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In This Issue

ANIMAL LAW DOCKET

Practice Tips For Animal Law Cases

From Birds, Rats and Mice, Big Things Come

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One of the notable stories about the development of animal law, and initial attempts by the government to ignore both the animals and their advocates, involves the Animal Welfare Act.[1] There are probably very few who have studied the history of the field who have not been surprised, confused, and confounded by this story. In the late 1990s, the federal department responsible for *protecting* warm-blooded animals under the Animal Welfare Act, instead made the determination that birds, rats, and mice were *not* warm-blooded animals.

For those who do not remember this basic and indisputable fact, birds, rats and mice – like humans – are warm-blooded animals. It's biology, it's physiology, it's science. And as we know, government agencies can enact regulations that serve as law; and legislatures can make laws that govern how we act, and what conduct is permitted and proscribed. But one thing legislatures *cannot* do is change undeniable, indisputable facts. For example, they cannot decide that the chemical composition of water is not H_2O; they cannot decide that we walk on sky and the earth is up in the air. Nor can they "decide" that warm-blooded animals are not warm-blooded animals. But they actually tried that approach[2], in a battle that began before the turn of this century, and ended, at least with respect to birds who were not bred for use in research, only this year. This was another in a string of world-changing successes for animal advocates that represented strategic collaborations between animal welfare organizations and animal lawyers. For example, a concerted and decades-long effort, in 2015, led to the end to chimpanzee research and the protection of chimpanzees under the Endangered Species Act - something that took us by surprise despite the hard work. Likewise, the recent success in the U.S. Supreme Court when different group of organizations and lawyers established the constitutionality of states' decisions to limit the sales of products derived from acts of animal cruelty[3]. Or the recent establishment in California in late 2023 of greatly expanded access to veterinary care for pets around the state, supported again by advocates and lawyers with their eyes on the prize. As with all of those groundbreaking victories, the twenty-five-plus year fight to obtain protection for birds under the Animal Welfare Act was the result of a concerted effort by a coalition of animal protection groups, and the

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animal lawyers who followed their dream to victory in the courts.[4] It is another in an increasingly long string of wins that demonstrate the inescapable conclusion that animal lawyers are making a difference for animals in all walks of life.

Starting from the truth-defying announcement that birds were not warm-blooded animals, and as a compromise after regular pushback from animal protection groups insisting that such a determination was faulty, USDA landed on the final determination that birds "bred for use in research" were not covered under the Animal Welfare Act, meaning that any birds *not* bred for use in research would be covered.[5]

The next confounding set of circumstances came by way of an *18-year delay* between the purported protection of birds and their *actual* protection. That is, to enforce the coverage of the Animal Welfare Act (AWA), and by Congressional mandate, USDA had a "statutory responsibility to issue standards regarding the humane treatment of birds" covered by the Act.[6] Those "standards" must come in the way of regulations incorporated into the Code of Federal Regulations. And in 2001, USDA agreed to enact those regulations in a "reasonable time."

In 2004, 28 animal welfare groups drafted detailed species-specific standards and submitted them to USDA. Although government agencies sometimes move slowly in the regulatory area, in this case the USDA did not move at all, for what eventually was twenty years. During that time, like the boy who cried wolf, the USDA promised the animal welfare community over and over that the promulgation of the draft regulations was just about to happen. From 2001-2014, USDA at various times said the regulations were done and waiting approval; that they were almost done; that they were being submitted to the Office of Management and Budget for approval. But despite all of these promises, no draft regulations were ever published for notice and comment.[7]

It's helpful to understand the real-life consequences of government inaction like this, because there were serious consequences for birds around the country based on USDA's failure to enact regulations. The AWA is the federal law established to protect animals used in commercial activities, and to oversee the industries that use these animals. And while there may be state laws as well that may be implicated, the AWA's inspection and oversight procedures are often the sole source of protection for these animals. In the case of birds, because of the lack of regulations, neglect and even affirmative acts of cruelty could go on unabated – and had been documented.[8] But when approached with these problems, USDA's boilerplate response was that

birds were not covered by the AWA, or that there were no regulations and so they could not address the problems.[9]

In 2014, USDA stopped promising regulations, but did not publish any, and did not explain why. Dead silence about the bird regulations. The Department continued to resist all efforts by animal welfare groups to move the ball forward, despite the clear mandate. Finally, in 2018, the American Anti-Vivisection Society and the Avian Welfare Coalition joined forces and sued USDA based on "unreasonable delay."[4] It had been almost eighteen years, yet the government was still stonewalling, and neither acknowledging the delay was unreasonable nor claiming it was reasonable. Instead it made one last attempt to use procedural arguments that would stop the groups in their tracks. USDA argued, as expected, that the groups did not have standing, and that there was no "discrete agency action" being challenged.[4] In other words, the government was claiming that it did *not* have an obligation to promulgate bird-specific standards (even though it was mandated to do so) and that by seeking those standards, the plaintiffs were stepping over the line of what kind of action can be compelled by a court.

The district court held that the groups had standing, but agreed with the Department that the plaintiffs were suing on a faulty legal basis.[10] But the D.C. Circuit disagreed and found that "USDA ha[d] failed to take a discrete action—issuing standards to protect birds—that the Act require[s] it to take."[10]

While the court stopped short of finding unreasonable delay, the writing was on the wall. The case was returned to the district court and USDA quickly agreed to a court-ordered schedule of drafting and promulgation of regulations that would cover birds under the Animal Welfare Act.[10] The tide had turned, and birds not bred for use in research would soon be covered, really covered, under the AWA.

As required, USDA went through the requisite notice-and-comment process, receiving thousands of comments, from those involved in the commercial use of birds (breeders, sellers, falconry and homing pigeon enthusiasts), and from the animal welfare community. And in March 2023, the Code of Federal Regulations was populated with the final regulations with respect to birds under the AWA.[10]

As is almost always the case with regulations adopted where there are two "sides" wanting different degrees of governmental authority, the regulations compromised the requests of both industry participants and animal welfare advocates. For those who use birds in business, there is a significant "*de minimis*" rule that allows for an inordinate amount of birds to be sold on an annual basis with no protection under the AWA.[11] In other words, anyone who sells less than 201 smaller birds per year will not be inspected, does not need to be licensed, and all of those birds have

no protection under the federal law specifically enacted to protect birds used in commerce. The other significant disappointment with the new regulations is that it does not have any requirement for birds to be able to fly.

However, the bird regulations do provide great evidence of how far animal welfare advocacy has come since it began ramping up less than four decades ago. The bird regulations have an express provision that requires those individuals covered by the AWA to provide "environment enhancement adequate to promote the psychological well-being of birds."[12] In 2023 this may not seem like such a radical proposal; and to those who understand and know birds and their rich cultures and their recognized sentiency, it simply makes sense. But it is probably the case that this conscious recognition of avian behavior, and of the avian mind, would never have entered federal law if these regulations had been written twenty or thirty years ago. It is a remarkable admission both that the clear path of animal law is a forward one, and that animal welfare groups and their counsel are gaining more and more ground (or air, in the case of birds) in the move towards a better world for our nonhuman planetary cohabitants. There are always some barriers for sure – after all, "are birds free from the chains of the skyway?"[13] – but we are flying in the right direction for sure.

Endnotes

1 7 U.S.C. § 2131 *et seq.*

2 *See* 36 Fed. Reg. 24, 919 (1971) (USDA declaring that "warm-blooded animals" expressly excluded "birds, aquatic animals, rats and mice.")

3 National Pork Producers Council v. Ross, 598 U.S. 356 (2023).

4 American Anti-Vivisection Society v. United States Department of Agriculture, 946 F. 3d 615 (D.C. Cir. 2020) *(AAVS v. USDA).*

5 9 C.F.R. § 1.1.

6 *AAVS v. USDA*, 946 F .3d at 620.

7 See Complaint, *American Anti-Vivisection Society et al. v. USDA,* Case No. 1:18-cv-1138, 14-21 (D.D.C. Aug. 10, 2018) (Doc. 15).

8 *See id.* at 22-23

9 *Id.*

10 *AAVS v. USDA*, 946 F .3d at 620

11 9 C.F.R. § 3.150 *et seq.*

12 9 C.F.R. § 2.1(a)(3)(iii) ("[E]xempt from licensing is any person who sells 200 or fewer pet birds 250 grams or less annually, and/or sells 8 or fewer pet birds more than 250 grams annually, determined by average adult weight of the species, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license.")

13 9 C. F. R. § 3.154.