

The New Drug War

by Adam B. Summers

Seeking to combine the failures of the War on Drugs and the War on Poverty, the U.S. government has now embarked on the War on (Expensive) Prescription Drugs. You see, grannies crossing the northern border in search of cheaper prescription drugs are causing fits at the Food and Drug Administration (FDA).

U.S. District Judge Claire Eagan last November granted the FDA and Justice Department's request for a preliminary injunction shutting down the company doing business as Rx Depot and Rx of Canada. The company operated 85 stores nationwide and served as the middleman for consumers wishing to benefit from cheaper prescription-drug prices outside U.S. borders. The decision has thrown a monkey wrench into the plans of several state governments—including those of Illinois, Iowa, Michigan, Minnesota, New Hampshire, and Wisconsin—that have been considering importing drugs to ease their tight budgets by lowering the costs of state employee health-care programs.

What began as a few busloads of senior citizens entering Canada to keep their health-care costs down has ballooned to an \$800 million business, as an estimated 1 million to 2 million Americans now get their drugs from our northern neighbor. Con-

sumers are realizing that they can save up to 85 percent on the same drugs sold in the United States. One heart-transplant patient and Rx Depot customer, for example, testified at a hearing during the case that he saved \$9,000 per year by using the company's services.

The problem is that the U.S. government, in its infinite wisdom, has deemed it a crime to purchase and import prescription drugs, even if they are the same drugs manufactured in the United States and approved by the FDA. The government's argument, according to FDA Commissioner Mark McClellan, is that the "FDA's job is to assure drug safety in the United States, and unapproved, imported drugs are illegal because FDA does not have the resources under current law to assure their safety." He added, "[Consumers] are buying under buyer-beware conditions." Heaven forbid people purchase prescription drugs without the government's approval, as they do countless other products!

In analyzing the FDA's position that it is necessary for the government to monitor imported drugs (and numerous other food and drug products) for our own safety, let us ignore that, as Rep. Rahm Emanuel has pointed out, "[Importation opponents] cannot tell you a single case they've discovered of anybody getting ill" from Canadian drugs. The government has already conceded the argument and called the law's merits into question by its own actions. As

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FDA witnesses in the Rx Depot case testified, the agency uses “enforcement discretion” in cases where individuals cross the border to purchase small amounts of drugs and bring them back into the country. According to government attorneys, the Rx Depot case was special, however, since it involved a large company making a commission on the sale of large quantities of drugs. But if importing drugs is harmful and illegal, why should the amount or the existence of a middleman make any difference? If the product in question were cocaine, it wouldn’t matter if the smuggling was being done by granny or a large cartel. Granny would do time.

Others have argued against drug importation on the grounds that it is “unfair” trade since Canada keeps its drug prices down through price controls. Said Jeff Trewhitt, spokesman for Pharmaceutical Research and Manufacturers of America (PhRMA), “We don’t want somebody else’s failed government-mandated price-fixing schemes being brought into this country.” Indeed, Canada’s price-fixing system is anti-free market, but the answer is not to prohibit trade. Every nation has policies that are anti-free market or anti-free trade (including the United States), but to isolate ourselves by halting trade with all of them would surely bring only economic harm.

To be sure, the pharmaceutical industry would stand to lose big if importation were legalized. Thus it should come as no surprise that PhRMA spent roughly \$8.5 million lobbying in 2003, much of it against legislation that would have allowed the practice. The industry and its proponents argue that permitting drug importation would lead to smaller profits for U.S. drug makers, which in turn would cause the companies to slash research and development budgets, resulting in a diminution of innovative drugs brought to market. (This may or may not be the case, as firms would still have to introduce new products to compete with one another.)

The Bush administration’s answer to rising pharmaceutical prices was to create a “limited” prescription drug benefit under Medicare. Apparently it is the scope of the

program—not the cost—that will (initially) be limited; the administration requested, and Congress approved, a Medicare and prescription-drug plan that was supposed to consume \$395 billion over the next ten years. Two months after the bill was signed, the cost estimate rose by one third, to \$535 billion. Given the government-inertia principle, Americans should expect that “limited” benefit to be universal before too long.

Market Protection

I have a different solution: abolish the FDA and the drug-importation ban altogether. But without the FDA, you might ask, how are we to know that our food and drug products are safe? There are two checks to combat this problem that are built into the free market: reputation and the legal system.

Reputation is perhaps the most important, and least discussed, aspect of doing business. What would happen, for example, if certain state governments stopped licensing exterminators, chiropractors, and barbers? People would be living in bug-infested dwellings and running around with bad backs and bad haircuts? Of course not. People would find a way to manage without government regulation. When looking for a place to get your hair cut, you probably just ask your friends for a good referral. If you happen to get a bad haircut anyway, you simply go somewhere else next time. Herein lies the beauty of the free market: businesses have an incentive to provide the goods and services customers want at the best possible price *and quality*. Bad service is just as much a killer for businesses as high prices.

In cases where a single indiscretion may lead to serious injury or even death, such as unsafe prescription drugs, the legal system provides an additional incentive for businesses to provide high-quality goods and services. If you are injured by a defective product, you can sue the manufacturer for negligence and perhaps fraud. If the stigma of being tried and convicted for selling faulty products is not enough to deter shady business practices, the economic effects of a guilty verdict certainly are. Any company

foolish enough to hawk faulty and dangerous goods would quickly be put out of business by legal judgments.

Abolishing the FDA would relieve drug makers and other businesses of costly regulations that make it difficult to bring products to market. As it is, pharmaceutical companies have to spend hundreds of millions of dollars and waste years jumping through regulatory hoops. Any lost profits the drug companies would suffer from importation would at the very least be partially offset by the removal of these burdensome and unnecessary regulations. As the Cato Institute points out, “85 percent of the cost of pharmaceutical development goes to complying with FDA regulations.” (See Cato’s *Handbook for Congress*, chapter

32, www.cato.org/pubs/handbook/hb105-32.html.) Furthermore, the elimination of FDA regulations would reduce certain “non-monetary” costs—such as the loss of human life—by allowing life-saving and life-enhancing drugs to come to market sooner.

The FDA’s attack on the right of consumers to do business with whomever they choose has nothing to do with product safety and everything to do with special-interest politics. The additional government interference sought by the Bush administration will only repeat previous governmental failures. Of course, this will once again provide politicians with a campaign issue and a “crisis,” they will claim, that only government can solve. □



Ultimate Victims

The ultimate victims of stifling FDA bureaucracy are patients. New and improved medical products would enhance people’s lives in a number of areas, ranging from heart and coronary disease to ligament repair. Tens of thousands of lives could be saved; millions of people could enjoy a higher quality of life; billions of dollars could be saved. Unfortunately, federal regulation stands in the way of these advances. . . .

Paternalism remains a powerful influence in Washington. But it is time for patients and doctors, insurers and hospitals, pharmaceutical firms and device manufacturers, senior citizens and healthy young people to together say “No more.” For years the system has seemingly “worked” despite stultifying regulation: highly competitive American firms have led the world in the discovery and marketing of new treatments and cures. But so much more could have been accomplished, and the U.S. government continues to put arbitrary roadblocks in the way of developing, testing, and marketing new drugs and devices. For too long too many people have unnecessarily suffered and died because of the FDA.

—DOUG BANDOW, “Increasing Access to Pharmaceuticals”