

# The History of Food Law

GEORGE M. BURDITT, ESQ.\*

The history of food law records a series of incremental events. Events do not occur *in vacuo*; they are precipitated by people who make the history of food law come alive. Peter Barton Hutt documents the early history in a 1984 article:

For centuries, government has had an essential role in assuring the integrity of the food supply. The focus of the regulatory function has, of course, evolved over the years. It originated essentially as a means to protect against fraud in the marketplace. Very quickly, it expanded into a mechanism for preventing the sale of unsafe food. As the science of nutrition has developed, it has assumed the role of protecting the nutritional integrity of the food supply as well . . . .<sup>1</sup>

Some of the people involved in the earliest efforts in food regulation include:

- Theophrastus (370-285 B.C.), who reported on the use of artificial flavors in the food supply;
- Cato (234-149 B.C.), who recommended a method “to determine whether wine has been watered”;
- Pliny the Elder (23-79 A.D.), who described adulteration of bread with chalk, vegetable meals, and cattle fodder; and
- Galen (131-201 A.D.), who warned against adulteration of products such as pepper.

Then came the Dark Ages, anarchy, and the cessation of commerce. Nobody took time or knew how to write complaints about fraud and adulteration.

The English Parliament began the revival of interest in food laws in the mid-thirteenth century with statutes prohibiting adulteration and fraud. Individuals surfaced again as movers and shakers in this area:

- Frederick Accum in 1820 published his *Treatise on Adulteration of Food and Culinary Poisons*.
- Lemuel Shattuck published in 1850 a landmark report on public health and sanitation; in the late 1800s Congress enacted several laws that addressed new concerns about the food supply (e.g., to prevent the importation of adulterated tea, an oleo-margarine statute, and laws intended to prevent the import or export of adulterated food).
- Dr. E.R. Squibb in 1879 proposed enactment of a nationwide food and drug law.
- Dr. Harvey W. Wiley, the father of American food and drug law, and eventually Chief Chemist of the U.S. Department of Agriculture, began his work in 1883.
- Elliot O. Grosvenor, Dairy and Food Commissioner of Michigan, wrote to Joseph

---

\* Mr. Burditt is a Partner in the law firm of Burditt & RADIUS, Chicago, Illinois.

<sup>1</sup>Peter Barton Hutt, *Government Regulation of the Integrity of the Food Supply*, 4 Ann. Rev. of Nutrition 1 (1984).

P. Blackburn, Dairy and Food Commissioner of Ohio, in May 1897, and suggested a meeting to discuss cooperation among states, and between states and the federal government. On August 25, 1897, commissioners from ten states met in the Turkish Room of the Cadillac Hotel in Detroit and formed the National Association of State Dairy and Food Departments, now the Association of Food and Drug Officials (AFDO).

- Upton Sinclair wrote *The Jungle*, and the muckrakers precipitated the passage of the first major American food and drug statute, the Pure Food and Drugs Act of 1906.<sup>2</sup>
- Senator Royal S. Copeland of New York sponsored and engineered the passage of the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA).<sup>3</sup> As to food, the new law prohibited false advertising; required informative labeling; authorized definitions and standards for foods; prohibited the addition of poisons to food; authorized the operation of plants under federal permit where necessary; and increased criminal penalties and authorized injunctions as well as seizures.
- Charles Wesley Dunn, a New York attorney, founded the Food Law Institute,<sup>4</sup> the Food and Drug Law Division of the American Bar Association, the Food and Drug Law Section of the New York State Bar Association, and the Nutrition Foundation. He was simultaneously General Counsel of the Grocery Manufacturers of America and the Pharmaceutical Manufacturers Association. His contributions to food law are legion.<sup>5</sup> Among other things, he established Food and Drug Law Fellowships at New York University, subsequently expanded into food and drug law courses at more than twenty law schools throughout the country.

There are multiple sources of information on early food laws.<sup>6</sup>

No history of food and drug law would be complete without significant reference to Dr. Harvey W. Wiley. His persistent demands, supported by the experiments in which his laboratory assistants cooperated personally, were a major factor in the passage of the 1906 Act. Dr. Wiley's accomplishments have been detailed in food and drug law literature, but a personal anecdote, using his own words spoken at the 1925 annual conference of the Association of Dairy, Food and Drug Officials of the United States, may add to the lore:

At the age of 67 — this is a personal narrative — I committed the indiscretion of matrimony. Up to that time I never had the time to get married. When I was paralyzed in the Bureau of Chemistry, my thoughts turned in other directions. Had it not been for the Remsen Board, I would always have been a bachelor. I met a girl while I was in the company of Mr. W.P. Cutter, the Librarian of the Department of Agriculture. He had just fitted up his new library, and he came to my office to ask me to step over and see it. I accompanied him, and as I was entering the library with him I saw before me my Ideal Woman. I had written a complete description of her thirty-five years before. It was published; I have it

---

<sup>2</sup> Pub. L. No. 59-384, 34 Stat. 768 (1906).

<sup>3</sup> Pub. L. No. 75-717, 52 Stat. 1040 (1938), as amended 21 U.S.C. §§ 301 et seq. (1988).

<sup>4</sup> This was the predecessor organization of The Food and Drug Law Institute.

<sup>5</sup> See also Alan H. Kaplan & John A. Maher, *What Charles Wesley Dunn Did: His Life in the Law*, [Special Issue] FOOD & DRUG L.J. 1 (1995).

<sup>6</sup> See, e.g., PETER BARTON HUTT & RICHARD A. MERRILL, FOOD AND DRUG LAW CASES AND MATERIALS 4 (2d ed. 1991).

yet; and there stood the woman I had described as my Ideal. I never expected to see her here on earth, but there she was in flesh and blood. I caught Mr. Cutter by the arm as we reached the door. "Stop a minute," I said to him; "I am going to marry that girl!" "Don't you think," he asked, "you had better be introduced to her first?" I replied, "No, that won't change my purpose; you can't turn me off by a little thing like that. She is going to be my wife." But he did take me up and introduce me. I did not propose just then, but ten and a half years later I married her.<sup>7</sup>

Dr. Wiley's uncompromising opinions and ideals on unlikely issues such as benzoate of soda put him at odds with his boss, Secretary of Agriculture James Wilson. His crusading nature endeared him to about half of the state food officials, but alienated him from the other half. After a preliminary tug of war at the 1908 AFDO meeting at Mackinac, the climax came at the 1909 annual convention of the Association, dubbed "The Battle of Denver." Dr. Wiley supported Commissioner A.C. Bird of Michigan for president of the Association; the opposition candidate was George L. Flanders of the New York Department of Agriculture and Markets. Eighteen states voted for Bird, and another eighteen voted for Flanders. It fell to the U.S. Department of Agriculture (USDA) — Dr. Wiley's own organization — to cast the deciding vote, but all three of the agency's votes went against Dr. Wiley's candidate, and George Flanders was elected.

Proof that old wounds heal slowly came at the 1913 AFDO convention when the Resolutions Committee presented a group of routine motions to thank several state officials for making the convention arrangements. A single paragraph had been included to thank Dr. Wiley for his work, but Idaho's James H. Wallis, President-elect of the Association, moved that the Wiley paragraph be stricken. His motion carried, and the USDA voted two-to-one in favor of the crass insult to Dr. Wiley.

At the 1925 meeting of the Association, Dr. Wiley reminisced:

Mr. Chairman and Members of the Convention; ladies and gentlemen: I propose to take perhaps the full hour which has been accorded me for the purpose of bringing before this convention certain facts which many of you have had no opportunity to know, and also in connection therewith to relate a number of incidents which are not recorded in any official documents, but which throw a considerable amount of light on the efforts of this country to have a National Food and Drug Act, after my advent into public life in the Capital of our country in 1883.

[The next sixteen pages of the Official Proceedings of the Association, in small print, describe Dr. Wiley's battle against those who were opposing him on many issues, including passage of the federal act.]

[O]rganized bodies for deception and injury to health; the rectifiers of this country; the patent medicine organizations; certain manufacturers and business organizations using preservatives in their food products; poisoners of infants and invalids . . . .<sup>8</sup>

---

<sup>7</sup> Mrs. Wiley, the former Anna Kelton, was about 40 years younger than Dr. Wiley, and she survived him by many years. This author remembers meeting her at food and drug meetings in the 1950s. *See also* Anna Kelton Wiley, *Original Federal Food and Drugs Act of June 30, 1906; Its Great Founder*, 1 *FOOD DRUG COSM. L.Q.* 314 (1946).

<sup>8</sup> *OFFICIAL PROCEEDINGS OF THE ASSOCIATION OF FOOD AND DRUG OFFICIALS* 124 (1925).

Proponents of a federal food and drug act would face ordeals similar to Dr. Wiley's, but to a far less inflammatory degree, in the late 1930s. Senator Copeland and his supporters spent five years drafting and urging passage of the new Act; they were assisted mightily by the public tragedy involving elixir of sulfanilamide. History keeps repeating itself: deplorable conditions spurred the passage of the 1906 act; several sulfanilamide fatalities facilitated the passage of the 1938 act; and some of the amendments discussed below (specifically, the 1962 Kefauver-Harris Amendments and the 1980 Infant Formula Act) also were precipitated by unfortunate events.

The FDCA of 1938 remains the basic food and drug act in the United States. That Act, however, has been amended frequently:

- In 1950, Congress passed the Oleomargarine Act<sup>9</sup> repealing much of the discriminatory legislation that restricted margarine sales;
- In 1954, the Miller Pesticides Amendment<sup>10</sup> empowered the FDA to establish tolerances for pesticides;
- In 1958, the Food Additives Amendment<sup>11</sup> required premarket approval of new food ingredients. Until that time, a marketer could add ingredients without the FDA's specific approval;
- In 1960, the Color Additive Amendment<sup>12</sup> established a premarket approval system for colors;
- In 1962, the Kefauver-Harris Amendments<sup>13</sup> added the requirement of proof of efficacy prior to approval of new drugs, although the amendments did not have a major impact on food;
- In 1966, the Fair Packaging and Labeling Act<sup>14</sup> completely restructured American food labels. Virtually every label on every food product in the United States had to be changed. One major food company had to change 20,000 different labels;
- In 1976, the Vitamin-Mineral Amendment<sup>15</sup> limited the FDA's authority to regulate the composition and promotion of dietary supplements. The Medical Device Amendments<sup>16</sup> also were passed that year;
- In 1977, Congress passed the first of several laws precluding FDA action to ban the use of saccharin,<sup>17</sup> and directed the FDA to refrain from implementing a proposed system for controlling the sanitation of shellfish;
- In 1980, Congress passed the Infant Formula Act,<sup>18</sup> which imposed drug-like requirements on infant formulas;
- In 1990, Congress passed the Nutrition Labeling and Education Act,<sup>19</sup> substantially revising the substance and format of dietary information on labels and regulating nutritional factors more intensively; and
- In 1994, Congress passed the Dietary Supplement Health and Education Act,<sup>20</sup> severely restricting the FDA's authority to regulate human nutritional foods.

---

<sup>9</sup> Pub. L. No. 81-459, 64 Stat. 20 (1950).

<sup>10</sup> Pesticide Residues Amendment of 1954, Pub. L. No. 83-518, 68 Stat. 511.

<sup>11</sup> Pub. L. No. 85-929, 72 Stat. 1784 (1958).

<sup>12</sup> Pub. L. No. 86-618, 74 Stat. 397 (1960).

<sup>13</sup> Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780 (1962).

<sup>14</sup> Pub. L. No. 89-755, 80 Stat. 1296 (1966).

<sup>15</sup> Pub. L. No. 94-278, 90 Stat. 410 (1976) ("Proxmire Amendment").

<sup>16</sup> Pub. L. No. 94-295, 90 Stat. 539 (1976).

<sup>17</sup> Saccharin Study and Labeling Act, Pub. L. No. 95-203, 91 Stat. 1451 (1977).

<sup>18</sup> Pub. L. No. 96-359, 94 Stat. 1190 (1980).

<sup>19</sup> Pub. L. No. 101-535, 104 Stat. 2353 (1990).

<sup>20</sup> Pub. L. No. 103-417, 108 Stat. 4325 (1994).

Congress also has passed separate legislation regulating meat, poultry, and eggs, all under the jurisdiction of the USDA. The first Meat Inspection Act<sup>21</sup> was passed in 1906, again as a result of Upton Sinclair and the muckrakers. The Poultry Products Inspection Act<sup>22</sup> was enacted in 1957 and the Egg Products Inspection Act<sup>23</sup> was passed in 1970.

The advertising of food and food products is regulated by the Federal Trade Commission pursuant to the Federal Trade Commission Act.<sup>24</sup>

Each state has its own food, drug, and cosmetic act. AFDO drafted a uniform state Food, Drug, and Cosmetic Bill, which effectuates the goal of uniformity enunciated by Commissioner Grosvenor, Commissioner Blackburn, Mr. Flanders and their colleagues who attended the 1897 session of what would become AFDO. The Uniform Bill is identical to the FDCA in most of its provisions, and even provides for prospective automatic adoption of certain specified federal regulations, such as food standards of identity.

Weights and measures issues are the concerns of the USDA, the FDA, the Department of Commerce, as well as state and local officials. A key U.S. Supreme Court decision on "shrinkage" is *Jones v. Rath Packing Company*.<sup>25</sup> The National Conference on Weights and Measures and the Industry Committee on Packaging and Labeling have been instrumental in attempting to achieve rationality and uniformity in this challenging field.

Some kinds of food, particularly milk and some dairy products, also are regulated at the county or city level. Uniformity has been sought and largely achieved by cooperation between the industry and the regulatory officials involved, primarily through the Interstate Milk Shippers.

This enormity of regulation at the federal, state, and local levels, with several federal agencies, many more than fifty state agencies, and hundreds of local agencies enforcing various laws is a generally accepted fact of life. But, in November 1994, for the first time in forty years, voters elected Republicans to a majority in both Houses of Congress. Food legislation was not in the "Contract with America" to be accomplished in the first hundred days of the 104th Congress, but several committees of both Houses currently are considering significant changes in legislation. While drug, medical device, and biologics amendments have priority, it is clear that food legislation, particularly in the areas of food additives and color additives, will be considered. Food law is an exciting place to live, and it has been since the *Food and Drug Law Journal* was founded fifty years ago!

---

<sup>21</sup> Pub. L. No. 59-242, 34 Stat. 1260 (1907). The Wholesome Meat Act in 1967 was combined with the 1907 act and designated the Federal Meat Inspection Act, Pub. L. No. 90-201, 81 Stat. 584 (1967).

<sup>22</sup> Pub. L. No. 85-172, 71 Stat. 441 (1957).

<sup>23</sup> Pub. L. No. 91-597, 84 Stat. 1620 (1970).

<sup>24</sup> Ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-64 (1988)).

<sup>25</sup> 430 U.S. 519 (1977).