

LUNCHEON AND KEYNOTE ADDRESS: 100TH ANNIVERSARY OF FTC'S BUREAU OF ECONOMICS¹

September 4, 2003

**By James C. Miller III
Chairman, The CapAnalysis Group**

Chairman Muris, Commissioners, Directors, and everyone else: it's a pleasure to be with you today. Please bear with me: I'm just recovering from the awful shock I received at opening up today's Washington Times and being confronted with a photograph of Howard Beales. The photo makes him look like some sort of madman!

Chairman Muris was kind to mention that once he was my student. Well, Wendy Gramm, with whom I served on the faculty of Texas A&M, will probably vouch for the fact that I've taught many classes which included students who knew more about the subject than I did. But never did I have such an experience where the student knew as much more about the subject as when Tim Muris was in my class.

I'm honored to be here today -- in part because I'm not officially an alumnus of the Bureau of Economics. I'm reminded that soon after arriving at the Commission I participated in my first Part III matter -- you know, a judicial-type hearing. As I walked out the hearing room on the fifth floor, someone from the staff came up to me and said, "Mr. Chairman, how long have you been a lawyer?" I responded, "Oh, I'm not a lawyer. I jumped from being an economist directly to being a judge." And so, when I came to the Commission, I jumped directly from being an economist right over BE to become a Commissioner.

I'm glad to see Paul Pautler here -- and glad to see that he's found a comparative advantage. One of his first jobs in Washington was helping me unload a U-Haul truck and trailer containing everything my family brought with us from Texas

¹ Actually, the 100th anniversary of the establishment of the predecessor Bureau of Corporations.

A&M. Paul surmised that after unloading trucks, working for BE would be just a charm. You know, when I left government and set up office at Citizens for a Sound Economy, I had a series of young women work as my assistant. They'd be with me seven, eight, ten months or a year, and then they'd get married. Then another one would come aboard and work six, eight months or whatever, and she'd get married. People began to comment on the phenomenon. My wife had an easy explanation for it: "After working with Jim Miller for six months, any man looks good!"

I was interested in Paul's rather expansive history of BE. As I began reading it, I was drawn to the fact that for many years Francis Walker was chief economist of the Bureau of Corporations and then chief economist of the FTC. Here was this Francis Walker: living in a man's world and performing so well. So, rather than finishing the piece, I called Paul, to find out more. Paul told me that Walker was a man, not a woman, and that his father was the first president of the American Economic Association and prior to that was president of the American Statistical Association. But then I remembered that while Paul and I were at Texas A&M, playing a lot of basketball during the lunch hour, Bob Tollison and I wrote a piece about rates of publication per faculty member. In doing the research we came across a piece that had been co-authored by Leonard Weiss describing a "hall of fame" for women economists, based on the number of publications in major journals. Included in that hall of fame was Sally Herbert Frankel. Writing Weiss a note, I said, "I know Sally Herbert Frankel; he's a man." Weiss wrote back and said, "Yes; well, that's an easy mistake to make these days; sometimes you can't tell one from the other."

Mr. Chairman, I notice that the title of the "intervention program" has been changed to "advocacy program." I really think that's a shame, because the word "intervention" has more pizzazz than "advocacy." You know, you go running into Tim's office and say, "Tim, something's up. Let's go intervene!" That's much catchier than, "Tim, something's up. Let's go advocate!" It reminds me of how that great Georgia Bulldog, Lewis Grizzard, distinguished between the words "naked" and "nekked." According to Grizzard, "naked" is when you don't have any clothes on, and "nekked" is when you don't have any clothes on and you're up to something!

About the intervention program: Tim, do you remember when we sent Bill MacLeod to Minneapolis to deliver papers to the City Council, suing them over monopolizing the taxicab market? Bill held a press conference at which a bunch of taxi drivers showed up. Former Minnesota Vikings, according to Bill. And didn't we send Mack McCarty down to New Orleans to do the same thing? Mack left the Commission soon after that, as I recollect. Those were the days. They were a lot of fun.

In his piece on BE history, Paul addresses what I call the Arthur Burns question. He does so without firm resolution, but at least he tries. Let me explain. When I was at the American Enterprise Institute during the late 1970s, I sponsored a monthly series where we'd invite the head of a regulatory agency to come over and meet with the scholars and then discuss their issues. Mike Pertschuk came one time; we also had the heads of OSHA, FMC -- organizations such as that. I called the program "Meet the Regulators." The guest would talk about what he was doing and then take questions. Arthur Burns, former chairman of the Federal Reserve Board and then an AEI distinguished scholar, always asked the same question: "Would the world be different if your agency didn't exist?"

I want you to know that I've taken a very careful look at the FTC and have tasked myself to answer the Arthur Burns question. I want to share with you now the results of that inquiry. We can divide the century into decades. Consider the first two decades together; the decade of the thirties; then the forties, the fifties and sixties together; then the seventies; then the eighties; and then the nineties. Now the answers are: probably yes, no, marginally yes, yes, damn right, and yes.

Now in the remainder of this conference, in ruminations about what transpires today, and in your writings, I hope you will keep several things in mind. One is that, as an independent agency, the FTC is very vulnerable, because it has few friends and lots of enemies. Parenthetically, when an organization such as that can keep the allegiance of the public and have a reputation for professionalism and credibility -- such as you have today -- you're accomplishing a lot!

Part of the problem is that you don't have the cover of the Executive. You really don't, because you are "an independent agency." Not everyone would be so bold as Tim, but in 1980, right after the election, as a member of the Reagan-Bush transition team, Tim went up and down the halls at FTC Headquarters saying to no one in particular but to anyone who would listen, "We're going to retry *Humphrey's Executor*." As you will no doubt recall, William E. Humphrey was chairman of the FTC when President Franklin Delano Roosevelt took office, and when Roosevelt tried to fire all the FTC commissioners, Humphrey took him to court. After Humphrey's unfortunate passing, his executor won in the U.S. Supreme Court -- a landmark decision that establishes the independence-from-the-Executive of independent agencies. Of course, Tim was just poking fun, though not everybody knew it at the time.

As you will recall, the environment for the FTC was very tense in the early 1980s. The agency had been shut down for awhile, and the medical doctors and other

professionals were close to obtaining an explicit exemption from FTC authority. I thought, once you open that door, there will be lots of others. So we fought very hard, and ultimately successfully, to prevent that.

Also, in a strategy of trying to consolidate our strength, we peeled off some controversial things. The cigarette lab: we got rid of it; it was just a drag (!). The cigarette companies hated it because they had no confidence in its results. We spun off the Quarterly Financial Report over to the Department of Commerce. With the QFR program we were sampling with replacement; sometimes people got hit two times in a row, and they'd go complain to their congressman or senator. And we closed down the line of business program, another source of controversy and a program that had pretty much run its course. It was a little like being in a sleigh out in the woods on a cold night and being pursued by a pack of wolves. You throw off a few cats and dogs, so the wolves will leave you alone.

A second thing to bear in mind is that the Commission's work has been enhanced by economists in addition to those in BE. Don't forget the contribution of economists George Douglas, Tom Campbell, Tim Muris, Howard Beales, Walter Van Daele, and Bruce Yandle, plus those who think like economists, such as Andy Strenio and Orson Swindle.

A third thing you need to keep in mind is that often economists have a difficult time being understood and are easily misunderstood. I'll give you some examples.

After Bob Tollison had been Director of BE for about a year, he gave an interview to the Bureau of National Affairs, BNA. The reporter asked him about mergers and how you would go about analyzing their prospective effects. Bob came up with a classic thought experiment. He said,

You would allow a lot of mergers to go through. You would allow a lot of people to put their money on the line and see what happens to prices, profits, sales, R&D. We get a natural experiment in the economy going. Let firms merge and see what happens.

The next day, the BNA story read:

The chief economist of the Federal Trade Commission would like to conduct, "a natural experiment in the economy." According to Robert D. Tollison, director of the FTC's Bureau of Economics, the experiment would involve approval of virtually all mergers and acquisitions to the point where there are three or four firms per market; then, if there are

competitive problems, the enforcement agencies can step in and “unscramble the eggs.”

Or take, for example, my first press conference. Soon after I went over to the FTC, and against the advice of Tim, Carol Crawford, and others, I decided to hold a press conference. Carol kept saying, “Why?” “Oh, I want people to know we’re here,” I said. “Why? Why don’t you do something and then hold a press conference?” “I don’t know; I just want to hold a press conference,” was the best I could come up with.

So I held a press conference and talked about a number of things. I was asked a bunch of questions and thought I was pretty good at responding until somebody asked me about defective products. I offered the example of a hammer: a cheap hammer is okay to pound nails in a wall for hanging pictures, but you wouldn’t want to use one to build a house. Following that was a question about ad substantiation. You can catch the drift here -- I recalled something Tim had taught me, but obviously I had not gotten the whole story. In any event, I answer as follows:

Consumers are not as gullible as many regulators think they are. They make intelligent choices. The thing that concerns me is that if we are so tight with our regulations that only the top-of-the-line kind of products [get produced], then people who would like to purchase a much lower-priced and perhaps not as high quality product will be deprived of that opportunity. And I want to make sure that doesn’t happen. . . .

On the question of substantiation, yes, I personally have strong reservations about the whole issue.

Now what I was thinking about, of course, is prior substantiation, not ex post. I went on:

I want to study this more. I count myself as an academic. I think an academic is a person who wants to know what the evidence is and wants to draw their own conclusions. On some of these issues, I will say I do not know as much about them as I should. I am not going to make a precipitous judgment, but I have substantial problems with the whole idea of substantiation and will be looking at that very critically and may well recommend to my fellow Commissioners that we move away from that standard.

The next day the New York Times led off with the following story:

James C. Miller, 3d, the new chairman of the Federal Trade Commission, said today the Commission should no longer protect consumers from defective products and unsubstantiated advertising claims.

There was also an Associated Press story:

Several leading consumer activists said yesterday there would be a flood of false advertising and shoddy products if the Government adopted proposals by the head of the Federal Trade Commission for less regulation of industry.

"It's horrifying," said Karen Burstein, Chairman of the New York State Consumer Protection Board. And Rhoda Karpatkin, Executive Director of Consumers Union, the product-testing organization, said, policies advocated by James C. Miller, the Trade Commission chairman, would move the country "back to the age of 'Let buyer beware' or maybe 'Let the buyer be milked'."

Obviously, what I had hoped to communicate and what I actually communicated were two different things.

Economists especially have this kind of problem. Lawyers talk about things like this and it sounds esoteric, reporters don't understand what they are saying, and few people respond. When economists talk, reporters think they understand what's being said. And sometimes they don't get it.

You may remember another case that involved being misunderstood. One of our economists was writing a paper explaining FTC enforcement behavior, and one of the variables in his or her model was the philosophical views of members of relevant congressional committees. In the statistical test, the economist was using the well-known ratings of Americans for Democratic Action and the American Conservative Union. Unfortunately, he or she called up the organizations to get their most current ratings and made the mistake of telling them something -- but apparently not everything -- about the use to which the data would be put. All of a sudden, people went nuts. I got a call from, among others, Congressman John Dingell, Chairman of our authorizing committee in the House. And I told him forthrightly, "As long as I am chairman of the Federal Trade Commission, we will never allocate our resources or decide cases based on the philosophy or party affiliation of a member of Congress." Fortunately, I had enough credibility with Chairman Dingell that he accepted my assurances. Of course, that's not what the economist was doing with the data, but it shows how easy it is for an economist to be misunderstood.

And then there was the famous Black Death study that was included in BE's series of working papers. What most people didn't know is that the study was put there because of a commitment by the previous administration -- as an inducement for an

especially well-qualified candidate to join BE. Bob Tollison, quite appropriately, believed in keeping commitments.

Well, I couldn't pass up an opportunity such as this without presenting a few recommendations for you -- the Commission as a whole as well as BE.

One! In investigations, I hope that you will maintain transparency as much as you possibly can. Part of my thinking on this goes back to my favorite movie, "My Cousin Vinny." For those of you who have seen it, you'll recall that when the defense attorney, Vinny, played by Joe Pesci, asks the prosecuting attorney, played by Lane Smith, for some information the latter has on his clients, the prosecutor says he would be glad to give it to him, and got on the phone and asked his staff to send over a whole box of stuff. That's transparency. And that's the law in such criminal matters, as I understood it.

On point, yesterday I read in the BNA Daily Report that Assistant Attorney General Pate has a coordinated effects manual that the Antitrust Division follows to make determinations of liability. Well, they ought to share that with the public. I realize, of course, it would take Jim Ferguson at least a week to reply to that report! But releasing it would give people on the outside some notion of how the Department of Justice staff goes about its evaluations, and so those in the antitrust bar could better counsel their clients. I'm sure that if Tim had anything like that he'd put it on the FTC website.

Two! Increase the predictability of which -- FTC or DOJ -- gets what, when, and where. Now, I know you tried to do this. Senator Hollings was absolutely wrong, and you guys were absolutely right. I hope that you can overcome that setback and get together with DOJ so there is more predictability about the process of reviewing mergers and acquisitions.

Three! (I learned this one!, two!, three! stuff from Dr. Laura.) This is something hard to do, but to the extent that you can forecast the workload, do it not only for BE and the Commission, but for lawyers who engage in this kind of practice. When I went over to Howrey, one of the first things people asked me was, "When are mergers going to pick up?" So I started thinking about the question and came up with a little model. Probably two variables would be very important in explaining merger activity -- growth of the economy and cash balances of firms. Then somebody said to me, "This guy over there at the FTC -- Paul Pautler -- he knows all this stuff." So I called Paul. It turns out

that the problem is a lot more complicated and more difficult to model than I thought. Nevertheless, it's a useful thing to pursue.

Four! Try to measure productivity. I don't know to what extent you do that, but as George Mason University President Alan Merten says, "What gets measured gets better." But you've got to measure the right things. Once Executive Director Bruce Yandle came to my office and said, "Jim, you will not believe what I just heard." I said, "What was that?" He said, "I got a call from someone at the Bureau of Labor Statistics requesting our productivity numbers. I said, "I don't know what you're talking about, please tell me." It turns out the BLS measured the productivity of the FTC as the number of lawsuits per employee! Now if you measure the wrong thing and it gets "better," you may be getting worse. So be careful.

Five! Find ways to minimize interference with the market for corporate control. This is a dicey thing. If you think about it, the default is, "the market works." But there are times when the government should say, "Wait a minute, we want to look at this to see if there's a problem." But since many acquisitions are very complicated, with multiple suitors, you can have an effect on who gets what just by saying, "Wait a minute." My partner and former FTC official, Mark Schildkraut, reminded me the other day that at one point during my tenure at the FTC, I actually triggered a second request just to hold somebody back until we had concluded the review of a proposed acquisition so that we wouldn't be standing in the way of the market's making its choice.

Six! Study and help remedy abuses of the legal process for rent seeking purposes. This is something of particular interest to me. And it's obviously something in which Tim is already interested, because he's got Mr. Delacourt and Mr. Zywicki hard at work on the Commission's Noerr-Pennington Task Force.

I happen to know from personal observation that there's a case where a firm is representing that it has a valid patent, and while the claim is baseless, it is going around to customers of its competitors and holding them up for settlement. In another case I know about, a company has gone out and sued a competitor and then has gone on radio and television to tell people about the lawsuit and to claim that as a result of the lawsuit its stock is going up and its competitor's stock is going down. So, "sell them; buy us." Both constitute an abuse of the judicial process, and if the business models are allowed to continue, their extent -- and the efficiency costs they impose -- could escalate significantly.

Seven! One of the best things I think the Bureau of Economics can do is to be ready to address controversial issues in a very rational, analytical way. The oil merger report we did in the early eighties is a good example. You remember the petroleum industry was basically frozen in place during the late 1970s. Then, in 1981, the caps were taken off, and there was a lot of reorganization in that industry. As a result, some really spurious proposals were made on Capitol Hill. The Commission was able to work through all the issues and make a substantial contribution to that debate, perhaps heading off some very wrong-headed legislation. A more recent example is SPAM. You've promulgated the Do-Not-Call list, and it appears to make good sense. But as the Commission has noted, SPAM is very different in many ways. Making those kinds of reports is a very useful thing for you to do.

Eight! (I just have twelve!). In your report writing, realize that the major audience is not your fellow colleagues but others. So, write more briefly. Lawyers are not the only ones who should be writing briefly, and you have even less incentive to be long-winded. As Adam Smith observed, "in order to increase to their payment, the attorneys and clerks have contrived to multiply words beyond all necessity."

Nine! When recruiting economists, shop at some of the smaller, less well-known schools. If you don't, you're going to miss a Bruce Yandle and some other really good people.

Ten! Be particularly wary of expanding Section 5, unfair methods of competition or unfair or deceptive acts or practices. I know I'm preaching to the choir here. But Section 5 is very open-ended.

Eleven! Stand your ground. Stand your ground. The doctors fight that Chairman Muris mentioned was very important. But there was another case that you may not have heard about -- *Indiana Federation of Dentists*. This was a case where the Commission found liability, and the defendants went to the federal court of appeals and got the case overturned. I was mightily troubled about that, partly because we hadn't lost any cases which I had authored or in which had concurred, and on the merits we thought finding liability it was exactly the right thing to do. So I got the Commission together, and the commissioners voted to ask the DOJ to represent us and seek *certiorari*. But, DOJ turned us down. And so, now even more troubled, I recommended to my colleagues that we ask DOJ to reconsider. Some of the people at the FTC, especially those in the General Counsel's office, said that was a bad idea. But we did it anyway. I got on the phone to Ed Meese and my current Howrey partner, Brad Reynolds, and others at DOJ, and tried to talk them into it. They told me the probability

of the Supreme Court's granting *cert.* was remote; and the basis on which we could make an appeal was very narrow and not very substantive. They turned us down again.

I was really distraught at that point. But one day I'm about to go in my office and one of the staff members -- could be someone sitting in this room -- said, "Mr. Chairman, did you know that the FTC law only gives DOJ the right of first refusal? The Commission can actually appeal a case on its own initiative." I said, "No, I didn't know that." So I called another meeting of the Commission, and it was very divisive. The commissioners voted three-to-two -- against the wishes of our General Counsel, Jack Carley, by the way -- to seek *cert.* on our own. And guess what? The Supreme Court granted *cert.* And guess what? The Supreme Court overturned the lower court. So that's the way we prevailed, just by knowing something was right and standing our ground.

Twelve! (Finally!) Take your work very seriously. I'm talking to the people in BE right now. When I arrived at the Commission, there was a general feeling that the structure-conduct-performance paradigm was sort of old hat. It should make way for the Chicago School approach and so forth. And now, of course, there are criticisms from the Austrians, who say those in the Chicago School are not pure; they've compromised. And the industrial-planner-types who say, well, what we really ought to do is abolish the antitrust laws and let people get together within the context of some sort of indicative planning.

Let me respond to this and close my remarks by reading the last paragraph of my book, *The Economist as Reformer*:

How industry is organized and how businesses and consumers are regulated -- whether through cooperative centralized strategies, a free market protected by antitrust, a policy of restrained regulation, or a totally unregulated market -- affect not only our economic well being, but our basic liberties. No orthodoxy prevails forever. We must always be prepared to change our approach when faced with superior reasoning or contrary evidence. But we must also be prepared to oppose unfounded changes that would deprive us of the unsurpassed freedom and prosperity that this country has achieved and that the FTC was established to protect.

Thank you very much!