several studies showing that vegetarian diets have health benefits, including lowering blood pressure and cardiovascular disease.<sup>84</sup> The report further states that all nutritional needs can be met through

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<sup>83</sup> Herman, *supra* note 60, at 294–95 (internal citations omitted).

<sup>84</sup> U.S. DEP'T OF AGRIC. & DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE DIETARY GUIDELINES ADVISORY COMMITTEE ON THE DIETARY GUIDELINES FOR AMERICANS 17, 27 (2010) [hereinafter DIETARY GUIDELINES COMMITTEE REPORT], available at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/DGAC/Report/2010DGACReport-camera-ready-Jan11-11.pdf>.

plant-based foods.<sup>85</sup> At the same time the report specifically promotes eating animal products, stating, for example, that “[a]nimal sources of protein, including meat, poultry, seafood, milk, and eggs, are the highest quality proteins.”<sup>86</sup> Moreover, the report raises unsubstantiated concerns about plant-based diets.<sup>87</sup>

While the report details the dangers of saturated fat and cholesterol and states that Americans consume too much of these items, it rarely directly ties these dangers to animal products in particular. The key recommendations include reducing solid fats, but do not tie this recommendation to reduced animal product consumption.<sup>88</sup> The recommendations ultimately encourage both increased and decreased consumption of animal products:

Shift food intake patterns to a more plant-based diet that emphasizes vegetables, cooked dry beans and peas, fruits, whole grains, nuts, and seeds. In addition, increase the intake of seafood and fat-free and low-fat milk and milk products, and consume only moderate amounts of lean meats, poultry, and eggs.<sup>89</sup>

Furthermore, the committee recommends increased consumption of dairy products for all Americans and increased consumption of meat, poultry, fish, and eggs particularly for adolescent girls and adult women.<sup>90</sup> Even if someone were to read the entire report, it is unclear what is being recommended and the committee members make certain to never specifically recommend eliminating meat or other animal products.

Similarly, the 2010 *Guidelines* themselves devote several pages to promoting plant-based foods, and address some of the health consequences of eating certain animal products. They also provide information specifically for vegetarians and vegans, information that previous committees were unwilling or unable to provide.<sup>91</sup> However, even this information provides less than accurate cautions that plant-based diets require fortified foods to obtain adequate nutrition,

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<sup>85</sup> *Id.* at 19.

<sup>86</sup> *Id.* at 4.

<sup>87</sup> See John McDougall, *A Scientific Critique of the 2010 Dietary Guidelines Advisory Committee's Report for the Dietary Guidelines for Americans* (June 2010), <http://www.drmcDougall.com/misc/2010other/guidelines.htm>.

<sup>88</sup> DIETARY GUIDELINES COMMITTEE REPORT, *supra* note 84, at 13.

<sup>89</sup> *Id.* at 52.

<sup>90</sup> *Id.* at 133.

<sup>91</sup> Marion Nestle, *2010 Dietary Guidelines, Deconstructed*, FOOD POLITICS (Feb. 1, 2011), <http://www.foodpolitics.com/2011/02/2010-dietary-guidelines-deconstructed/>.

thereby implying that animal-based diets are preferable.<sup>92</sup> Moreover, while the recommendations regarding what to eat are specific, the recommendations regarding what not to eat are hard to parse. The *Guidelines* include an entire chapter committed to “Foods and Food Components to Reduce.”<sup>93</sup> While this chapter does recommend reducing saturated fat, solid fat, and cholesterol intake and lists some of the animal-based products that contain these things, it never explicitly recommends reducing meat or dairy intake. Moreover, it is only in delving deep into the document that certain foods to avoid are associated with specific animal products or that the reader learns that cholesterol only exists in animal-based foods.<sup>94</sup> The top-line recommendations do not mention specific animal-based products at all. This is in stark contrast to the chapter on “Foods and Nutrients to Increase,” which specifically lists foods, not just nutrients.<sup>95</sup> This chapter urges individuals to increase consumption of fruits, vegetables, whole grains, and legumes. At the same time, it also encourages increased consumption of dairy products and protein including seafood, meat, poultry, and eggs, with plant-based protein sources listed last.<sup>96</sup> The *Guidelines* make no attempt to distinguish between plant-based and animal-based forms of protein, or to explain that there are substantial health consequences to eating animal-based proteins that can be mitigated or eliminated by eating plant-based proteins. The 112-page *Guidelines* devote about one quarter of a page to the research indicating that vegetarian diets have health benefits and attribute these benefits to a consumption of “lower proportion of calories from fat . . . fewer overall calories; and more fiber, potassium, and vitamin C,”<sup>97</sup> rather than to reduced animal product consumption, despite the fact that this does not reflect the scientific data. Therefore, while there is no specific recommendation to reduce animal product consumption, there is a recommendation to include animal products in the diet. This lack of clarity not only fails to provide Americans with complete nutritional information but also leaves them with the assumption that animal products are healthy. Not

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<sup>92</sup> DIETARY GUIDELINES, *supra* note 58, at 52–53.

<sup>93</sup> *Id.* at 20.

<sup>94</sup> *Id.* at 26.

<sup>95</sup> *Id.* at 33.

<sup>96</sup> *Id.* at 38.

<sup>97</sup> *Id.* at 45.

surprisingly, as compared to other diets, adherence to the *Guidelines* has not been shown to reduce chronic disease.<sup>98</sup>

#### *D. Criticism of the 2010 Dietary Guidelines*

When releasing the 2010 *Guidelines*, the Secretaries of HHS and the USDA stated, “[b]y adopting the recommendations . . . , Americans can live healthier lives and contribute to a lowering of health-care costs, helping to strengthen America’s long-term economic competitiveness and overall productivity.”<sup>99</sup> Similarly, the Report from the *Guidelines* Committee states that the recommendations are “focused on evidence-based guidelines and recommendations that are considered effective and useful in halting and reversing the obesity problem through primary prevention and changes in behavior, the environment, and the food supply.”<sup>100</sup>

However, nutritional experts have concluded that the 2010 *Guidelines* fall far short of these laudable goals. Medical experts have pointed out that the committee advises reducing saturated fat and cholesterol but then makes recommendations, particularly for increased cows’ milk consumption, that are certain to be unsuccessful at addressing these concerns:

The Dietary Guidelines Advisory Committee recognizes dairy foods—loaded with artery-clogging saturated fat, cholesterol, animal protein, and lactose, and deficient in dietary fiber and complex carbohydrates—as the healthiest of foods for Americans to consume. This, of course, is not what science, untainted by dairy industry dollars, clearly reports.<sup>101</sup>

Walter Willett of the Department of Nutrition at Harvard School of Public Health and David Ludwig of Department of Medicine at Boston’s Children’s Hospital criticized the *Guidelines* in a *New England Journal of Medicine* commentary for their lack of clarity and for continuing to “recommend three daily servings of dairy products, despite a lack of evidence that dairy intake protects against bone fractures and probable or possible links to prostate and ovarian

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<sup>98</sup> Herman, *supra* note 60, at 290.

<sup>99</sup> Press Release, U.S. Dep’t of Agric., USDA and HHS Announce New Dietary Guidelines to Help Americans Make Healthier Food Choices and Confront Obesity Epidemic (Jan. 31, 2011), <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PressRelease.pdf>.

<sup>100</sup> DIETARY GUIDELINES COMMITTEE REPORT, *supra* note 84, at 6.

<sup>101</sup> McDougall, *supra* note 87.

cancers.”<sup>102</sup> They go on to state that “[a] clearer message would have been that Americans must reduce consumption of red meat, cheese, butter, and sugar, but that message would have offended powerful industries.”<sup>103</sup> They also point out that MyPlate, the current visual representation of what Americans should eat based on the *Guidelines*, “is inherently constrained, most notably by failures to distinguish between whole grains and refined grain products and among protein sources, and by continued promotion of high dairy consumption.”<sup>104</sup>

Representatives of the Harvard School of Public Health also highlighted these and other concerns in a letter to the *Guidelines* Committee.<sup>105</sup> They expressed their concern that the recommendations for high intake of lean meat were “worrisome as there is substantial evidence that high intake of heme iron may increase risk of diabetes and consumption of red meat has been associated with incidence of colorectal cancer. There is no good evidence that the association . . . is limited to well done meat as suggested by the report.”<sup>106</sup> They noted that the recommendations, if followed, “would have huge adverse public health and environmental impacts.”<sup>107</sup>

The Harvard School of Public Health and the Physicians Committee for Responsible Medicine (PCRM), a public interest organization that promotes plant-based diets, have created alternative visual representations for what Americans should be eating that can be compared to MyPlate. They indicate what these experts believe an agency devoted to public health and good nutritional science would be promoting.

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<sup>102</sup> Walter C. Willett & David S. Ludwig, *The 2010 Dietary Guidelines—The Best Recipe for Health?*, 365 *NEW ENG. J. MED.* 1563, 1564 (2011) (internal citations omitted), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp1107075>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1565.

<sup>105</sup> Letter from Walter Willett et al., Harvard School of Public Health Department of Nutrition, to Carole Davis, Co-Executive Secretary and Designated Federal Officer of the Dietary Guidelines Advisory Committee (July 15, 2010), available at <http://www.hsph.harvard.edu/nutritionsource/files/2012/10/commentary-hsph-dga-2010-advisory.pdf>.

<sup>106</sup> *Id.* (internal citations omitted).

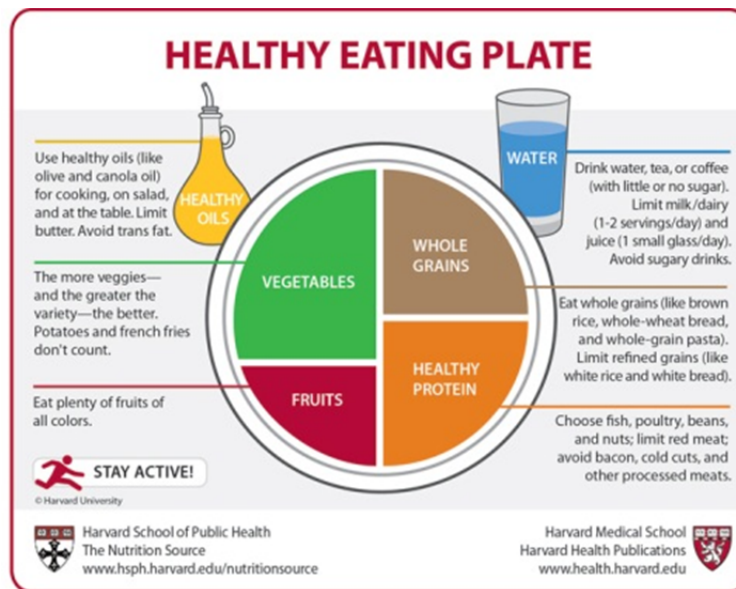
<sup>107</sup> *Id.*

Figure 1: MyPlate<sup>108</sup>Figure 2: Power Plate<sup>109</sup>

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<sup>108</sup> U.S. DEP'T OF AGRIC., <http://www.choosemyplate.gov/> (last visited Sept. 4, 2013).

<sup>109</sup> PHYSICIANS COMM. FOR RESPONSIBLE MED., <http://www.pcrm.org/health/diets/pplate/power-plate> (last visited Oct. 19, 2013).

Figure 3: Healthy Eating Plate<sup>110</sup>

The main criticisms of MyPlate (Figure 1) are that it does not distinguish between protein sources and that it promotes dairy consumption. The Harvard Healthy Eating Plate (Figure 3) provides more specific information about what should be eaten, distinguishes between protein sources, discourages consumption of red meat, and specifically promotes whole grains and physical activity. PCRM's Power Plate (Figure 2), which is also available in an interactive format at PCRM's website,<sup>111</sup> specifically promotes plant-based protein sources. PCRM has filed suit challenging the 2010 *Guidelines* for failing to base the recommendations on the 'preponderance of scientific and medical knowledge' and alleging "'there is no scientific basis' for advocating meat and dairy 'because it is well-established that people who avoid these foods have no health disadvantages, and in fact, have certain health advantages.'"<sup>112</sup> The USDA's failure to

<sup>110</sup> *The Nutrition Source: Healthy Eating Plate vs. USDA's My Plate*, HARVARD SCHOOL OF PUBLIC HEALTH, <http://www.hsph.harvard.edu/nutritionsource/healthy-eating-plate-vs-usda-myplate/> (last visited Sept. 4, 2013).

<sup>111</sup> *Id.*

<sup>112</sup> Evelyn Theiss, *Should the USDA Make Dietary Guidelines While it Promotes Meat and Dairy Industry?*, THE PLAIN DEALER, Monday, March 07, 2011, available at

promote good nutritional science is harmful to Americans' health. The next section proposes a potential solution to this problem that would better provide U.S. consumers with accurate nutritional information.

### III

#### A NEW CONSUMER PROTECTION AGENCY TO PROMOTE NUTRITION AND PUBLIC HEALTH

As detailed above, the USDA's decision to bow to pressure from the animal agriculture industry regarding Meatless Monday was a good example of how it typically balances its dual roles of promoting good nutrition and promoting agriculture. As Mark Bittman said in response to the Meatless Monday fiasco, "The U.S.D.A., sadly, is incapable of telling people . . . that eating less meat would be beneficial. Even though it is not a trade organization . . . , it is beholden to trade organizations and their political representatives."<sup>113</sup> Other commentators have noted that "Health and Human Services Secretary Kathleen Sebelius and USDA Secretary Tom Vilsack are former governors of Kansas and Iowa, respectively; two states that produce a lot of meat as well as the grains livestock animals typically eat in industrial systems."<sup>114</sup> As a result, Americans do not have a government source for good, accurate nutritional information, and individuals whose diets are legally based on the *Guidelines*—such as children dependent on the National School Lunch Program and elderly persons in institutions—are particularly harmed.

In addition to responsibility for the *Guidelines*, the USDA has responsibility for overseeing all major federal nutrition programs, including: the Supplemental Nutrition Assistance Program; the National School Lunch, School Breakfast, and Summer Food Service Programs; the Child and Adult Care Food Program; the Special Supplemental Nutrition Program for Women, Infants, and Children; the Commodity Supplemental Food Program; Food Distribution Program on Indian Reservations; and the Emergency Food Assistance

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[http://www.cleveland.com/healthfit/index.ssf/2011/03/should\\_the\\_usda\\_make\\_dietary\\_g.html](http://www.cleveland.com/healthfit/index.ssf/2011/03/should_the_usda_make_dietary_g.html).

<sup>113</sup> Mark Bittman, *No Meatless Mondays at the U.S.D.A.*, N.Y. TIMES OPINIONATOR, July 31, 2012, 9:00 pm, <http://opinionator.blogs.nytimes.com/2012/07/31/no-meatless-mondays-at-the-usda/>.

<sup>114</sup> Leah Zerbe, *Health Experts Have Beef with New Gov't Dietary Guidelines*, RODALE, <http://www.rodale.com/new-dietary-guidelines?page=0> (last updated Jan. 31, 2011).



Program.<sup>115</sup> All of the citizens served by these programs lack significant political power and are directly and intimately impacted by the USDA's decisions to promote consumption of animal products over healthier foods.

It has long been argued that the USDA is incapable of promoting good nutrition.<sup>116</sup> Experts have contended that the "USDA should not have any role in dietary advice, as its duty to promote and support the agricultural industry is fundamentally inconsistent with promoting health and preventing chronic diseases."<sup>117</sup> Walter Willett and David Ludwig have recommended that the responsibility for the *Guidelines* be moved to the Centers for Disease Control (CDC) or the Institute of Medicine in order to protect against conflicts of interest.<sup>118</sup> Moreover, while this article focuses on nutrition and public health, this is not an issue that is limited to nutrition. Numerous experts have documented the USDA's inability to protect the safety of the food system due to influence from the animal agriculture industry.<sup>119</sup> Currently, food responsibilities are split between the USDA, the Food and Drug Administration (FDA) and the CDC within HHS, and the Environmental Protection Agency. None of these agencies is adequately able to protect consumers. A new federal agency could be devoted to consumers and public health, could accurately assess the scientific data and provide the public with good nutritional information, could be responsible for protecting food safety, and could take into account the extraordinary public health impacts that result from the environmental devastation caused by raising animals for food.

Following the recent financial crisis, professor and scholar (and now senator from Massachusetts) Elizabeth Warren proposed a new agency that would be devoted entirely to protecting consumers and regulating consumer financial products.<sup>120</sup> The administrative agencies that were supposed to be regulating financial institutions

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<sup>115</sup> See, *Programs & Services*, U.S. DEP'T OF AGRIC. FOOD AND NUTRITION SERV., <http://www.fns.usda.gov/fns/services.htm> (last visited Oct. 19, 2013).

<sup>116</sup> See, e.g., Schaffer, *supra* note 13; Mayer, *supra* note 56.

<sup>117</sup> Herman, *supra* note 60, at 285.

<sup>118</sup> Willett & Ludwig, *supra* note 102, at 1564.

<sup>119</sup> See, e.g., Daluiso, *supra* note 73; Casey, *supra* note 74; Fortin, *supra* note 74.

<sup>120</sup> See James Surowiecki, *The Warren Court*, THE NEW YORKER, June 13, 2011, available at [http://www.newyorker.com/talk/financial/2011/06/13/110613ta\\_talk\\_surowiecki](http://www.newyorker.com/talk/financial/2011/06/13/110613ta_talk_surowiecki).

prior to the financial crisis were instead mostly promoting them. The failure of the agencies to protect the welfare of consumers was devastating. Millions of people lost their homes, pensions, and life savings.<sup>121</sup> “[C]onsumer financial protection was not a central task for any of the federal banking agencies, whose principal mission was ensuring the safety and soundness of financial institutions. The fragmentation in regulatory structure made policy coordination difficult.”<sup>122</sup> As a result:

[F]ederal agencies did not make protecting consumers their top priority and, in fact, seemed to compete against each other to keep standards low, ignoring many festering problems that grew worse over time. . . . As a result, agencies did not act to stop some abusive lending practices until it was too late. And regulators were not truly independent of the influence of the financial institutions they regulated.

. . . Combining safety and soundness supervision—with its focus on bank profitability—in the same regulatory institution where consumer protection regulation was housed magnified an ideological predisposition or anti-regulatory bias by federal officials that led to unwillingness to rein in abusive lending before it triggered the housing and economic crises.<sup>123</sup>

In advocating for legislation to address the issue, Senator Christopher Dodd, then Chair of the Senate Banking, Housing, and Urban Affairs Committee, explained that for many years, “the Federal Reserve Board took no action to ban abusive home mortgages. Gaping holes in the regulatory fabric allowed mortgage brokers and bankers to make and sell predatory loans to Wall Street that turned into toxic securities and brought our economy to its knees.”<sup>124</sup> Michael Barr of the Department of the Treasury noted in testimony before Congress that “we have had a long and disastrous experience with having bank

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<sup>121</sup> See Arthur E. Wilmarth, Jr., *The Financial Services Industry’s Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. OF BANKING & FIN. L. 881 (2012).

<sup>122</sup> Leonard Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1145 (2012) (internal citations omitted).

<sup>123</sup> U.S. PIRG EDUC. FUND, 10 REASONS WE NEED THE CFPB: AN AFR ISSUE BRIEF (July 2011), available at [www.uspirg.org/sites/pirg/files/reports/tenreasonsweneedcfpb.pdf](http://www.uspirg.org/sites/pirg/files/reports/tenreasonsweneedcfpb.pdf).

<sup>124</sup> *Creating a Consumer Financial Protection Agency: A Cornerstone of America’s New Economic Foundation: Hearing Before the Comm. on Banking, Housing and Urban Affairs*, 111th Cong. 3 (2009) (statement of Sen. Christopher Dodd, Chair, S. Comm. On Banking, Housing, and Urban Affairs).

agencies with a mixed mission, with no one focused on protecting consumers . . . .”<sup>125</sup>

Greater consumer protection was seen as vital to our nation’s financial health, and in 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Consumer Financial Protection Bureau (CFPB) was created. According to the Senate Report on the bill, the purpose of the CFPB is to ensure “that consumers get clear and effective disclosures in plain English and in a timely fashion so that they will be empowered to shop for and choose the best consumer financial products and services for them.”<sup>126</sup> Among other responsibilities, the CFPB is tasked with ensuring consumers are provided with good information so that they can make good decisions.<sup>127</sup>

There is another crisis in our country. According to the CDC, 70 percent of deaths in the United States each year are due to chronic illnesses, with heart disease, cancer, and stroke accounting for more than half of all deaths.<sup>128</sup> According to the latest preliminary data from the CDC, of the approximately 2.5 million Americans who died in 2011, nearly 595,000 died from cardiovascular disease, just over 575,000 died of cancer, and nearly 130,000 died of stroke.<sup>129</sup> Together, those total approximately half of all deaths. These numbers compare to nearly 123,000 dying from accidents and less than 16,000 dying from homicide. Yet, most of those deaths are preventable. In 2005, the World Health Organization (WHO) evaluated the impact of chronic disease, including heart disease, diabetes, cancer, stroke, and chronic respiratory disease, worldwide.<sup>130</sup> WHO estimated that 35 million people would die in 2005 as a result of chronic illness,<sup>131</sup> and, without significant change, 41 million people would die annually of

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<sup>125</sup> *Id.* at 13. (statement of Michael Barr, Assistant Sec’y for Fin. Inst., Dep’t of the Treasury).

<sup>126</sup> S. Rep. No. 111-176, at 11 (2010).

<sup>127</sup> 12 U.S.C. § 5511(b) (2012).

<sup>128</sup> *Chronic Disease Prevention and Health Promotion*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/chronicdisease/overview/index.htm#ref1> (last updated Aug. 13, 2012).

<sup>129</sup> See Donna L. Hoyert & Jiaquan Xu, U.S. Dept. of Health and Human Servs. *Deaths: Preliminary Data for 2011*, 61 NAT’L VITAL STATS. REPS., Oct. 2012, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_06.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf).

<sup>130</sup> WORLD HEALTH ORG., PREVENTING CHRONIC DISEASES: A VITAL INVESTMENT (2005), available at [http://www.who.int/chp/chronic\\_disease\\_report/full\\_report.pdf](http://www.who.int/chp/chronic_disease_report/full_report.pdf).

<sup>131</sup> *Id.* at 2.

chronic illness by 2015.<sup>132</sup> WHO estimates that 80 percent of heart disease, stroke, and type-2 diabetes, as well as 40 percent of cancer, is preventable if governments promote policies that encourage changes in lifestyle and diet.<sup>133</sup> Also in 2005, researchers at Emory University School of Medicine projected the difference if McDonalds' next 100 billion burgers were to be veggie burgers instead of hamburgers.<sup>134</sup> They estimated that this would result in the consumption of 550 million fewer pounds of saturated fat, 1.2 billion fewer pounds of total fat, 1 billion additional pounds of fiber, and 660 million *additional* pounds of protein, with no difference in calories consumed.<sup>135</sup> This difference could have a dramatic impact on health.<sup>136</sup> As documented by medical experts, of the sixteen leading causes of death, only one—accidents—cannot be prevented, treated, and/or reversed through a plant-based diet.<sup>137</sup>

Millions of people in the United States die unnecessarily each year, while causes of death such as gun violence, which are dramatic but kill considerably fewer people, get significant attention. And even those Americans who do not die suffer needlessly from the effects of obesity, diabetes, heart disease, and other chronic illnesses. The United States spends \$37 billion per year on drugs to treat high blood pressure, heart disease, and diabetes and \$50 billion on coronary bypass operations and angioplasties.<sup>138</sup> Yet these diseases can be treated and reversed much less expensively through changes in diet.

However, as explained in detail above, powerful interests prevent federal agencies from protecting public health and providing consumers with the information that they need to make better decisions for themselves and their families. No agency is dedicated to protecting consumers. As a result, agribusiness interests are given priority over nearly all other interests, including nutrition and food safety. Congress and the Obama Administration believed that the United States needed the CFPB to protect consumers' financial health because the federal agencies responsible for regulating consumer

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<sup>132</sup> *Id.* at 6.

<sup>133</sup> *Id.* at 18.

<sup>134</sup> Elsa H. Spencer et al., *Potential Effects of the Next 100 Billion Hamburgers Sold by McDonald's*, 28 AM. J. PREV. MED. 379 (2005).

<sup>135</sup> *See id.*

<sup>136</sup> *See id.* at 380.

<sup>137</sup> Michael Greger, *Uprooting the Leading Causes of Death*, NUTRITIONFACTS.ORG (June 26, 2012), <http://nutritionfacts.org/video/uprooting-the-leading-causes-of-death/>.

<sup>138</sup> *See* JACOBSON, *supra* note 30, at 21.

financial products had completely failed to protect consumers, had instead promoted financial products that were harmful, and were complicit in the financial practices that led to the crisis. Similarly, the USDA has failed to protect consumers because of its duty to promote animal agriculture and other industrial agriculture interests. Rather than provide consumers with information they need to protect their health and eat nutritious foods, the USDA promotes products that are dangerous to human health. The USDA is incapable of providing good information due to its relationship with industrial agriculture. Just as Congress believed that a new agency was necessary to protect American's fiscal health and ensure that our interests were protected, we need a new federal agency to protect our physical health, protect the environment, provide us with good nutritional information, and start to address some of the substantial societal costs associated with Americans continuing to eat the way we do and raising animals for food.

### CONCLUSION

The USDA's decision to retract its support for Meatless Monday, a very modest but important public health campaign, could have just been an aberration and immediate response to pressure from animal agriculture and pro-meat members of Congress. However, an evaluation of the USDA's multiple responsibilities and its role in issuing the *U.S. Dietary Guidelines* shows that is not the case. Rather than an anomaly, the USDA's decision to bow to pressure from the animal agriculture industry exemplifies how it balances its dual roles of promoting good nutrition and promoting agriculture. Instead of providing consumers with good nutritional information based on the best scientific evidence, that information is tempered by concerns about urging consumers to eat fewer eggs, less meat, and less dairy, recommendations that would threaten the industries that produce these products, along with the many others that depend on them. It is time to take nutritional duties away from the USDA and place them with a federal agency that will truly evaluate nutritional science, will not be beholden to industrial agriculture, and will promote federal policies that are actually in Americans' best interests. It is long due for Congress to act to protect consumers, the environment, and public health.

