

RULE OF LAW, FOOD SAFETY EDITION

We talk a lot about the decline of the rule of law on this blog: about how the MOTUs get away with torture, wiretapping, financial fraud, lying to Congress, ruining the environment, and the like. The problem, it seems, is that the government doesn't want to prosecute anyone so laws aren't taken very seriously.

Apparently, the sense that the government refuses to actually prosecute people extends to food safety:

In 1938 Congress passed the Federal Food, Drug, and Cosmetic Act in reaction to growing public safety demands. The primary goal of the Act was to protect the health and safety of the public by preventing deleterious, adulterated or misbranded articles from entering interstate commerce. Under section 402(a)(4) of the Act, a food product is deemed "adulterated" if the food was "prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health." A food product is also considered "adulterated" if it bears or contains any poisonous or deleterious substance, which may render it injurious to health. The 1938 Act, and the recently signed Food Safety Modernization Act, stand today as the primary means by which the federal government enforces food safety standards.

Chapter III of the Act addresses prohibited acts, subjecting violators to both civil and criminal liability. Provisions for criminal sanctions are clear:

Felony violations include adulterating or misbranding a food, drug, or device, and putting an adulterated or misbranded food, drug, or device into interstate commerce. Any person who commits a prohibited act

violates the FDCA. A person committing a prohibited act "with the intent to defraud or mislead" is guilty of a felony punishable by not more than three years or fined not more than \$10,000 or both.

A misdemeanor conviction under the FDCA, unlike a felony conviction, does not require proof of fraudulent intent, or even of knowing or willful conduct. Rather, a person may be convicted if he or she held a position of responsibility or authority in a firm such that the person could have prevented the violation. Convictions under the misdemeanor provisions are punishable by not more than one year or fined not more than \$1,000, or both.

Similar laws deal with the meat side of the equation over at USDA/FSIS.

So, in the near two decades of being involved in every major foodborne illness outbreak in the United States, I have seen more than a few outbreaks that, if I had the authority, I would have prosecuted, some as felonies and some as misdemeanors.

Either way, I would have sought fines and jail time for the executives responsible for food safety.

The post goes on to list 17 food contamination outbreaks that could have been, but were not, prosecuted. Between the 17 outbreaks, 15 people died.

Some of the above causes of the above outbreaks could well have been considered for felony prosecution. All, however, could have been prosecuted as misdemeanors. Under either scenario a CEO may well have faced both a fine and jail time. Consider for a moment how a CEO might well think twice about pushing food safety to the side ahead of increased sales and profits. My bet is that if I had prosecuted some of the above cases, as the crimes they were, many of the others would never have happened. CEOs now

might risk poisoning people because an insurance company will pick up the tab, but they would not risk personal fines and jail time. I think it is time to give it a shot.

Remember that Peanut Corporation of America outbreak that sickened 714 people a few years ago? No one has been prosecuted for that yet, even though the owners knew they were shipping Salmonella-tainted peanut butter to consumers. PCA just declared bankruptcy and walked away.