Defending Consumers Against Regulation

The American Spectator

January, 1978

When President Carter was an obscure candidate in the wilds of New Hampshire, he began to attract attention and support with his fervent promises to slim down the federal bureaucracy. Having settled comfortably in Washington, he proposed the creation of two new federal agencies and succeeded in creating one (the Department of Energy) during his first year in office. This performance followed perfectly the precedent of Presidents Nixon and Ford, whose theoretical aversion to big government was even more emphatic than President Carter's, and who managed to establish eight major agencies in as many years without being seriously brought to account for it. (My figure does not include the Plumbers Bureau.)

My concern here is with the agency President Carter has so far failed to establish but which, I predict, he will secure in fulfillment of his second-year quote. This is the Agency for Consumer Advocacy, which bade fair to pass the Congress last spring, but which was temporarily defeated through the opposition of business groups, such as the Chamber of Commerce, and practically all political conservatives. I should like to argue that the Consumer Advocacy proposal is potentially the most strategically sound "regulatory reform" yet conceived, and that the uncompromising opposition of conservatives, businessmen, and others who wish to reduce the scope of political fiddling in the economic marketplace, was mistaken. An understandable mistake, given the confusion surrounding the debates over "consumer advocacy" and "regulatory reform," but one which promises unhappy consequences when the proposal finally becomes law.

The terms "consumer advocacy" and "consumer interest" have acquired a bad odor among businessmen and conservatives in recent years because of the association of these terms with the splurge of new health, safety, and environmental laws. At a formal level, the rationale of these laws has been that they correct various "market failures," such as the social costs of pollution, which a firm may ignore in the absence of legislation or common-law liability. But these laws have also been, in varying degrees, hostile toward traditional business values and paternalistic toward the consumer. In all they have enormously increased the costs and uncertainties of doing business, and have played an important role in propelling the young lawyers and civil servants of the "new class" to positions of social leadership and prestige once held by business managers themselves. To many businessmen beleaguered by these developments, "regulatory reform" has come to mean a counterrevolution against the consumer movement which would, at the very least, teach the "new class" good business manners: that regulations must take account of costs as well as benefits, and must be precise and predictable enough to restore a degree of confidence to the

business decisions they affect.

There is, however, an older and very different meaning to the term “consumer interest”—libertarian rather than paternalistic—in connection with laws designed to promote the paramount consumer interest in free markets, vigorous price and product competition, and a wide variety of choice. Thus, the original purpose of the Sherman Act (as Robert Bork demonstrated some years back) was to promote the interest of “consumer welfare” against the extortions of monopolies, price-fixing agreements, and other output-restricting schemes. The Clayton and Federal Trade Commission Acts were in many respects drafted with the same view of the “consumer interest” in mind. This distinction cannot be pushed too far, as monopolies and cartels are in a sense “market failure” themselves, and many businesses resent the antitrust laws as much as they resent OSHA and EPA. Nevertheless, the antitrust laws do aim to promote such traditional economic goals as output maximization and the efficient operation of markets: Those who defend the right to sell Tab to knowledgeable consumers do not generally defend the right to see it at a price fixed with that of Diet Pepsi. And although careless antitrust enforcement has often had perverse effects upon competition and efficiency, it has not involved hordes of shaggy-haired kids instructing senior business executives whether and where to build new factories, or their purchasing agents what shaped toilet seats to order.

The “consumer interest” in this traditional, libertarian sense has been the moving force behind its own brand of “regulatory reform”—the kind championed not so much by businessmen themselves as by an odd alliance of government reformers such as Edward M. Kennedy, Donald I. Baker, and Paul W. MacAvoy, and aimed not so much at safety and environmental regulation as at economic regulation as practiced by “independent” agencies such as the ICC, CAB, and FCC. During the Ford years, these individuals and others like them began to apply practically the academic learning on economic regulation, the bare sum of which is that: (a) However profitable private monopolies and cartels may be in the short run (until they degenerate through cheating or new entry, usually a year or two before the Antitrust Division finds out about them), they are no substitute for the same practices sanctioned and enforced by a government agency; and (b) whether or not the true purpose of economic regulation is to protect consumers (the only respectable purpose of business regulation), in practice it consistently benefits organized economic groups at the direct expense of unorganized consumers. As a result, in recent years the Sherman and FTC Acts have been directed increasingly at*government enforced* restraints on price and product competition, market entry and exit, advertising, and other fundamentals of free trade. And, at the legislative level, the “consumer interest” in vigorous economic rivalry has been the touchstone of a variety of proposals to reform the regulatory commissions by diminishing their powers to snuff out competition for the benefit of favored groups.

The libertarian view of the “consumer interest” is distinguished from the

paternalistic view by the insight that, in the economic arena, what the consumer most needs protection against is not the marketplace, but the manipulation of the marketplace by government at the behest of organized economic groups. This insight is correct—anyone who doubts it may refer to the latest report of Nader's Raiders or of the American Enterprise Institute—and there are powerful institutional reasons why it is correct. Those whose stakes in regulation are large and concentrated (the regulated industries and their immediate customers, competitors, and unions) naturally attend closely to every quiver in the regulatory process, and master the complex economic and legal details necessary to press their interests persuasively; while those whose stakes are equally large but diffuse (you and me as final consumers of the products of regulated businesses) naturally do neither, since no one's individual stakes are worth the effort. But the interests of those who do attend regulatory proceedings are often in conflict with those of consumers, and frequently no party has any incentive to present the regulatory agency with either a correct economic description of the dispute at hand, or a solution which would benefit ultimate consumers as well as itself. Because the agencies seek, for both legal and political reasons, to "balance" the interests of those appearing before them, it is only by accident that regulatory decisions benefit rather than harm the silent majority of unorganized consumers.

This imbalance is powerfully reinforced by the legal standards governing judicial review of agency proceedings. In most cases appeals courts may overturn regulatory decisions only where there is a lack of "substantial evidence" supporting them. But there is almost always substantial evidence in the record—the evidence submitted by the party that prevailed! So even when decisions are outrageously anti-consumer—running a hapless independent bus driver out of business at the behest of Greyhound Lines; or prohibiting AT&T, the airlines, or the railroads from *lowering* rates to their costs—the appeals courts ordinarily have little choice but to acquiesce.

Now, the Agency for Consumer Advocacy proposal is decidedly in the libertarian tradition of the "consumer interest." The Agency's charge would be to identify and advocate the interests of consumers in federal regulatory proceedings. More importantly, the federal appeals courts would be permitted, on petition by the Agency, to set aside regulatory decisions shown to be inimical to consumers' interests. These two statutory changes are aimed precisely at what is wrong with the regulatory process as currently practiced, and are based in part on the experience of recent "regulatory reform" efforts of the Antitrust Division, the Federal Trade Commission, and the Council on Wage and Price Stability. Under the Ford administration, each of these agencies performed a generally competent job of weighing into regulatory proceedings and urging the commissions to look beyond the importunings of the immediate parties. But all three proved to be poorly suited to the task because of conflicting statutory responsibilities. For example, the FTC is itself responsible for enforcing a number of bizarre special-interest laws, and both the FTC and the Antitrust Division have

been compromised, in challenging government-supported restraints on advertising, by their position in other proceedings that advertising itself is anti-competitive. Most seriously, none of these agencies can appeal regulatory decisions to the courts in a way that compels the commissions to face up to a distinct, overriding legal standard. The Agency for Consumer Advocacy could, and its government legal standard, rather than addressing intermediate phenomena such as "unfair" or "monopolistic" commercial practices, would come straight to the point of how a particular regulatory decision affected consumers.

Two widely-voiced objections to the Agency for Consumer Advocacy illustrate the most important thing to be said on its behalf. The first objection, raised by economists and many "regulatory reformers" themselves, is that if the regulatory process in fact works against those it ought to serve, the obvious remedy is to reform or abolish the regulatory agencies rather than unleash yet another one. The second, raised by lawyers such as Leon Jaworski (in congressional testimony widely publicized by the Chamber of Commerce), is that the spectacle of one federal agency confronting another in court, purportedly on behalf of a higher conception of the pubic interest than its bureaucratic adversary, is fundamentally undemocratic and weakens the separation of powers. There is little merit in the second objection: The Department of Justice has long had discretion to "confess error" and actively oppose regulatory decisions appealed by other parties, a legal weapon it has used as part of the Antitrust Division's regulatory reform campaign; and of course, Mr. Jaworski himself is familiar with precedent for one agency of the executive branch taking another to court with results he approves. But the objection does give emphasis to the untidiness of the notion of setting up one agency to reform the others.

The defense of this untidiness is that the Agency for Consumer Advocacy is a singularly political response to the problems of regulation, and is probably the *only* response that is currently feasible. Regulatory reform has now been in the forefront of public-policy debate for many years, and commands the general assent of virtually every important political figure in Washington. Yet none of the myriad legislative proposals to reform the regulatory agencies (with the minor exception of railroad regulation) either has passed or has any discernible prospect of passing. The reason, plainly, is that those in a position to secure the case-by-case benefits of regulation are also those in a position to protect the statutory foundations of regulation. But no individual group has a direct interest in the consumer Advocacy bill comparable to, say, its interest in a bill to permit free entry into the trucking business. This is the secret of the proposal's much greater prospects of enactment, and of its appeal to the majority of legislators who wish to do the right thing within the narrow limits of political necessity. It is one of a number of devices Congress has been experimenting with in an attempt to find some respite from the ferocious pressures of interest-group politics, pressures which have been increasing ever since the 1930s, when the Supreme Court abandoned the last constitutional restraints on the government's authority to bestow economic favors on this and that faction. This is realism, not defeatism,

and there is no reason it should be resisted by those who desire an improvement in the political and economic position of the ordinary citizen.

The battle over regulatory reform is now returning from the congressional conference tables to the regulatory trenches: many legislators have been emphasizing recently the degree to which the commissions' own unilateral reforms could reduce the damage they do to the nation's economy. This is true as a matter of legal possibility, but it is unlikely to make much difference until there is a fundamental shift in the balance of power at the agency and appellate-court levels. The Agency for Consumer Advocacy, by impressing a new and proper standard on the work of the regulatory agencies, could accomplish this.

At the same time it must be said that, in the hands of anti-business ideologues or those who believe they can judge the consumer interest better than consumers themselves, the Agency for Consumer Advocacy could also accomplish great harm. Unfortunately, this possibility has been substantially increased by the circumstance that those n a position to advance and execute the libertarian vision of the Agency's function have instead chosen to oppose it every (inevitable) step of the way. It is a prime example of the continuing failure to heed Irving Kristol's admonition: that the fight to preserve a relatively free economy must be fought *within* rather than *against* the "new class" if it is to have any prospect at all for success.