1970


Reuben B. Robertson

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation

This Book Review is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
Book Review


Few informed observers of the Washington scene, the regulators included, will take issue with the thesis that our regulatory system is in serious trouble. There are persistent, well-documented charges that the regulatory agencies are failing to protect and promote the public interest; that they are failing to establish standards and priorities for their actions, to maximize their available resources, to understand the technology, economics, structures and practices of the regulated industries, to coordinate their efforts and to observe procedural and even substantive requirements of the laws governing their actions.¹ The impact of regulatory deficiencies is being realized, with increasing intensity, in terms of environmental hazards, transportation crises, inflation and social disorder. Making our mechanisms for regulation and planning more responsive, rational, and humane is a matter of utmost priority. For that task, we urgently need insightful and empirically based studies of the regulatory agencies and the problems they face.

Kohlmeier’s book, which touches on a number of the valid points of criticism of agency performance, purports to be such a contribution: “a comprehensive evaluation of government’s efforts of many years to regulate and promote private industry for the public good.”² The author’s stated purpose is to review, from a consumer interest perspective, “those laws, policies and programs that are concerned with people’s jobs and wages and with the goods and services the public buys”³—a promise surely impossible to fulfill in a book that completely neglects such topics as the federal regulation of occupational hazards, pensions, food quality, drugs, pesticides, automotive safety, and advertising. Unfortunately, The Regulators is such a superficial, uninformed, arrogant and ultimately naive attack on regulatory agencies and on the very concept of regulation that it makes no meaningful contribution to the resolution of the problems at hand.

³. Id.
Kohlmeier's talent is essentially that of a Washington journalist trained to dig up enough facts and data to compose a presentable newspaper story. There is no harm, to be sure, in retelling case histories of bureaucratic chaos, ineptitude and corruption; indeed it is nice to have available the author's concise and readable exposition of such episodes as the Dixon-Yates affair, President Truman's covert intervention at the SEC on behalf of Wall Street in opposition to a proposed ban of floor trading on the stock exchanges, and the spectacular growth of the LBJ broadcasting kingdom. Kohlmeier is particularly good in describing the discoordinated and irrational regulatory actions which have impeded both competition and planning in the transportation industries. If he had left it at that, one could have little objection to this book. Unfortunately, the author cannot resist the temptation to go far beyond the range of his abilities and experience, into proposals for massive restructuring of the federal government, and the result is a disaster.

One of the central problems of this book is that Kohlmeier has done virtually no hard, empirical study and analysis of the real structure and workings of the agencies. We learn nothing of the motivation and aspirations of the regulators, of how decisions are made (or not made), of the barriers to coordination and communication, or of why the agencies are, as the author charges, captured by the industries they were supposed to regulate. Instead, a substantial part of the book is given over to Kohlmeier's theory that legislation establishing so-called independent regulatory agencies is unconstitutional, followed by a series of sweeping recommendations which would abolish these agencies, turning over their functions variously to state and local government, the federal executive department, a newly constituted Article III court to be known as the Commerce Court, a beefed-up Antitrust Division, and the Better Business Bureau. There is not much point at this juncture in debating the issue of whether the independent agencies, not having been expressly foreseen and provided for in the Constitution, are thereby unconstitutional, largely because the question itself is so wide of the mark. What Kohlmeier apparently utterly fails to recognize is that a substantial part, if not the majority, of existing federal regulation is now assigned to executive departments, and that the deficiencies and failures of the independent agencies are repeated, if not magnified, in the agencies of the executive branch. Whether or not the independent agencies are unconstitu-

4. For a classically near-sighted agency attempt to clear itself of Kohlmeier's criticism, see "Is Regulation No Longer Necessary?" remarks of George M. Stafford, Chairman of the Interstate Commerce Commission, before the Board of Governors of the Regular Common Carrier Conference, Honolulu, Hawaii, February 20, 1970.


6. See generally REPORT ON REGULATORY AGENCIES, supra note 1.
tional, an issue I had thought to have been long since laid to rest,7 we must deal with the massive problems that confront the government officials whose duty it is to regulate corporate behavior and plan the rational development and use of our public resources in the public interest.8

I do not mean to imply that all of Kohlmeier's proposals should be rejected out of hand. Some of them—such as a major reinvigoration of antitrust enforcement, repeal of the Robinson-Patman Act, and the redistribution of certain regulatory and planning functions—have been advanced by more sensible and qualified critics of the regulatory process and are worthy of careful consideration, but Kohlmeier's arguments are not convincing. Most of his recommendations, moreover, are of the "out of the frying pan, into the fire" variety, such as his proposal to transfer the Federal Power Commission's energy regulation functions to the Interior Department whose own ineptitudes (as evidenced by such regulatory disasters as the Santa Barbara Channel bemucking, the Teapot Dome affair, the Farmington mine disaster, and the work of the oil import administration) are of exponentially greater magnitude than the misdeeds of the Federal Power Commission.

At the heart of his program for reform is an immensely naive faith in "pure" competition as a faultless mechanism of consumer justice and social planning. Kohlmeier provides no evidence in support of his hypothesis, which seems to belie centuries of experience to the contrary, including the very real abuses that inspired regulatory legislation in the first place. Kohlmeier is undoubtedly correct in his assessment that big business would strenuously resist any efforts at antitrust enforcement which tended to threaten the present complacency and "stability" of the American marketplace, and he is also right, I believe, that such efforts would be a good thing for the American consumer. He is wrong in his belief that antitrust-inspired competition would be adequate to protect the public interest, and that federal regulatory controls over corporate behavior would not be required. For one thing, he overlooks the continuing abuse of the consumer and his environment by corporate predation in unregulated phases of the economy. A good example is the problem of automobile defects and deceptive warranty practices by the automobile manufacturers, as to which the Federal Trade Commission has recently called for protective legislation aiming to "create a meaningful mandatory, statutory warranty instead of the meaningless voluntary, unilateral warranty now issued by the manufacturers, and would obligate the automobile manufacturer . . . to stand behind his product and

---

replace or repair it without charge." Neither competition, self-interest, nor corporate goodwill have in the past constrained manufacturers to protect consumers, employees, or innocent bystanders from economic exploitation or from hazards in their products and their production technologies. Philip Elman, member of the Federal Trade Commission, has pointed out:

Competition does not inevitably take the form of a rivalry to produce the safest product. Indeed, the competitive struggle may sometimes lead to a "shaving" of the costs of manufacture involving some sacrifice of safety. Nor does competition always reward, in the form of greater volume and higher profits, the manufacturer who tries to sell "safety" as a feature of his product.10

Another fallacy in Kohlmeier's ideology results from his failure to perceive the impact of social, economic, and technological changes upon the potential of competition as a device to accomplish rational resource allocation. Ours is an advertising age, and consumers make their choices of goods and services not primarily on the basis of price or informed judgments as to product quality, but rather on the basis of subconscious impressions skillfully planted in a constant seduction through mass media. Donald F. Turner, a former Assistant Attorney General in charge of the Antitrust Division, has pointed out that advertising itself, which is the primary mode of competition in many consumer industries, has seriously adverse effects on competition11 and other forms of nonprice competition undoubtedly have similar impact. High profits in the production of such advertising-keyed consumer items as drugs, packaged soaps, and automobiles have not led to extensive entry by new competitors, nor to competitive price reductions in these industries. Turner has articulated the problem as follows:

For heavy advertising expenditures may promote industrial concentration in a number of ways. In a competitive industry we normally expect to find firms entering and leaving the market during any given period of time. Although the exit of firms will continue, entry will be made more difficult as a result of the barriers created through extensive advertising. To the extent that consumers are unable to evaluate the relative merits of competing products, the established products may have a considerable advantage and it is this advantage that advertising messages tend to accentuate. High entry barriers interfere with the normal process through which increases in demand are met at least in part by new firms.12

12. Id.
Some of Kohlmeier's bizarre conclusions and specious reasoning make it tempting to dismiss *The Regulators* lightly. It is, after all, unlikely that experienced legislators or academics will consider his recommendations seriously. Nevertheless, the author's shotgun attack on the agencies does strike home on some important problems. Perhaps more significantly, Kohlmeier emerges as a kind of prototype consumer-victim. Here is a man who has observed the agencies at close hand for years as a Washington newspaperman, who has had his fill of bureaucratic doubletalk, indolence, and deceit, and who resents deeply the arrogance and unresponsiveness of the legal profession.

It is urgent for the professions to turn themselves with new energy toward the problems of social planning and controlling corporate behavior. A new empirical grasp of what actually happens in the administration of the law is the first order of business. While we know that special interests have taken over the regulatory agencies, we do not understand how their "daily machine-gun-like impact" on the agencies and their staffs really works, nor how "public interest" advocates before the agencies can negate or surpass their influence.

REUBEN B. ROBERTSON*