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THE FTC'S CONSUMER PROTECTION PROGRAM DURING THE MILLER YEARS: LESSONS FOR ADMINISTRATIVE AGENCY STRUCTURE AND OPERATION

Mark E. Budnitz*

The conventional wisdom is that the Federal Trade Commission (FTC) under President Carter's Chairman, Michael Pertschuk, turned the FTC into a renegade agency which engaged in runaway consumer protection, hamstringing business with excessive regulation to such an extent it became known as the "national nanny."¹ According to this popular view, Congress ultimately was compelled to rein in the agency to force it to return to the role Congress intended for it. The conventional wisdom portrays the FTC under Pertschuk's successor, President Reagan's appointee James Miller, in very different yet equally immoderate terms. Miller supposedly went to the opposite extreme, acting as the puppet of the industry he was supposed to regulate by virtually halting the agency's consumer protection activities.²

This Article demonstrates that the reality was far more interesting, complex, and problematic than these generalities suggest. The story of Miller's leadership of the FTC also raises important issues relating to the

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1. See MICHAEL PERTSCHUK, *REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT* 69 (1982) (indicating that the phrase "national nanny" had its origin in a *Washington Post* editorial). See generally BERNICE ROTHMAN HASIN, *CONSUMERS, COMMISSION, AND CONGRESS: LAW, THEORY, AND THE FEDERAL TRADE COMMISSION, 1968-1985* 197 (1987) (expressing this view of Pertschuk's chairmanship). Pertschuk remained an activist after he left the Commission. See Jim Drinkard, *Tobacco's Big Bucks Fuel Fight*, ATLANTA CONST., Sept. 9, 1996, at A1 (describing Pertschuk as "an anti-tobacco researcher and activist at the Advocacy Institute").

2. See RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 189-97 (2d ed. 1996). In 1996, Miller ran for the U.S. Senate, with the backing of state party leaders and conservative Christians, but lost to Senator John Warner, who received 66% of the vote to Miller's 34%. *Thurmond, Warner Survive Challenges*, CHARLESTON GAZETTE, June 12, 1996, at 5c [hereinafter *Challenges*].

structure and operation of administrative agencies. This Article examines the major consumer protection activities of the FTC during the years Miller was chairman, in order to go beyond and behind these generalities and to record what actually happened, to explore possible explanations for why these events occurred, and to examine the lessons which one can learn from this study.

This Article recounts the activities of the FTC during the Miller years by examining those who served as commissioners and high-level staff members, critiquing Miller's management philosophy, style, and plan, analyzing the enforcement cases the FTC brought, and describing its regulatory program. This Article also considers the activities of "outsiders" such as Congress, the courts, industry, and consumer groups. For the process involved, the relationships which developed, and the productive and acrimonious interactions which took place, are important to consider in understanding and evaluating each activity. These elements of time and process are largely ignored in examining legal events. Instead, scholars often focus on the final results of agency action, regulations, and decided cases. These final results are viewed within the perspective of a traditional doctrine³ or chosen theory and a set of assumptions upon which the theory rests.⁴ In contrast, this Article concentrates on the process in which the Commission engaged, over time, in deciding to take specific action. Taking time and process into account enables one to bring into an analysis many factors which otherwise would be lost. Several theories are considered, but only in the context of the empirical evidence of that process which has been gathered from the statements and activities of the commissioners and top-level FTC staff.

It is important to consider time and process to appreciate the competing forces with which the new chairman of any federal administrative agency must contend. The chairman typically has an established reputation and has publicly voiced views on the mission of the agency. Moreover, the President often has his own programmatic objectives and has appointed the chairman in the belief and hope, based on the chairman's reputation, that the chairman's ideology matched the President's and that the chairman would lead the agency in the same direction as the President's program.⁵ The President, therefore, trusts the chairman to act consistently with the ideological proclivities expressed prior to appointment.

3. See William J. Woodward, Jr., *Empiricists and the Collapse of the Theory-Practice Dichotomy in the Large Classroom: A Review of Lopucki and Warren's Secured Credit: A Systems Approach*, 74 WASH. U. L.Q. 419, 425-26 (1996).

4. See *id.* at 426.

5. See DAVID M. WELBORN, *GOVERNANCE OF FEDERAL REGULATORY AGENCIES* 141 (1977).

A chairman who acts otherwise may feel he or she is betraying the president's trust.⁶ One would be especially loathe to betray that trust if one desired future appointments in administrations controlled by that political party.⁷

Once in his or her role as chairman, however, a person is subject to countervailing influences. The FTC, for example, is established as an "independent" agency.⁸ In structuring the FTC in this way, Congress obviously intended that the agency would not merely parrot the President's views. Otherwise, Congress would have established the FTC as a department in the executive branch. The chairman must decide how to respond to criticism and pressure from various external sources, including Congress, which controls the FTC's budget and can expand or restrict its authority. Other external sources seeking to influence the FTC include state officials, the press, the public, and the industry the FTC regulates.

Furthermore, a chairman acts within an institutional context. The FTC has its own culture and bureaucratic structure which determines how things get done.⁹ The chairman inherits a docket of ongoing cases and pending rulemaking proceedings in which the agency has invested vast sums of time,¹⁰ energy, ego, and money. It takes tremendous determination and leadership to make substantial changes in current projects. One reason is that changes likely will encounter resistance from commissioners who initially approved the projects and the staff who completed the

6. See *id.* at 142.

7. After the FTC, Miller was appointed Director of the Office of Management and Budget. See JAMES C. MILLER, III, *THE ECONOMIST AS REFORMER, REVAMPING THE FTC, 1981-1985* (1989). He continued his career in politics in 1996, running unsuccessfully for the United States Senate. See *Challenges*, *supra* note 2, at 5c.

8. Congress defines the FTC's authority, approves its budget, and has oversight responsibilities. The Senate approves the chairman and members of the Commission. Its power over the FTC is limited because only the President can appoint the chairman and members of the Commission. The President's appointment power is somewhat constrained, however, in that commissioners serve staggered terms and a new President can name his or her own chairman. Though Congress has attempted to veto an agency's rules, the Supreme Court has ruled that Congress may not exercise such veto power. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983).

9. See James Q. Wilson, "Culture" and "Compliance," in *FOUNDATIONS OF ADMINISTRATIVE LAW* 269, 269 (Peter H. Schuck ed., 1994). Mr. Wilson indicates that:

Every organization has a culture, that is, a persistent, patterned way of thinking about the central tasks of and human relationships within an organization. Culture is to an organization what personality is to an individual. Like human culture generally, it is passed on from one generation to the next. It changes slowly, if at all.

Id.

10. See Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 DUKE L.J. 238, 247 (discussing the factor of time in explaining the advantage an agency bureaucrat has over a political official).

work. Agencies such as the FTC have a tradition of collegiality which would be broken by possible confrontation resulting from radical changes.¹¹ The FTC's actions cannot be understood without taking into account these external and internal institutional actors and forces.

It would be equally amiss to ignore the norms and values of the person who led the organization, his or her particular concerns, and the meaning he or she gave to the information the FTC interpreted in deciding policy.¹² The leader can be especially influential in an organization like the FTC which has broad discretion.¹³ Despite the many external and internal forces which resisted alterations at the FTC, or fought for reforms which would benefit their interests, Miller sought to make fundamental changes. To fully appreciate what he tried to do, it is necessary to understand his perspective on the world and his vision for the FTC. This Article describes Miller's initial vision and how closely he was able to adhere to it. This Article also considers the significance of Miller's training as an economist and the difference between an economist's approach and a lawyer's approach to heading an agency.

In addition to describing the chairman and the events which took place during his tenure, this Article explains why the FTC and its chairman took the positions and engaged in the activities which occurred during this period. Various theories are examined for the insights they provide. As Professor Peter H. Schuck has remarked, "administrative law is constantly searching for its intellectual bearings."¹⁴ Because "[e]ach agency's behavior reflects its distinctive history, statutory scheme, policy problematic, legislative politics, bureaucratic culture, judicial review pattern, private interests, and specialized bar,"¹⁵ no one theory can "capture the institutional complexity and human drama of the administrative process."¹⁶ Consequently, this Article discusses the applicability, as well as the inadequacies of several theories, including "capture" theory,¹⁷ com-

11. See WELBORN, *supra* note 5, at 10-12, 48, 135.

12. See Keith Hawkins & John M. Thomas, *Making Policy in Regulatory Bureaucracies*, in MAKING REGULATORY POLICY 3, 11, 18 (Keith Hawkins & John M. Thomas eds., 1989) (noting that the "social constructionist perspective" on regulation requires examining the norms and values of the actors).

13. See *id.* at 18.

14. PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 4 (1994).

15. *Id.* at 5.

16. *Id.* at 4-5. Schuck's remarks were made in connection with the difficulty of writing an adequate law school casebook on administrative law, but his thoughts are equally applicable to the difficulty of devising an adequate theory to explain agency action.

17. See Marver H. Bernstein, *The Life Cycle of Regulatory Commissions*, excerpts from *Regulating Business by Independent Commission* (1955), reprinted in THE POLITICS OF REGULATION 80, 85 (Samuel Krislov & Lloyd D. Musolf eds., 1964).

prehensive rationality theory,¹⁸ the social constructionist perspective,¹⁹ and public choice theory.²⁰ As discussed in subsequent sections of this Article, some theories more adequately explain events than others.

Finally, the Article explores several policy implications of Miller's administration of the FTC. This study of the FTC provides insights about the structure of regulatory and enforcement agencies and how these agencies should make major policy changes. Issues explored include the role of public participation, the preferability of the commission structure over a single administrator, the role of the chairman vis-à-vis other commission members, and the significance of being an independent agency.

To put the Miller years in context, it is necessary to examine the years immediately preceding Miller's appointment, because so much of what happened during his chairmanship was in reaction to that of Michael Pertschuk's chairmanship.

I. TRANSITION FROM PERTSCHUK TO MILLER: FROM ACTIVISM TO LAISSEZ-FAIRE

A. *The Past as Prologue: The Pertschuk Period*

The FTC has long been a very "political" institution, as evidenced in two ways. First, many FTC appointments can be traced directly to presidential policy initiatives or the appointee's political influence.²¹ Second, Congress has long taken a strong interest in the activities of the FTC and has not been shy to inform the FTC of its disapproval through use of the budget process²² and legislative restrictions.²³ Public pressure also has had a profound influence on the FTC. A turning point in the FTC's mission occurred in 1969 after studies by Ralph Nader²⁴ and the American Bar Association²⁵ pointed to the failure of the FTC to aggressively pro-

18. See Hawkins & Thomas, *supra* note 12, at 7-10.

19. See *id.* at 10-13.

20. See Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 624 (1995).

21. See REGULATION: PROCESS AND POLITICS 36 (Congressional Quarterly, Inc. 1982). A 1976 study found that many appointments "can be explained in terms of powerful political connections and little else." *Id.*

22. See, e.g., *House Commerce Committee Advances FTC Authorization Bill With No Amendment*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1078, at 343-44 (Aug. 19, 1982).

23. For example, Congress passed resolutions calling for the termination of the FTC's Used Car Rule. See *House Passes Resolution Vetoing FTC's Rule Governing Used Car Sales; New Proposals Surface*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1067, at 1163 (June 3, 1982); *Senate Passes Resolution Vetoing FTC's Rule Governing Used Car Sales*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1065, at 1075 (May 20, 1982).

24. See REGULATION: PROCESS AND POLITICS, *supra* note 21, at 79.

25. See *id.*

tect consumers. In reaction, the Nixon administration, under the leadership of Caspar Weinberger, reorganized the Commission and embarked on a far more active path.²⁶ Congress also urged the Commission to become more vigorous. For example, in 1975, Congress criticized the Commission for being too passive and specifically suggested that the FTC take measures in regard to children's television.²⁷

Seen in this historical context, one must ask whether Pertschuk's activism was revolutionary or evolutionary. The conventional wisdom, which views Pertschuk as the chairman who defied Congress by taking the FTC down the path of increased activism against Congress's wishes, clearly is wrong. Pertschuk was chided for his wide-ranging effort to promulgate trade regulation rules, but most of that activity began when Nixon was President,²⁸ and it was Congress that had enacted the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act,²⁹ which conferred broad rulemaking authority upon the FTC.³⁰ Although Pertschuk was vilified by Congress and others for his "kid vid" initiative,³¹ Congress itself had recommended FTC action to protect children from television advertisements.³² The conflicting messages may be more a reflection of the election of a more conservative Congress than a principled objection to the Pertschuk agenda.³³ Moreover, Pertschuk sometimes was his own worst enemy. Whereas Nader criticized the old FTC as somnolent, Pertschuk was perceived as arrogant.³⁴ In addition, Pertschuk admitted that he waited two years to try to build positive personal relationships with members of Congress and their staffs.³⁵

Pertschuk attempted to ride the wave of the consumer movement which gathered steam in the 1960s and continued to exert its influence into the 1970s.³⁶ He was appointed by Jimmy Carter who, as a presiden-

26. See *id.* at 80.

27. See SUSAN J. TOLCHIN & MARTIN TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 180 (1983).

28. See REGULATION: PROCESS AND POLICIES, *supra* note 21, at 80-81.

29. 15 U.S.C. §§ 2301-2312 (1994).

30. See PERTSCHUK, *supra* note 1, at 44. See generally *id.* Pertschuk attributed passage of the Act to the popular recognition regarding warranty protection.

31. See REGULATION: PROCESS AND POLITICS, *supra* note 21, at 81-82.

32. See TOLCHIN & TOLCHIN, *supra* note 27 and accompanying text.

33. See REGULATION: PROCESS AND POLITICS, *supra* note 21, at 80-81.

34. See TOLCHIN & TOLCHIN, *supra* note 27, at 151.

35. See PERTSCHUK, *supra* note 1, at 92-95, 98-99.

36. See ROBERT N. MAYER, *THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE*, 28-30 (1989) (indicating that "[t]he years 1966-68 witnessed the passage of several key consumer protection statutes," and that "[u]ntil about 1976 consumerists were highly successful in Congress").

tial candidate, had promised to be a consumer advocate if elected.³⁷ In addition to Nader, the Consumer Federation of America and other national and local consumer organizations played important roles.³⁸ Lawyers employed in offices funded by the Legal Services Corporation were responsible for substantial consumer victories.³⁹ As Pertschuk himself has acknowledged, however, it is not clear whether the activities of these organizations ever actually reached the point where it is correct to speak of a consumer "movement."⁴⁰ Moreover, the business community organized for political action and made effective use of political action committee (PAC) money to push for deregulation.⁴¹ Meanwhile, the public became receptive to the contention that government had become too large, expensive, and intrusive, and that government programs produced insufficient benefit, and government mandated paperwork buried businesses.⁴² In short, Pertschuk was riding a wave, but the tide was quickly going out.

B. Miller's Confirmation Process: The Economist Approach Shines Through

James Miller's remarks to the Senate Committee on Commerce, Science, and Transportation during the confirmation process provided an accurate summary of his guiding principles throughout his stay at the Commission. In addition, they raised questions about his intentions. Miller was appointed by President Reagan, who, as a presidential candidate, promised to reform the FTC and other regulatory agencies.⁴³ In his brief prepared statement to the Committee, Miller quoted Adam Smith three times.⁴⁴ He said he "would require a fairly substantial benefit-cost test before initiating particular investigations and initiating particular

37. See HASIN, *supra* note 1, at 16.

38. See PERTSCHUK, *supra* note 1, at 29.

39. See generally The National Consumer Law Center, *Consumer and Energy Law: 25 Years and Beyond*, 26 CLEARINGHOUSE REV. 27 (1992) (reviewing emerging issues and strategies for protecting consumer rights).

40. See PERTSCHUK, *supra* note 1, at 10 n.8. Because of competing economic concerns, consumer protection never had a high enough priority for a consumer movement to be established. See *id.* In addition, consumers are dispersed throughout the country and most live far from the government agencies that engage in rulemaking. See *id.* at 133. In contrast, business can organize to influence these agencies.

41. See *id.* at 50, 57, 62.

42. See REGULATION: PROCESS AND POLITICS, *supra* note 21, at 19.

43. See MILLER, *supra* note 7, at 2.

44. See *Hearing before the Committee on Commerce, Science, and Transportation on Nominations of Dr. James C. Miller III, To Be Chairman, Federal Trade Commission; and Dr. Robert G. Dederick, To Be Assistant Secretary of Commerce*, 97th Cong. 2-4 (1981) [hereinafter *Miller Hearings*].

rulemaking proceedings. It would be a fairly subjective test, I realize, in many instances."⁴⁵ In the area of unfair advertising, he said he would concentrate on deception and fraud, but he did not want to stop the flow of information just because "a few gullible people might be deceived."⁴⁶ He took advantage of the pre-hearing questions submitted by the minority committee members to criticize the work of the FTC under Pertschuk. He felt the Commission had spent too much of its resources adding costly regulation when it should have used cases and rules to "reinforce market forces."⁴⁷ In addition, the FTC had been "overly adversarial" to the businesses affected by its actions.⁴⁸ He voiced reservations about the Commission's advertising substantiation program.⁴⁹ Finally, he believed the FTC had applied its definition of unfairness in a way that created uncertainty and did not factor in market forces.⁵⁰ He recommended the use of economic analysis to improve the lot of consumers.⁵¹

Mark Green, then President of The Democracy Project, testified against the nomination.⁵² He faulted Miller's tendency to criticize government rather than business.⁵³ He pointed to the Reagan transition team report on the FTC which Miller chaired.⁵⁴ According to Green, the report criticized FTC economists for identifying market imperfections, saying that instead they should be finding imperfections in government regulation.⁵⁵ In regard to cost-benefit analysis, Green feared that under Miller, the FTC would overstate costs and undervalue benefits that could not be measured.⁵⁶

The Senate confirmed Miller's nomination in September 1981. Senator Metzenbaum opined that Miller did not believe in the mission of the FTC.⁵⁷ He voiced the fear that Miller believed everything business does

45. *Id.* at 5. Professor Ernest Gellhorn, an advocate of using cost-benefit analysis in FTC proceedings, also admits that the analysis is subjective and its calculations are, at best, "crude guesses." Ernest Gellhorn, *Trading Stamps, S & H; and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903, 957.

46. *Miller Hearings*, *supra* note 44, at 6.

47. *Id.* at 19.

48. *Id.*

49. *See id.* at 21.

50. *See id.*

51. *See id.* at 22.

52. *See id.* at 23-25. He stated that his testimony was made in conjunction with Ralph Nader. *See id.* at 23.

53. *See id.*

54. *See Miller Gains Confirmation to FTC: Senators Attack Enforcement Program*, 41 Antitrust & Trade Reg. Rep. (BNA) No. 1032, at A-1 (Sept. 24, 1981).

55. *See id.* at 23.

56. *See id.* at 25.

57. *See id.*

is efficient, and would lead the FTC back to adherence to the principle of caveat emptor.⁵⁸

Miller's statements during the confirmation process were troublesome for several reasons. He advocated the use of an economic approach in general and cost-benefit analysis in particular, but acknowledged that such an analysis would be applied in a subjective manner. Later, he justified applying an economic approach as superior to the ethical standards he believed guided previous actions.⁵⁹ He also accused the former FTC of being governed "by unbridled discretion exercised by fallible and sometimes unpredictable individuals" that led to incoherent enforcement policies.⁶⁰ According to Miller, a better approach was "to promote consumer welfare by protecting and promoting the functioning of markets."⁶¹ The economic approach advocated by Miller gave "one a sense of limits and provide[d] much better standards for judgment and evaluation."⁶² These later statements contrasted sharply with his admission at the confirmation hearing that economic analysis, as with any method used by fallible and sometimes unpredictable individuals, ultimately contains a heavy dose of subjectivity. Perhaps all Miller meant to say was that a person has somewhat less discretion when being forced to justify decisions using economic analysis. Nonetheless, his statements provided grounds for Mark Green's concerns regarding the application of cost-benefit analysis.

When the Confirmation Committee asked whether the FTC had authority to regulate unfair advertising, Miller's initial answer was "I am not an attorney."⁶³ He then went on to say, however, that his focus would be on deception and fraud. By this answer, Miller apparently tried to convey the message that regardless of whether the FTC had the authority to regulate unfair advertising, he would ignore that authority. Instead, he would concentrate on deception, which is an entirely distinct legal basis from unfairness under section 5 of the FTC Act,⁶⁴ and fraud, which is a common law cause of action.

Although the Confirmation Committee members did not question Miller further on this point, Miller's implications that he would not focus on unfair acts or practices are significant. Such implications give credence to Senator Metzenbaum's charge that Miller did not believe in

58. *See id.* at 24.

59. *See MILLER, supra* note 7, at 25.

60. *Id.* at 3.

61. *Id.* at 24-25.

62. *Id.* at 25.

63. *Miller Hearings, supra* note 44, at 6.

64. 15 U.S.C. § 45(a)(1) (1994).

the mission of the FTC because Congress specifically directed the FTC to investigate the market for evidence of unfair practices.

Miller was true to his word. Rather than using the unfairness standard as a basis for regulatory and adjudicatory actions, he demonstrated his hostility toward the standard by urging Congress to redefine unfair practices,⁶⁵ an effort that ultimately failed.⁶⁶ Miller also said he would concentrate on fraud. This focus was consistent with his view,⁶⁷ and that of other law and economics advocates,⁶⁸ that the common law offered the best legal approach to promoting an efficient market.

In vowing to concentrate on fraud and deception, Miller added a significant caveat. He greatly valued the flow of useful information to consumers, and did not want to enforce the law in any way that the flow would be lessened in order to protect "a few gullible people" who might be deceived.⁶⁹ Miller's efforts were consistent with the law and economics view that if most consumers in a targeted market possess adequate information, the government need not regulate that market.⁷⁰

Miller criticized the FTC for being "overly adversarial."⁷¹ In opposing the adversarial relationship, Miller indicated that he intended to start talking to the regulated businesses. Did this mean Miller questioned the validity of the capture theory? Did it mean he believed it appropriate for the regulator to be in a cooperative relationship with those it regulated? Notable in its absence was any mention of nurturing the FTC's relationship with consumers or their organizations. Miller's statement and its implications provided grounds for Mark Green's charge that Miller's

65. See *FTC Letter to Senate Committee Takes Stand on Unfairness, Professional Groups*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 528 (Mar. 11, 1982); *FTC's Letter to Senate Subcommittees on Bill to Restrict Agency's Jurisdiction over Professionals and Unfair Acts or Practices*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 568 (Mar. 11, 1982); *Miller Expects to Make Recommendations for Revising Federal Trade Commission Act*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1049, at 234 (Jan. 28, 1982) [hereinafter *Revising Federal Trade Commission Act*].

66. See *infra* notes 276-91 and accompanying text.

67. See MILLER, *supra* note 7, at 11, 13.

68. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 347 (3d ed. 1986).

69. *Miller Hearings*, *supra* note 44, at 6.

70. See POSNER, *supra* note 68, at 96-100. It also might have been a harbinger of Miller's later revision of the standards for applying deception. See *infra* notes 174-78 and accompanying text.

71. *Miller Hearings*, *supra* note 44, at 19. This adversarial relationship, which led to FTC staff refusing to speak to industry, actually began prior to Pertschuk's appointment. It was a reaction to the charge that the FTC was too cozy with those businesses it was supposed to regulate. This phenomenon is so common it has spawned its own conceptual framework and is known as "capture theory" because the regulated industry is said to capture the regulators. See Bernstein, *supra* note 17, at 85.

interest was in attacking government regulation, but not in attacking business abuses.⁷²

Miller's training as an economist was significant. His economic background likely influenced his view that the best way to protect consumers was to promote "the functioning of markets,"⁷³ his skepticism regarding the gullibility of consumers, and his penchant for cost-benefit analysis. Additionally, an economist's approach to problems is fundamentally different from that of a lawyer. Lawyers customarily work within the context of reacting to complaints and consequently adopt strategies that "are reactive, concrete, and particularistic."⁷⁴ In formulating policy, a lawyer's main concern is to draft a policy that will withstand legal challenge.⁷⁵ Economists are more concerned with the structure of the consumer economy and "prefer a more abstract, proactive approach involving comprehensive planning and policy analysis."⁷⁶ President Reagan's decision to appoint an economist rather than a lawyer, therefore, signalled an apparent intention to change the perspective from which the FTC would view its mission. Miller's appointment raises the issue of whether Congress should be more specific in defining that mission so it is not subject to radically different interpretations depending upon the professional background of the chairman.

C. *Theoretical Concepts: Espousal of the Comprehensive Rationality Theory*

Miller's training also made him amenable to determining policy in a fashion more consistent with "comprehensive rationality" than other theoretical concepts. According to this theory, an agency decides policy by "specify[ing] the goals of policy . . . select[ing] and evaluat[ing] alternative methods of regulatory intervention, and . . . weigh[ing] the costs and benefits of various programs."⁷⁷ This approach has been characterized as

72. A few months later, Miller seemed to espouse his own unique view of the capture theory. He stated, "The last thing I want to do is to be captured by the agency or by the agency's constituency." *Revising Federal Trade Commission Act*, *supra* note 65, at 235. This statement does not make clear who Miller thought the agency's constituency was. If this statement meant the industry regulated by the agency, then that part of Miller's statement is consistent with the capture theory. Miller, however, also did not want to be captured by the "agency," the FTC. Presumably, by this he meant he did not want to become trapped by the FTC's history, culture, and bureaucracy. To the contrary, as discussed below, he intended to implement substantial changes in the way the FTC conducted its business. *Id.*

73. MILLER, *supra* note 7, at 24-25.

74. Hawkins & Thomas, *supra* note 12, at 21.

75. See *id.* at 21-22.

76. *Id.* at 21.

77. *Id.* at 7.

"rational, empirically based policy analysis."⁷⁸ In contrast, the capture theory contends that an agency adopts policies favorable to the industries regulated by the agency because the industry heavily influences the agency. Miller's response to the capture theory was to vow that he would not be captured by the FTC's constituency. This could be interpreted as a rejection of any notion that the capture theory would apply to the FTC under his leadership. By urging the FTC to end its adversarial relationship with those industries, however, Miller raised fears that the capture theory would correctly describe the FTC's conduct under his chairmanship.

Miller also promised not to be captured by the agency itself. This is a reflection of his determination not to decide policy in a manner consistent with the "social constructionist" theory. According to the "social constructionist" theory, "policymaking is a social process, in which actors interpret their environments, their goals, and the constraints in the process. Shared meanings arise through interaction among officials . . . and between these officials, interest groups, and other actors involved in the regulatory process, such as the courts and the legislature."⁷⁹ This social interaction is a dynamic process which continues over time, leading agency officials to continually reinterpret the meaning of the information used in formulating policy⁸⁰ because that meaning is influenced by the differing norms and values of the actors,⁸¹ the bureaucratic setting in which the interaction occurs,⁸² and the competing pressures exerted by the various publics with which the agency interacts.⁸³ This theory is consistent with agency policies that encourage collegiality among the commissioners and public participation in policymaking.

The social constructionist theory sharply contrasts with the comprehensive rationality theory, which assumes that agency officials should be immune to the influence of interaction, and that policy can be decided solely by means of objective, neutral, data-driven analysis. Individuals running an agency consistent with the comprehensive rationality theory tend to disfavor public participation because giving heed to what public partici-

78. Barry Boyer, *The Federal Trade Commission and Consumer Protection Policy: A Postmortem Examination*, in MAKING REGULATORY POLICY 93, 116 (Keith Hawkins & John M. Thomas eds., 1989). Boyer points out that in the consumer protection area, it is often very difficult to obtain the quantity and quality of empirical data necessary to support a policy based on empirical data alone. *See id.* Thus, relying solely on this data to support a policy amounts to adopting a device to defeat policy initiatives. *See id.*

79. Hawkins & Thomas, *supra* note 12, at 7.

80. *See id.* at 11.

81. *See id.* at 16.

82. *See id.* at 12.

83. *See id.* at 17.

pants urge leads to accommodating conflicting values, rather than objectively and systematically evaluating alternatives.⁸⁴ Public participation, moreover, is viewed as an element of "incrementalism."⁸⁵ Incrementalism is a term for policymaking in which officials consider several competing values, "decisionmaking is fragmented and decentralized . . . strategy is remedial and ad hoc . . . conflicts of value are accommodated, and policy goals are adjusted to reflect diverse political interests."⁸⁶ As described below, Miller quickly adopted a centralized management style and did not favor either management or policymaking by accommodation. He discovered, however, that achieving goals in an agency setting requires social interaction and a certain amount of accommodation.

D. Early Statements and Actions

Soon after taking office, Miller's statements and actions revealed his commitment to making substantial changes at the FTC. While assuring FTC staff that he did not intend to "gut" the agency, Miller told them to be less adversarial with the business community.⁸⁷ He then began to assemble his team, most of whom had economics backgrounds and came from universities with reputations for free market economics.⁸⁸ Most notably, Timothy Muris was named to head the Bureau of Consumer Protection. He was a professor of law and economics who coauthored and coedited a book critical of the FTC under Pertschuk.⁸⁹

At a press conference on September 26, 1981, three weeks after assuming his post, Miller continued some of the themes he voiced during the confirmation process. He said he "may well" recommend changes in the FTC's advertisement substantiation program.⁹⁰ He expressed skepticism about the degree of the public's gullibility and noted that the cost of substantiation studies are passed on to consumers. Interestingly, the President of the National Association of Advertisers did not share Miller's distaste for advertisement substantiation, asserting that business supported it and the additional expense was nothing business was "con-

84. *See id.* at 9; *see also* WILLIAM F. WEST, *ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESS* 189-92 (1985).

85. *See* Hawkins & Thomas, *supra* note 12, at 9.

86. *Id.* at 8 (citations omitted).

87. *See Miller Advises FTC Staff To Be Less Adversarial With Businesses*, 41 *Antitrust & Trade Reg. Rep.* (BNA) No. 1034, at A-13 (Oct. 8, 1981).

88. *See id.*

89. *See id.* at A-13, A-14. A few months later, Miller stated that one of the most important things he had done in the beginning of his term was to hire persons sharing his philosophy. *See Revising Federal Trade Commission Act*, *supra* note 65, at 235.

90. *Miller May Seek Elimination of Ad Substantiation Program*, 41 *Antitrust & Trade Reg. Rep.* (BNA) No. 1037, at A-4 (Oct. 29, 1981).

cerned about or aware of.”⁹¹ Several weeks later Miller tried to clarify his position.⁹² He said he was troubled by certain aspects of the program, but had not yet decided what action the FTC should take.⁹³ He had three concerns. First, he felt it was not clear which claims needed to be substantiated.⁹⁴ Second, he was troubled by how the Commission determined the meaning of claims.⁹⁵ He believed that too often the FTC found implied claims that the business never intended and by which most consumers would not be misled.⁹⁶ Third, he criticized the flexible approach the FTC had used in regard to the amount of substantiation required.⁹⁷ Miller suggested, for example, that the FTC might have been requiring greater substantiation for objective claims than for subjective claims.⁹⁸ Finally, he recommended a reassessment of whether the Commission should require substantiation prior to a company making claims.⁹⁹ The advertising substantiation program proved to be unsusceptible to quick resolution. One year later, Miller repeated his reservations about requiring prior substantiation.¹⁰⁰ The director of the Bureau of Economics suggested that no one knew what the effect of the program was; it might actually be encouraging puffing and favoring some advertisers over others.¹⁰¹

At the September 1981 press conference, Miller repeated his intention not to be adversarial with business and argued that the FTC should “‘not . . . be exploring the edges of the law.’”¹⁰² Instead, he wanted a return to traditional enforcement,¹⁰³ but predicted the Commission would bring the same number of complaints it had previously.¹⁰⁴ Regarding an FTC staff recommendation to require stronger disclosure of the health risks of smoking, Miller characterized himself as a libertarian who believed that it

91. *Id.*

92. *See FTC Chairman Tries to Clarify Position on Ad Substantiation*, 41 *Antitrust & Trade Reg. Rep. (BNA)* No. 1039, at A-20 (Nov. 12, 1981).

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.* at A-21.

99. *See id.*

100. *See Muris Predicts at ABA Conference Some Lessening of Credit Disclosure in TV Ads*, 43 *Antitrust & Trade Reg. Rep. (BNA)* No. 1090, at 932 (Nov. 18, 1982).

101. *See id.*

102. *Miller May Seek Elimination of Ad Substantiation Program*, *supra* note 90, at A-5.

103. *See infra* notes 408-17 and accompanying text (discussing whether the FTC did return to “traditional” enforcement).

104. *See infra* notes 144-73 and accompanying text (discussing the applicable data).

is a person's own affair whether to smoke.¹⁰⁵ This seems consistent with his feeling that people are not as gullible as the FTC may have assumed previously and can make their own decisions. Miller vowed that the Commission would be strong despite threatened budget cuts, explaining that many people at the agency were not productive and that independent agencies tend to be less energetic.¹⁰⁶ He even questioned the very concept of independent agencies, believing they do not fit into the tripartite structure envisioned by the Constitution.¹⁰⁷ Consistent with Miller's concern that too many FTC actions were the result of the exercise of "unbridled discretion," the FTC under Miller's leadership urged Congress to revise the FTC's statutory mandate by defining the terms "unfair" and "deceptive."¹⁰⁸

II. THE CHAIRMAN AS MANAGER OF THE AGENCY

A. Miller's Organization

Some agencies are largely run by the staff, which initiates most programs.¹⁰⁹ Other agencies are run by all the commissioners jointly based on a consensus model.¹¹⁰ Still other agencies are run by a strong chairman who dominates the entire agency, sets the tone, and decides the agenda. Such a chairman ensures his or her power and influence by filling positions with people loyal to the chairman's program, and loyal to him or her personally.¹¹¹ The FTC under Miller followed the latter model.

Miller appointed Timothy Muris to head the Bureau of Consumer Protection. Muris was a staff member with Miller at the Office of Management and Budget (OMB), a former FTC staff attorney, and a coauthor of a book about the FTC entitled, *The Federal Trade Commission Since*

105. See *Miller May Seek Elimination of Ad Substantiation Program*, *supra* note 90, at A-6.

106. See *id.* at A-5.

107. See *id.*

108. MILLER, *supra* note 7, at 3.

109. See WELBORN, *supra* note 5, at 25.

110. See *id.* at 7.

111. See *id.* at 22. Miller named to top positions Carol Crawford, who was a senior advisor to the Reagan Administration's FTC's transition team, Larry Harlow and Karen Stevens, who worked with Miller at OMB, and Fred McChesney, an attorney who was about to receive a doctorate in economics. See *Miller To Name OMB Aides To Top Positions At FTC*, 41 Antitrust & Trade Reg. Rep. (BNA) No. 1032, at A-18 (Sept. 24, 1981). A few months after his appointment, Miller acknowledged the significance of appointing these people: "I think the most important thing was that I was able to bring aboard a good group of people whose philosophies are consistent with my own." *Miller Expects to Make Recommendations for Revising Federal Trade Commission Act*, *supra* note 65, at 235.

1970: *Economic Regulation and Bureaucratic Behavior*.¹¹² In his book, Muris suggests that the FTC's budget be frozen to reduce the size of the agency by one-half when taking into account inflation.¹¹³ At the end of five years, the budget could be increased if Muris's recommendations were adopted. These recommendations included increased use of economic analysis and other measures to constrain the agency. Muris called the FTC "lawless" because it was not subject to meaningful judicial review.¹¹⁴ Muris concluded the book by declaiming, "So powerful and harmful an agency must be constrained. Consumers simply cannot afford otherwise."¹¹⁵

Miller reorganized the structure of the agency. For example, two programs formerly handled by the regional offices were shifted to Washington, the role of senior management was strengthened, and the Office of Congressional Relations was moved from the Office of the General Counsel to the Office of the Chairman.¹¹⁶

There were reports that the staff was antagonized by Miller's resistance to compromise on issues and his lack of familiarity with Commission practices.¹¹⁷ Miller admitted his unwillingness to compromise. He described his general management style by saying he was "a very tough person . . . inflexible, uncompromising, unyielding," who was determined not "to be captured by the agency or by the agency's constituency."¹¹⁸ Miller's statement to the management team on the first day he took office succinctly expressed his management philosophy: "You are not to be the staff and the Commission's constituent's representatives to me; you're to be my representatives and the Commission's representatives to the staff and the outside world."¹¹⁹ Under his regime, the direction of initiatives was to be "from the top down, rather than vice versa."¹²⁰

112. See *Miller To Name OMB Aides To Top Positions at FTC*, *supra* note 111, at A-18.

113. See *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 310 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981).

114. *Id.* at 312.

115. *Id.* at 315.

116. See *Miller Reorganizes Commission, Consolidates Bureaus' Programs*, 42 *Antitrust & Trade Reg. Rep. (BNA)* No. 1047, at 76-77 (Jan. 14, 1982).

117. See *FTC Commissioners, Staff Are Antagonized by New Chairman's Management Style, Not Ideas*, 42 *Antitrust & Trade Reg. Rep. (BNA)* No. 1049, at 213 (Jan. 28, 1982).

118. *Miller Expects to Make Recommendations for Revising Federal Trade Commission Act*, *supra* note 65, at 235.

119. *Id.* at 236.

120. *Id.* This point was reiterated six months later in regard to FTC attorneys who in the past had taken the initiative in commenting on the regulatory practices of other agencies. See *FTC Holds Policy Session, Instructs Staff To Consult Closely With Commissioners*, 42 *Antitrust & Trade Reg. Rep. (BNA)* No. 1069, at 1265-66 (June 17, 1982).

Miller continued his strong management style into 1983. One example illustrates just how strained the relationship between the Chairman and Commissioners Pertschuk and Patricia P. Bailey had become. In an unprecedented move, Miller assumed responsibility for handling interlocutory motions, a job which previously had been performed by Pertschuk only.¹²¹ In addition, he took away from Bailey the authority to approve motions to quash subpoenas.¹²² Because they no longer had these responsibilities, both were expected to lose one of their four staff attorneys. Pertschuk and Bailey reacted by claiming the loss of the staff attorneys was intended as punishment for opposing Miller.¹²³ Pertschuk's problems stemmed from Miller's refusal to let Pertschuk examine weekly staff reports prepared for Miller, in addition to barring Pertschuk from meetings where cases were evaluated.¹²⁴ Miller later relented in part by allowing Bailey, but not Pertschuk, to keep her fourth attorney.¹²⁵

The Chairman's effort to reduce the number of regional offices reflected his desire to be a strong manager who consolidated as much power as possible in the headquarters office. His effort also illustrated the external constraints on a chairman's management authority. Soon after assuming his post at the FTC, Miller and the other commissioners were forced to consider closing regional offices. The OMB, the agency at which Miller worked prior to his appointment to the FTC, had proposed substantial budget cuts for the FTC.¹²⁶ Miller recommended leaving open only three offices out of the ten, but all three of the other commis-

121. See *Miller Assumes New Duties; Moves Will Reduce Pertschuk, Bailey Staffs*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1103, at 390 (Feb. 24, 1983).

122. See *id.*

123. See *Pertschuk and Bailey Refuse to Cut Staffs After Miller Reorganization*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1104, at 496 (Mar. 3, 1983). As will be seen, Bailey already opposed the redefinition of the term deceptive and expressed differences over litigated matters. See *infra* notes 179, 447-49 and accompanying text. In addition, Bailey criticized the Commission's lack of enforcement of the Equal Credit Opportunity Act; for over a period of 18 months, the FTC had brought no ECOA cases. See *FTC Commissioner Blasts Staff For Lack of Enforcement of ECOA*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1065, at 1076 (May 20, 1982). Bailey attributed this lack of activity to staff insisting on adding a level of economic analysis to the requirements of the statute. See *id.* One year later Bailey, supported by Pertschuk, raised the same concerns, fearing that in effect the FTC was administratively repealing the ECOA. See *FTC Holds Policy Session to Discuss ECOA Enforcement*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1074, at 233 (July 22, 1982). Pertschuk's spokesman claimed Pertschuk needed the disputed attorney position because of the difficulties in learning what was happening at the Agency.

124. See *Pertschuk and Bailey Refuse to Cut Staffs After Miller Reorganization*, *supra* note 123, at 496.

125. See *Miller Agrees with Bailey to Allow Advisor to Remain on Personal Staff*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1105, at 553 (Mar. 10, 1983).

126. See *Diminished Budgetary Funding Forces FTC to Shut Down Four of Ten Regional Offices*, 41 Antitrust & Trade Reg. Rep. (BNA) No. 1036, at A-17 (Oct. 22, 1981).

sioners voted to retain six offices.¹²⁷ Seven months later, the FTC announced which offices would be closed.¹²⁸ Miller justified the closings by stating they were consistent with President Reagan's view of federalism; less regional presence was necessary because of the growth of state and local consumer offices, and fewer regional offices would be easier to manage.¹²⁹

B. Congressional Reaction to Miller's Consolidation Proposal

Representative Benjamin Rosenthal requested a postponement of these actions to allow for hearings to be held on whether regional offices should be closed. Although a critic of the regional offices in 1977, Rosenthal believed they had improved.¹³⁰ He held his hearing later that month. Miller justified the closings, giving management objectives as a major reason.¹³¹ He claimed closing offices would enable him to equalize workloads. He also questioned the productivity of the regional offices, referring to data he claimed supported that charge.¹³² Bailey and Pertschuk testified in opposition to closing the offices. Pertschuk offered his own statistics purporting to show that the offices were, in fact, productive.

One might wonder whether the proposal was merely part of Miller's attempt to bully Bailey and Pertschuk, while showing the staff, the other commissioners, and Congress that he was in charge. At the same time, one might question whether the basis of Congress's opposition was the desire to protect the Commission's ability to carry out Congress's consumer protection mandate or to serve a more parochial political purpose. Members of Congress battling Miller over the regional office closings expressed concerns about the effect upon their own districts.¹³³ Conse-

127. See *id.*

128. See *FTC Decides to Close its Four Offices in Los Angeles, Seattle, Denver, and Boston*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1061, at 807 (Apr. 22, 1982).

129. See *id.*

130. See *id.*

131. See *Rosenthal Blasts FTC Chairman on Closing of Four Regional Offices*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1062, at 848 (Apr. 29, 1982).

132. See *id.* at 849. It is interesting to note that President Reagan's "FTC transition team," which Miller headed, had recommended closing all of the regional offices. *Id.*

133. For example, Representative Rosenthal opposed Miller's plan in part because it called for a decrease in the staff of the New York office while increasing the office's jurisdiction through the addition of the New England territory. See *id.* at 850. Congresswoman Patricia Schroeder of Colorado objected to the closing of the Denver office. See *id.* At a later Senate hearing, Senator Lowell Weicker of Connecticut, Chairman of the State, Justice and Commerce Subcommittee, responded to Miller's justification for closing the offices by advising Miller: "don't ever close regional offices in the chairman's region." *Weicker Lectures FTC Chairman on Closing of Boston Regional Office*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1066, at 1114 (May 27, 1982). As a result of Weicker's influence, the Senate Appropriations Committee voted to prohibit spending funds to close the

quently, the FTC temporarily abandoned its effort to close the regional offices.

The proposal to close the regional offices did not die, however. Seven months later, facing a budget deficit despite the increased funding for regional offices, Miller and two commissioners voted to close three regional offices.¹³⁴ Pertschuk and Bailey objected, with Pertschuk suggesting the deficit be cured by reducing the amount of economic studies and the frequency of intervening in the actions of other agencies.¹³⁵ A House Appropriations subcommittee instructed the FTC not to close any regional offices and to maintain viable operations in each.¹³⁶ Democrats on the subcommittee pointed to earlier testimony by Commissioners Miller and David Clanton, which indicated that almost all of the cases involving consumer redress and the majority of the investigations came out of the regional offices. As a result, the FTC was left with the task of balancing its budget some other way. The issue ultimately was resolved by an agreement that Miller reached with Republican Senators Paul Laxalt and Warren Rudman.¹³⁷ Under the agreement, all ten offices would remain open, but the staff of each was to be reduced to eighteen.¹³⁸ To fund the regional offices at that staff level, Miller and the Senators agreed to seek an additional \$2 million for the FTC.¹³⁹

Questions remained whether Miller was wise in his effort to close the regional offices, and whether his prolonged effort was "inefficient" once the strength of Congress's opposition became obvious. The controversy lasted from October 1981 to February 1983, and involved meetings of the commissioners, planning by staff, and hearings by congressional subcommittees. The proposal substantially lowered morale among the staff at the

regional offices. The full Senate agreed, and increased the agency's budget by \$3.6 million to enable the FTC to continue operating the offices. See *FTC Suspends Its Proposal to Close Four Regional Offices*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1067, at 1155 (June 3, 1982).

134. See *FTC Votes 3-2 to Close Three Regional Offices*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1099, at 191 (Jan. 27, 1983).

135. See *id.*

136. See *House Appropriations Panel Orders FTC to Maintain All 10 Regional Offices*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1101, at 265 (Feb. 10, 1983).

137. See *Miller, Rudman, Laxalt Hold Meeting; Agreement Reached on Regional Offices*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1103, at 388 (Feb. 24, 1983).

138. See *FTC Regional Offices Contemplate Streamlined Operations with Less Staff*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1107, at 640 (Mar. 24, 1983).

139. See *Miller, Rudman, Laxalt Hold Meeting; Agreement Reached on Regional Offices*, *supra* note 137, at 388.

regional offices; Miller had questioned their performance and they worked with the fear that they would be fired or, at best, transferred.¹⁴⁰

The proposal split the Commission. One could criticize Miller for persisting in a fight that was strongly opposed by two commissioners. Commissioners Pertschuk and Bailey were in the minority, opposing much of what Miller was attempting to do. If Miller had taken their positions into account, however, he would have backed down on most of his program. As the battle continued to rage month after month, it provided constant fodder for the two minority members and presumably made the divisiveness within the Commission even worse. Moreover, the proposal to close offices was opposed at the outset by key members of Congress.¹⁴¹ The end result certainly was not a victory for Miller, for no offices were closed, the strains within the Commission were exacerbated, and hostile members of Congress focused their antagonism toward Miller.

The costs of asserting Miller's management prerogative far outweighed any benefit. Miller regarded the office closing proposal as a management issue, but he soon learned it was regarded by others as much more than that. The proposal cost the Chairman political capital, staff morale, collegiality among commissioners, time, and effort. The only benefit was reducing the size of the staffs at the regional office from a total of 237 to 180.¹⁴² The incident also illustrated the limits of even a strong chairman, given Congress's oversight responsibilities and budgetary power.

The strong chairman model is consistent with the comprehensive rationality theory, under which policymaking is centralized and decided on objective data-based empirical evidence and cost-benefit analysis.¹⁴³ Closing regional offices would have reduced fragmentation and increased central control. Miller did, however, consolidate his control over the Washington headquarters and increase his ability to ensure that policy was based on comprehensive rationality by wrestling certain responsibilities from dissident commissioners and hiring top level staff.

Miller was determined to adhere to the model of an agency which is dominated by its chairman. His management style and policies were con-

140. See HARRIS & MILKIS, *supra* note 2, at 200, 210. The option of transferring to Washington obviously did little to bolster the staff's spirits, because when the ultimate resolution was implemented, few decided to move. See *FTC Regional Offices Contemplate Streamlined Operations With Less Staff*, *supra* note 138, at 640.

141. See *FTC Budget Will Face Congressional Scrutiny Because of Regional Offices*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1100, at 219 (Feb. 3, 1983) (reporting that Senators Warren Rudman, Earnest Hollings and Congressman Neil Smith opposed the office closings).

142. See *Miller, Rudman, Laxalt Hold Meeting; Agreement Reached on Regional Offices*, *supra* note 137, at 388.

143. See Boyer, *supra* note 78, at 113-17; Hawkins & Thomas, *supra* note 12, at 7-9.

sistent with that model. Given his mandate to change substantially the direction of the agency, Miller's practices were consistent with the agency model. Choosing an alternative model, or adopting a weaker version of the chairman model, which gave more of a voice to other commissioners or the staff, would have made it more difficult for Miller to achieve his goals.

Following the strong chairman model, however, has substantial costs. Given the bipartisan, staggered term structure of Commission appointments, a domineering chairman is likely to clash with other commissioners. Even if opposing commissioners are in the minority, as they were during Miller's chairmanship, they can be a constant thorn in the chairman's side, decreasing the productivity and efficiency of conducting the Commission's business. In addition, opposing commissioners presumably are eager to supply sympathetic members of Congress with grist for their mills. Moreover, an agency ordinarily has an abundance of career employees. A strong management style, emphasizing a "top-down" approach which questions the loyalty and worth of experienced professionals, ineluctably raises staff anxiety and resentment, thereby thwarting productivity and creativity. Miller further decreased staff morale by proposing the closing of all regional offices, as the head of Reagan's FTC transition team, and then by pushing for the closing of most of the offices as Chairman. Finally, the model's limitations became most apparent when Miller tried to apply the model in the face of congressional opposition.

C. *The Numbers Game: Arguing Quality over Quantity*

Commissioner Bailey and others decried the decline in the number and quality of cases brought under Miller's chairmanship.¹⁴⁴ Table I demonstrates that there was a definite decrease in the number of enforcement cases brought while Miller was chairman.¹⁴⁵ At the same time, however, the agency obviously did not stop enforcing the law altogether.

The difficulty of drawing conclusions from the caseload data is illustrated by a House committee oversight hearing held a little over one year after Miller took office. Miller claimed the FTC was very productive de-

144. See *infra* notes 164-65 and accompanying text.

145. Note that the numbers in Table I are compiled from the Annual Reports of the FTC. Those reports are based on the fiscal year. Thus, the data for the year labeled 1982 refers to the twelve months which ended on September 30, 1982. Miller became chairman at the beginning of the 1982 fiscal year and resigned at the end of fiscal year 1985. The numbers also must be viewed in light of substantial budget cuts, supported by Miller, which occurred during the years Miller was chairman. See HARRIS & MILKIS, *supra* note 2, at 204-05.

TABLE I

	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
Injunctions	4	2	3	1	0	4	8	14	16	15	26	35	56	62
Final Commission Orders	11	3	6	7	2	2	3	3	1	1	0	2	0	1
Consent Agreements Issued in Final Form - Investigation Stage	20	36	21	17	15	12	17	15	4	0	5	12	9	30
Consent Agreements Accepted & Published for Comment - Investigation Stage	16	9	12	6	1	11	8	4	4	14	2	4	8	10
Consent Agreements - Adjudicative Stage	12	13	1	4	0	1	2	6	4	2	2	1	3	2
Complaints Issued	8	2	3	5	1	0	6	3	4	2	0	6	4	2
Civil Penalty Actions	13	17	26	27	13	17	9	11	15	22	15	22	21	60
Initial Decisions	3	7	7	1	2	3	0	2	2	1	1	1	0	1

spite having a substantially smaller staff.¹⁴⁶ Then Democratic Congressmen Albert Gore and John Dingell countered with data showing a downturn in 1977 and 1982, coinciding with changes in the White House.¹⁴⁷ Their numbers indicated less enforcement activity under Miller.¹⁴⁸ Miller cautioned the validity of judging performance solely by counting cases and claimed the FTC was handling quality cases.¹⁴⁹ Pertschuk disagreed, claiming many of the cases should have been handled criminally or involved companies almost in bankruptcy. Muris had instituted a new procedure requiring regional offices to confer with an economist at the FTC headquarters before entering settlement negotiations.¹⁵⁰ Congressmen Gore and Dingell charged the FTC was engaging in excessive economic analysis that led to undue delays in enforcement.¹⁵¹

At times Miller claimed the FTC under his leadership was bringing a substantial number of cases,¹⁵² but at other times, he showed disdain for the entire enterprise of demonstrating that the agency was bringing an adequate number of cases.¹⁵³ For example, in testifying before a House Appropriations subcommittee early in 1983, Miller stated: "'Far more important' than bringing cases . . . are efforts to educate businessmen and consumers."¹⁵⁴

One year after taking office, Miller issued a report on the Commission's accomplishments.¹⁵⁵ One of Miller's most important goals was to improve the relationship between the FTC and Congress.¹⁵⁶ He claimed the previous adversarial relationship had given the agency a bad reputation.¹⁵⁷ The report showed that Miller had improved management, in-

146. See *House Commerce Committee Holds Hearing on FTC Enforcement Activity Under Miller*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1094, at 1083 (Dec. 16, 1982).

147. See *id.*

148. See *id.*

149. See *id.*

150. See *id.*

151. See *id.*

152. See *id.*

153. This disdain for bringing substantial numbers of cases was consistent with Miller's background as an economist rather than a lawyer, and reflected his goal of protecting consumers by improving the functioning of markets. Economists tend to favor attacking problems through "comprehensive planning and policy analysis." Hawkins & Thomas, *supra* note 12, at 21. It is not surprising, therefore, that Miller would be skeptical of the case-by-case approach which he might have regarded as incrementalism, the approach that often adopts strategies that are "remedial and ad hoc." *Id.* at 8.

154. *House Appropriations Panel Orders FTC To Maintain All 10 Regional Offices*, *supra* note 136, at 265.

155. See *FTC Chairman Places Blame for Political Problems on Legacy of Past*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1086, at 768 (Oct. 21, 1982).

156. See *id.*

157. See *id.*

cluding coordination and supervision, and that the FTC was concentrating on enforcement rather than new rulemaking proceedings.¹⁵⁸ In regard to enforcement actions, Miller reported that the staff had been told to focus on fraud “and other traditional law violations” rather than experimenting with “novel theories.”¹⁵⁹ He then repeated his plea for a definition of “deceptive.”¹⁶⁰ In Commissioner David Clanton’s view, the most important accomplishment was the development of an economics approach in addressing consumer cases.¹⁶¹ In contrast, Pertschuk claimed Miller had spent most of his time the first year in trying to close several regional offices (an effort Congress eventually blocked), pushing Congress to enact new legislation to weaken the Commission (which Congress refused to do), and providing a forum for economists which served to halt enforcement activity.¹⁶²

The disagreement regarding the Commission’s progress continued after Miller completed his second year. He claimed the FTC was concentrating on “quality” cases” rather than wasting time on “legal frolics.”¹⁶³ Pertschuk countered that enforcement activity was forty percent less under Miller.¹⁶⁴ Bailey complained that the Commission was not tackling major fraud problems.¹⁶⁵ Miller justified the FTC’s enforcement workload after his third year in office by declaring that the FTC, unlike the Commission under Pertschuk, would “not be a great morality court.”¹⁶⁶ Miller explained that he had altered the agency’s priorities so it would engage in “sober calculation” rather than “moralistic posturing.”¹⁶⁷ Although the number of cases brought by the Commission might be lower, he had achieved voluntary compliance from businesses by establishing a “cooperative” relationship with industry.¹⁶⁸ Although he had terminated cases, this was necessary when cases were based primarily on “social the-

158. *See id.*

159. *Id.* He included a table indicating there had been much enforcement activity. *See id.* The table highlighted that 204 initial phase investigations had started and 66 had closed. Furthermore, 28 full phase investigations were opened, and six were closed. *See id.*

160. *See FTC Chairman Places Blame for Political Problems on Legacy of Past, supra* note 155, at 768.

161. *See id.*

162. *See id.* The National Consumers League also criticized Miller’s first year in office. *See Consumer Group Calls Miller Report on FTC Activity “Piece of Puffery,”* 43 Antitrust & Trade Reg. Rep. (BNA) No. 1089, at 894 (Nov. 11, 1982).

163. *Miller Defends Record Before House Subcommittee,* 45 Antitrust & Trade Reg. Rep. (BNA) No. 1140, at 781 (Nov. 17, 1983).

164. *See id.*

165. *See id.*

166. *Administration’s Goal of Keeping Markets Competitive Has Worked, Miller Declares,* 47 Antitrust & Trade Reg. Rep. (BNA) No. 1192, at 986 (Nov. 29, 1984).

167. *Id.*

168. *Id.*

ories.”¹⁶⁹ Miller thus justified the low numbers in his first three years by charging that the numbers under Pertschuk were inflated by frivolous cases based on a Commission pushing its own social agenda, rather than the neutral, objective economic analysis employed under Miller.¹⁷⁰ Pertschuk scoffed at Miller's characterization of the FTC's new approach as a neutral economic analysis. He claimed that Reagan's appointees used “economics as a ‘veneer’ to disguise hidden biases and value judgments.”¹⁷¹ He accused these regulators of ignoring “human misery and suffering, greed and avarice,” by putting unwarranted faith in economic efficiency and the ability of markets to correct themselves.¹⁷²

The issue then becomes whether it is appropriate for a new chairman, absent any alteration in the agency's jurisdiction or authority, to change drastically the adjudication program of the agency. On the one hand, one could argue that such action is appropriate. The statute provides for the President to appoint the chairman; therefore, he or she can appoint a chairman who may make any changes not precluded by a statute or the Constitution. In addition, the chairman cannot prevail without persuading at least two other commissioners of the wisdom of such changes. On the other hand, if every chairman felt free to implement a radical restructuring of adjudicatory priorities as long as he or she could command a majority of commission votes, industry and consumers could have no confidence that reliance on current FTC adjudication policies would provide a reliable guide for what would be considered a statutory violation in the future. In addition, the chairman's ability to gain the support of two other commissioners may be due, not so much to their agreement with the chairman's agenda, but to the chairman's influence derived from his or her control over budget, personnel, and assignments.¹⁷³

169. *Id.*

170. *Id.* It is instructive to remember that Miller admitted at his confirmation hearings that the cost-benefit analysis often was “a fairly subjective test.” *Miller Hearings, supra* note 44, at 5.

171. *Pertschuk Reviews Regulators' Principles of New Economics*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1136, at 619 (Oct. 20, 1983).

172. *Id.* The reduced adjudicatory activity is further supported by Miller's imposition of an approach which favored bringing fewer cases. Miller criticized the higher numbers under Pertschuk as reflecting cases that should not have been brought. If there was no basis for bringing them, however, presumably those cases would have been appealed and ultimately dismissed. The fact that this did not occur indicates that there was a sound legal basis for them. Only two consumer cases decided while Pertschuk was chairman were appealed, and in neither case did the court hold that the Commission lacked a legal basis for bringing an action against the respondent. See *Lee v. Federal Trade Comm'n*, 679 F.2d 905, 906 (D.C. Cir. 1980) (affirming an FTC order); *Grolier Inc. v. Federal Trade Comm'n*, 615 F.2d 1215, 1222 (9th Cir. 1980) (vacating an FTC order and remanding the case because the Administrative Law Judge should have recused himself).

173. See WELBORN, *supra* note 5, at 22.

III. THE CAMPAIGN TO REVISE THE DEFINITION OF DECEPTION

A. Miller Meets Opposition in his Efforts to "Redefine" Deception

One of Miller's top priorities was to effect a change in the definition of "deception." This was a critical battle because most consumer enforcement cases are brought under the deceptive practices arm of the FTC's authority under section 5 of the FTC Act, and most Trade Regulation Rules (TRRs) are based on a record showing that deceptive practices justify regulation. The manner in which Miller waged this battle raises important policy issues and suggests the need for legislative change.

Miller initially attempted to persuade Congress to define the FTC Act's term "deceptive."¹⁷⁴ Miller, testifying on behalf of himself and not representing the views of any of the other commissioners, recommended that the definition of deception should require evidence that consumers were injured.¹⁷⁵ He suggested this could be accomplished by including materiality as an element of deception.¹⁷⁶ In addition, the FTC should be limited to bringing cases involving representations of fact, not opinion. Finally, the standard for deception should be "whether reasonable consumers are likely to be deceived, not whether any consumers might be deceived."¹⁷⁷ In regard to vulnerable groups of consumers, however, the test should be whether the company "knew or should have known that the act or practice was deceptive, regardless of whether or not reasonable consumers were deceived."¹⁷⁸

174. This was done in conjunction with a request for a congressional definition of the term "unfairness." See *Miller Circulates Proposal To Limit FTC Attacks on Deception*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1056, at 589-90 (Mar. 18, 1982). As Muris noted, a statutory definition of "unfairness," but not "deception," was not by itself sufficient because deception is such a broad concept. See *id.* at 590.

175. See *id.*

176. See *Miller Suggests Revisions in Deception Standard of § 5*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1057, at 629 (Mar. 25, 1982). Industry also supported a restrictive definition of deception. See *Advertising Groups Stake Out New Position on Amending FTC Act Standard on Deception*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1060, at 771 (Apr. 15, 1982) (stating that three advertising associations "proposed that deceptive acts or practices be unlawful where they 'consist of material representations known to be false or made in reckless disregard of their truth or falsity'"); *Kasten is Preparing Bill on FTC Reauthorization; Miller Finds Little Success for Deception Proposal*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1062, at 867 (Apr. 29, 1982) (indicating that the National Association of Manufacturers proposed "extending to deception the FTC's proposed definition of unfairness"); *Miller Suggests Revisions in Deception Standard of § 5, supra* (indicating that the U.S. Chamber of Commerce "made a recommendation similar to that made by the Commission majority").

177. *Miller Circulates Proposal to Limit FTC Attacks on Deception, supra* note 174, at 590.

178. *Id.*

Pertschuk opposed Miller's proposal, arguing that it ran counter to current law. Clanton, Bailey, and Pertschuk later testified against Miller's proposal.¹⁷⁹ Clanton feared that establishing new standards would create uncertainty.¹⁸⁰ He contended that if there were instances in which the Commission's actions were misguided, the fault lay with the application of the standards, not with the standards themselves.¹⁸¹ Bailey echoed Clanton's position and opposed making it more difficult for the Commission to prevent deception while a small budget was already making it difficult to enforce the present standards.¹⁸² Pertschuk challenged the list of cases Miller had been using to support his position, contending that they represented a very small number of mainly old cases.¹⁸³

The Republican chairman of the Senate subcommittee who was charged with preparing changes to the FTC Act decided not to support Miller's "deception" proposal.¹⁸⁴ Despite this lack of backing, Miller displayed his tenacity, some might say stubbornness, by continuing to push for his revision. He may, however, have lost some of the respect of the Senate in the process.¹⁸⁵ Ultimately, the Republican-controlled Senate decided not to include Miller's proposal in its reauthorization bill.

In 1982, the House Committee on Energy and Commerce requested that the FTC submit to it "an analysis of its deception jurisdiction as presently applied by the Commission and interpreted in case law."¹⁸⁶ The FTC prepared drafts of a proposed response, and the Wisconsin Attorney General asked the FTC to obtain public comment.¹⁸⁷ This request did not call for anything unusual. The FTC's consideration of its advertising substantiation policy during Miller's chairmanship was far less significant, but a lengthy public comment period was provided and Miller urged those interested to submit their reactions.¹⁸⁸ Pertschuk made a motion to

179. See *Miller May Support Exemption for Professions if Congress Won't Redefine Unfairness, Deception*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1059, at 737-38 (Apr. 8, 1982).

180. See *id.* at 737.

181. See *id.*

182. See *id.*

183. See *id.* at 738.

184. See *Kasten Is Preparing Bill on FTC Reauthorization; Miller Finds Little Success for Deception Proposal*, *supra* note 176, at 865.

185. See *id.* at 866. "Several Senate staff members wondered why the FTC Chairman still is sticking with his proposal. 'He's going to lose, and it's going to embarrass him,' commented one staffer." *Id.*

186. *Dissenting Statement of Commissioner Patricia P. Bailey Concerning the Commission's Statement on Deception*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 695 (Oct. 27, 1983) [hereinafter *Deception Policy Statement, Bailey's Dissent*].

187. See *Miller Calls For Vote on Policy Governing Deceptive Practices*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1136, at 610 (Oct. 20, 1983).

188. See *infra* note 297 and accompanying text.

require an opportunity for public comment on the proposed deception statement, but a tie vote prevented passage.¹⁸⁹ On October 14, 1983, the FTC submitted a statement in response to the Committee's request.¹⁹⁰ The statement was approved by three Commissioners: the Chairman and Commissioners Douglas¹⁹¹ and Clanton.¹⁹² Commissioner Clanton's approval was obtained on the last day of his term. Dissenting were Commissioners Bailey and Pertschuk.¹⁹³

The majority's statement purported to provide "a single definitive statement of the Commission's view of its authority."¹⁹⁴ The statement identified the three elements of a deceptive act or practice case.¹⁹⁵ The first element required that "there must be a representation, omission or practice that is likely to mislead the consumer."¹⁹⁶ The statement stressed that the first element did not require a finding of actual consumer deception.¹⁹⁷ Depending on the facts and circumstances of each case, the Commission may or may not require presentation of extrinsic evidence.¹⁹⁸

The second element of a deceptive act or practice case involves the consumer's interpretation or reaction to the seller's representations or practices.¹⁹⁹ The Commission would consider the challenged act or practice from the perspective of "reasonable consumers."²⁰⁰ The statement explains this element by saying that "[t]he test is whether the consumer's interpretation or reaction is reasonable. When representations or sales practices are targeted to a specific audience, the Commission determines

189. See *Dissenting Statement of Commissioner Pertschuk Concerning the Commission's Statement on Deception*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 697 (Oct. 27, 1983) [hereinafter *Deception Policy Statement, Pertschuk's Dissent*].

190. See *Deception Policy Statement, Bailey's Dissent*, *supra* note 186, at 695.

191. Commissioner George Douglas filed a concurring statement in which he disputed the assertion that the majority statement was rushed through without due deliberation. See *Concurring Statement of Commissioner George W. Douglas Concerning the Commission's Statement on Deception*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 699 (Oct. 27, 1983). He also defended the substantive portion in the majority statement. See *id.*

192. See *id.*

193. See *id.*

194. *FTC's Policy Statement on Deception Sent to Chairmen of Senate Commerce, Science and Transportation Committee and House Energy and Commerce Committee*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1137, at 689 (Oct. 27, 1983) [hereinafter *Deception Policy Statement*].

195. See *id.* at 689-94.

196. *Id.* at 689.

197. See *id.* at 690.

198. See *id.*

199. See *id.* at 691.

200. *Id.*

the effect of the representation or practice on a reasonable member of that group."²⁰¹

The third element of a deceptive act or practice case is that the representation, omission, or practice must be material.²⁰² One of the most controversial aspects of the majority's statement was its definition of the term "material." The majority equated materiality with injury, stating that material information is that which is likely to affect consumers' choices and cause injury if inaccurate or omitted.²⁰³

Commissioner Bailey's dissent charged that the majority statement "is an ill-conceived and frankly radical attempt to change the law of deception and create new and restrictive legal standards which would constrain the Commission's traditional and important law enforcement activities."²⁰⁴ Commissioner Bailey attacked the substance of the statement because it rewrote the law as she understood it, misstated the present law, and could be used to take away consumer protection.²⁰⁵ She charged that the first element created confusion because it substituted the standard of likelihood in place of the former "tendency or capacity to mislead consumers standard."²⁰⁶ Bailey posed several questions to show how much confusion this new standard of likelihood created.²⁰⁷ She also attacked the second element, noting that it represented a substantial departure from the holdings of the Commission and courts which found that acts or practices could be deceptive even if they did not mislead sophisticated consumers.²⁰⁸ Bailey criticized the third element because it equated materiality with injury. She believed this suggested "that actual injury must be shown before a finding of materiality is made."²⁰⁹ She claimed that equating the two concepts was contrary to the law and would restrict the FTC.²¹⁰

Finally, Bailey criticized the process that was used in issuing this statement, claiming that the Commissioners were in the process of negotiating the text of the statement when the negotiations were broken off and the

201. *Id.* (footnote omitted). Where representations or sales practices are targeted at a specific audience, such as children, the Commission considers the effect of the challenged representation or practice on a reasonable member of that audience. *See id.*

202. *See id.* at 693.

203. *See id.* at 693-94.

204. *Deception Policy Statement, Bailey's Dissent*, *supra* note 186, at 695.

205. *See id.*

206. *Id.*

207. *See id.*

208. *See id.*

209. *Id.* at 696.

210. *See id.* (indicating that such a standard could "severely and unacceptably narrow the Commission's advertising substantiation doctrine").

Chairman brought the statement for a vote on the last day of Commissioner Clanton's term.²¹¹ The clear implication was that the Chairman rushed the statement through just so that he could obtain a three-vote majority before Clanton departed.

Commissioner Pertschuk also filed a dissenting statement.²¹² Like Bailey, Pertschuk criticized the process the Chairman used in gaining a majority vote.²¹³ He claimed that both he and Bailey wanted to reach a consensus with the rest of the commissioners, but were unable to do so because of the Chairman's desire to bring the matter to a vote before Clanton left the Commission.²¹⁴ Pertschuk also was disturbed by the fact that the timing made it impossible for the public to respond to the statement that was being considered.²¹⁵ In particular, the state attorneys general had requested the opportunity to submit their reactions to the statement before it was released in final form.²¹⁶ They were unable to do so because of the Chairman's insistence that it be voted on before Clanton left the Commission.²¹⁷

Pertschuk then criticized the three elements of a deception case outlined in the majority's statement.²¹⁸ Pertschuk noted that the majority statement was very similar to Chairman Miller's proposed changes to the FTC Act.²¹⁹ Pertschuk asserted that the statement was, in fact, a reinterpretation of current law in a way that was consistent with the statutory changes Miller had originally proposed to Congress, which Congress rejected.²²⁰

The reaction of John Dingell, Chairman of the House Energy and Commerce Committee, was swift and negative. He rejected the FTC's policy statement.²²¹ He said that his Committee had asked for a neutral analysis of the FTC's deception jurisdiction and proposals for statutory changes, and that the FTC statement was not responsive to that request.²²² Congressman Dingell challenged the procedure which was used to obtain a three to two majority vote on the enforcement policy state-

211. *See id.* at 695.

212. *See Deception Policy Statement, Pertschuk's Dissent, supra* note 189, at 696.

213. *See id.* at 697.

214. *See id.*

215. *See id.*

216. *See id.*

217. *See id.*

218. *See id.* at 697-98.

219. *See id.* at 697.

220. *See id.*

221. *See Dingell, Miller Tangle Over New Enforcement Policy on Deception*, 45 *Anti-trust & Trade Reg. Rep. (BNA)* No. 1137, at 664 (Oct. 27, 1983) [hereinafter *Dingell, Miller Tangle*].

222. *See id.*

ment, namely Clanton's vote just prior to his term ending.²²³ Dingell claimed that the Office of the Commission Secretary had told Miller's office and the FTC General Counsel that pursuant to FTC tradition, the vote of a commissioner whose term is expiring does not count unless the other commissioners vote prior to the expiration of the commissioner's term.²²⁴ In this case, because Bailey and Pertschuk voted after Clanton's term expired, Clanton's vote should not have counted.²²⁵ Dingell also explained that he rejected the enforcement statement for two reasons: the statement served to weaken the FTC's deception standard; and the statement was not, as Dingell had requested, a neutral statement of the current law.²²⁶

Miller's response to Dingell's rejection of the deception enforcement statement demonstrates how far relations between Dingell's committee and Miller had deteriorated. Miller was quoted as saying, "We usually try [to] respond to requests from Congress, but we don't work for the Committee Chairman or a committee."²²⁷

In addition to his response to Dingell, Miller defended the enforcement statement by claiming that it was nothing more than a "consistent synthesis" of the FTC's treatment of deception in the past few years.²²⁸ This is in contrast to Miller's statements when he asked Congress to revise the FTC Act in regard to FTC jurisdiction over deception. At that time he acknowledged that his proposal changed the law, but that it was necessary "to correct three problems."²²⁹ The subsequent policy statement covers the same ground, but according to Miller, was not an attempt to change the law.

Miller did acknowledge that the statement did not include "principles from some 'outlying' decisions" and he admitted that this statement "might have screened out a few cases."²³⁰ On the one hand, Miller

223. See *Dingell Challenges Legitimacy of Clanton's Vote on Deception Statement*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1139, at 755 (Nov. 10, 1983).

224. See *id.*

225. See *id.*

226. See *id.*

227. *Dingell, Miller Tangle*, *supra* note 221, at 664. This "in your face" personal response to Congressman Dingell raises serious questions about the proper relationship between Congress and a regulatory agency that is purporting to act pursuant to a congressional statute.

228. *Id.* at 665.

229. *Miller Suggests Revisions in Deception Standard of § 5*, *supra* note 176, at 629. The three problems were the lack of a materiality requirement, the need to prohibit the FTC from attacking statements of opinion, and the need for a "reasonable consumer" standard. *Id.*

230. *Dingell, Miller Tangle*, *supra* note 221, at 665.

stated, "I don't really see it as a change."²³¹ At the same time, Miller attacked the previous deception standard as too vague, and favored using new standards such as a "reasonable man" analysis and whether the deception was "material."²³² Although claiming that the statement did not change the law of deception, Miller attacked the standard of "tendency or capacity" to deceive, which had been used in many previous cases,²³³ because that standard was "hardly more than a tautology on its face."²³⁴ Miller also claimed that under the new enforcement policy the FTC would not have to show actual injury to prove materiality.²³⁵ Miller said that those who read the enforcement statement as equating actual injury and materiality "have it exactly backward."²³⁶

During oversight hearings, James Florio, the Democratic Chairman of the House Commerce, Transportation and Tourism Subcommittee, denounced the October policy statement on deception, stating there was "the 'troubling possibility that there has been a breakdown of law enforcement at the FTC.'"²³⁷ Florio claimed the policy was contrary to the public's wishes.²³⁸ Pertschuk claimed the FTC was "'consciously neglecting' the big national advertising campaigns and [doing] 'nothing yet to slow the tide or even study the implications of liquor, beer, and wine advertising' frequently directed at young people."²³⁹ Bailey expressed concern over the smaller number of cases the Commission brought and the quality of those cases.²⁴⁰ Commissioners Douglas and Terry Calvani supported the policy, asserting that the policy statement distilled principles from the cases, rather than trying to change the law. Douglas claimed the policy merely requires a showing of likely injury; it does not require proving actual injury.²⁴¹ Furthermore, Douglas found the Commission's position was that an advertisement is considered deceptive if it does not have a "reasonable basis."²⁴² The Attorney General of Tennessee disagreed that the policy statement was merely a restatement of past

231. *Id.*

232. *Id.*

233. *Id.*; *Charles of the Ritz Distribs. Corp. v. Federal Trade Comm'n*, 143 F.2d 676 (2d Cir. 1944) (finding representations having a capacity to deceive unlawful as false advertising).

234. *Dingell, Miller Tangle*, *supra* note 221, at 665.

235. *See id.*

236. *Id.*

237. *House Subcommittee Examines Possible Breakdown of Enforcement Efforts at FTC*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1153, at 287 (Feb. 23, 1984).

238. *See id.*

239. *Id.* at 288.

240. *See id.*

241. *See id.* at 289.

242. *See id.*

principles. He claimed it was "not 'an accurate statement of the law of deception.'"²⁴³ Pertschuk and Bailey later submitted a formal statement expressing their views.²⁴⁴ Whereas the statement of Miller and two other commissioners was denounced by Congressman Dingell as "'not responsive,'"²⁴⁵ Dingell praised the statement Bailey and Pertschuk submitted.

In a June 1984 letter, Congressmen Dingell and Florio denounced the Commission for attempting "'to dismantle the law against false advertising.'" They stated that "[d]espite '[h]aving been rebuffed by Congress when you sought a legislative change in the law, you have attempted to weaken the law against such deception by administrative fiat.'"²⁴⁶ Dingell and Florio claimed that some rules seemed to have disappeared, while other rules and cases had been abandoned.²⁴⁷ Miller responded by claiming the Commission was concentrating on conduct which actually harms consumers, rather than being the national nanny. He said the Dingell and Florio letter "was the result of 'bloated congressional committee staffs' who 'sit around drafting silly partisan letters.'"²⁴⁸ It appeared Miller had abandoned his original objective of improving the relationship between the FTC and Congress, at least as far as critical Democratic members were concerned.

B. The Enforcement of Deception at the State Level

The actions of the FTC and the definition and enforcement of deception directly affects the states.²⁴⁹ Many states have mini-FTC statutes that incorporate the standards adopted pursuant to the FTC Act. In addition, to the extent that the FTC reduces its enforcement, the slack must

243. *Id.*

244. See *Deception Policy Statement Prepared by Commissioners Bailey and Pertschuk and Transmitted on Feb. 29 to the House Energy and Commerce Committee*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1154, at 372 (Mar. 1, 1984); *Pertschuk-Bailey Policy Statement on Deception is Forwarded to Dingell*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1154, at 325 (Mar. 1, 1984) [hereinafter *Pertschuk-Bailey Policy Statement*].

245. *Dingell, Miller Tangle*, *supra* note 221, at 664; *Pertschuk-Bailey Policy Statement*, *supra* note 244, at 325.

246. *Dingell, Florio Strongly Urge Miller to Return to Traditional Enforcement*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1168, at 1081 (June 7, 1984).

247. *See id.*

248. *FTC Has Restored Sense of Balance in Its Priorities, Miller Retorts*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1169, at 1132 (June 14, 1984).

249. The federalism problems resulted from the state attorneys general attempting to enforce consumer protection law in the vacuum produced by the Miller FTC's inactivity. See Roger E. Schechter, *A Retrospective on the Reagan FTC: Musings on the Role of an Administrative Agency*, 42 ADMIN. L. REV. 489, 505-06 (1990). As Professor Schechter points out, to the extent the individual states did step in to fill the vacuum, they created problems for businesses who faced inconsistent enforcement policies. *See id.* at 506.

be taken up by the states if consumer protection is to be preserved.²⁵⁰ It is no surprise, therefore, that the state attorneys general, who are those responsible in most states for enforcing the mini-FTC acts, would have definite views in regard to the FTC's enforcement policy statement on deception.

At a meeting of the National Association of Attorneys General (NAAG), the attorneys general adopted a resolution which expressed their view that the definition of deception, which Miller had proposed as a legislative change to Congress, would "substantially impair the ability of attorneys general to protect consumers in each state."²⁵¹ The resolution noted that the proposed legislative change would reduce the ability of the attorneys general to protect consumers because it had the potential of weakening the legal interpretation of those mini-FTC acts which are based on the FTC Act.²⁵² In addition, the legislative change would place a greater burden on the state attorneys general if they were to protect consumers in regard to interstate deception.²⁵³ The resolution specifically addressed the FTC policy statement on deception, claiming that the description in the statement of deception was "substantially different from the existing case law, [and] would depart from the principles developed over decades of Federal Trade Commission enforcement, and seeks to adopt administratively the restrictive definition not enacted by the Congress."²⁵⁴ The resolution specifically opposed the definition of deception as it appeared in the enforcement statement.²⁵⁵

Carol Crawford, the Director of the FTC's Bureau of Consumer Protection, responded to the criticisms of the attorneys general.²⁵⁶ She claimed that the policy statement was not a departure from previous enforcement and did not change the definition of deception.²⁵⁷ According to her, the statement simply explained how the Commission and the courts have interpreted deception.²⁵⁸

250. See generally JONATHAN SHELDON, *UNFAIR AND DECEPTIVE ACTS AND PRACTICES* (3d ed. 1991).

251. *NAAG Disputes FTC's Policy on Deception, Wants Bills on Overcharges, Rule 6(e), RPM*, 45 Antitrust and Trade Reg. Rep. (BNA) No. 1145, at 1052 (Dec. 22, 1983) [hereinafter *NAAG Disputes FTC's Policy*]. More recently, NAAG and the FTC have battled over the state's role in regulating national advertising. See generally Jef I. Richards, *FTC or NAAG: Who Will Win the Territorial Battle?*, 10 J. PUB. POL'Y & MARKETING 118 (1991).

252. See *NAAG Disputes FTC's Policy*, *supra* note 251, at 1052.

253. See *id.* at 1052-53.

254. *Id.* at 1053.

255. See *id.*

256. See *id.* at 1052-53.

257. See *id.* at 1053.

258. See *id.*

She also acknowledged that there were similarities between the views of Chairman Miller and the policy statement that purported to be merely the FTC's interpretation of deception under the FTC Act in recent years.²⁵⁹ She attributed that similarity to the fact that Miller's views on deception and the policy statement reflected the FTC's actual deception enforcement practices in past years.²⁶⁰

C. Did Miller Truly Redefine the Deception Standard or Merely Restate the Current Law?

One has to wonder why Miller and his staff continued to allege publicly that the statement merely restated the current law when so many of those most familiar with FTC law, its interpretation and application, read the enforcement statement entirely differently.²⁶¹ Did Miller really believe that his reading was correct and that everyone else was reading it incorrectly or refusing to acknowledge that it was merely a restatement of the law? Miller's own comments contain contradictions.²⁶² He admitted that his proposal to Congress was a change in the law, and acknowledged that he had ignored principles the Commission and the courts adopted in drafting the enforcement statement. One wonders why Miller did not simply acknowledge that the majority of the Commission intended to define deception more narrowly than before. Perhaps Miller sought to avoid a direct confrontation with Congress.²⁶³

The deception enforcement policy statement also obviously demonstrated the deteriorating relationships among the FTC commissioners. Both Commissioners Bailey and Pertschuk complained about rushing to vote on the policy statement instead of continuing to negotiate.²⁶⁴ Interestingly, after the statement was submitted to Congress, Miller defended the process that was used. He pointed out that the Commission had considered the policy statement for one and one-half years,²⁶⁵ and that he waited until Commissioner Clanton's last day in office to call a vote to

259. *See id.* at 1052.

260. *See id.* The resolution adopted by NAAG, however, demonstrates how completely NAAG rejected her characterization of the deception standard.

261. *See, e.g.,* Jack E. Karns, *The Federal Trade Commission's Evolving Deception Policy*, 22 U. RICH. L. REV. 399, 429-30 (1988) (concluding the FTC's policy statement reflected an important change in the law of deception).

262. *See supra* notes 230-36 and accompanying text.

263. When Congressman Dingell rejected the enforcement statement, however, Miller did not hesitate to confront Congress on the issue. *See supra* note 227 and accompanying text.

264. *See Deception Policy Statement, Bailey's Dissent, supra* note 186, at 695; *Deception Policy Statement, Pertschuk's Dissent, supra* note 189, at 697.

265. *See Dingell, Miller Tangle, supra* note 221, at 665.

provide the commissioners sufficient time to discuss and negotiate the terms of the statement. Thus, while insisting on a statement that would undoubtedly infuriate two of the commissioners, Miller took pains to explain that he was committed to a collegial commission which would fully debate important issues.

It is difficult to determine what Miller was trying to achieve by issuing the new deception enforcement statement. What he first characterized as significant changes, he later recharacterized as nothing more than a clearer and more consistent restatement of present FTC enforcement policy. The traditional standards that were accepted, explained, and refined in the case law were dismissed as "outlying" decisions. Language which others understood as equating actual injury with materiality was interpreted as meaning just the opposite by Miller. The enforcement statement rejected long-followed standards such as "tendency or capacity" to deceive and instead inserted new language establishing new standards. Miller claimed that these new standards, never before applied or interpreted in FTC cases, would somehow reduce confusion.

It is true that the old tests lacked certainty as to which practices might be considered deceptive. This was justified, however, because merchants were constantly looking for new ways to advertise and otherwise market their goods and services. Consequently, the FTC needed broad and flexible standards to cover new forms of deception. The old tests contained a certain amount of ambiguity to protect consumers appropriately under the statute.

Miller's focus was far different. He sought a standard that was as definite, concrete, and consistent as possible so merchants would know when their practices might run afoul of the FTC Act. The enforcement statement, however, did not achieve that goal. Its new standards and new terms raised multiple questions of interpretation and application.

Miller's approach, moreover, raised questions about whether he hoped to achieve something more than consistency and certainty for the business community. Congress, showing no desire to limit the FTC's deception jurisdiction, rejected Miller's proposal to amend the FTC Act by narrowly defining deception. Nevertheless, when asked by a House committee for a statement of existing FTC deceptive enforcement policy, Miller issued a statement which seemed to decrease significantly the FTC's jurisdiction. Miller's attempted justification of this statement as being responsive to the committee's request lacks credibility, however,²⁶⁶ for it appears that he may have had other reasons for issuing the enforce-

266. Miller's justification lacks credibility because what he had previously told Congress were necessary changes in the law were recharacterized in the enforcement statement as

ment policy statement. Perhaps a direct confrontation with Congress is what Miller sought to achieve. Agencies generally prefer to avoid conflict with Congress because they fear Congress will respond by decreasing their appropriations or reducing their jurisdiction. That may be exactly what Miller was trying to accomplish. Ironically, because Miller desired to reduce government enforcement and regulation, Congress could only counter Miller's efforts by passing legislation specifically increasing the FTC's jurisdiction and funding. Congress would be reluctant to respond in this way, however, because it would be giving increased power and money to an agency headed by a chairman whose goals were contrary to what Congress sought to achieve. Thus, Miller may have hoped to obtain his ultimate objective by using the deception enforcement policy statement as a catalyst for conflict and confrontation with Congress, goading Congress into reducing the FTC's budget and authority.

What then did Miller's initiative in issuing the enforcement statement accomplish? It further alienated two FTC commissioners. It greatly angered the state attorneys general and the chairman of a vital congressional committee with direct jurisdiction over the FTC. Yet it may have accomplished Miller's objectives. Congress did not pass legislation defining deception in a way that would repeal the description in the enforcement statement. Moreover, some courts have followed the definitions and descriptions in the enforcement statement.²⁶⁷ The Commission, therefore, was able to apply the statement in deciding which cases to investigate and pursue. Although Miller was hostile to the "independent agency" concept,²⁶⁸ the inability of the opponents of the statement to prevent the FTC from implementing it demonstrates the extent to which the FTC was able to act as a truly independent agency.

Miller's behavior is consistent with the theory of comprehensive rationality. Under this theory, an agency acts independent of outside influences, basing policy on empirical evidence and cost-benefit analysis.²⁶⁹ The failure to provide notice and a period of public comment is consistent with the theory, because such public participation may result in pressure to compromise the integrity of the agency's objective, rational, and neutral analysis.²⁷⁰

Nevertheless, the FTC Act should be amended to require notice and a public comment period prior to adopting substantive policy changes relat-

mere reflections of current FTC enforcement policy. What had been long established principles, were now characterized as "outlying" cases. *See id.*

267. *See infra* notes 455-58 and accompanying text.

268. *See infra* notes 524-29 and accompanying text.

269. *See Boyer, supra* note 78, at 116; Hawkins & Thomas, *supra* note 12, at 8.

270. *See Hawkins & Thomas, supra* note 12, at 9.

ing to the definition of "deceptive" and "unfair" acts or practices and the agency's enforcement authority. Administrative agency policy always reflects a struggle between rationality and responsiveness.²⁷¹ While the FTC must make decisions within a framework of rationality, it also should be responsive to the public. Responsiveness, which "connotes sensitivity to relevant values or interests,"²⁷² is particularly appropriate for the FTC, as the FTC Act is perhaps an extreme example of a "politically laden mandate."²⁷³ Even if this were not so, because "the administrative process involves value judgments . . . decisions should reflect the interplay of social interests."²⁷⁴

Providing notice and a period for public comment, together with the agency's justification for changing previous standards, provides persons outside the agency with the opportunity to do far more than merely try to pressure the agency to adopt a policy which they favor. Those who agree with the proposed new standards can identify drafting mistakes which undermine the agency's ability to accomplish its objectives. Those who disagree can articulate in detailed fashion their substantive objections and support their positions with their own empirical data. The agency can hear, not only from "interest groups" who advocate partisan positions merely to promote the parochial needs of their own constituencies, but also from nonpartisan organizations engaging in neutral policy analysis, academics, and other officials with the same mission as the agency, such as the state attorneys general. Without an opportunity to submit formal comments, those who want to pressure the agency will find other ways to do so, such as lobbying and voicing their views through far less informative news bytes to the media. In addition, the agency can appear far more responsive if publication of their final policy includes a principled explanation for why it rejected comments contrary to the policy ultimately adopted.

271. See WEST, *supra* note 84, at 189. See generally *Ford Motor Co. v. Federal Trade Comm'n*, 673 F.2d 1008, 1010 (9th Cir. 1981) (finding that the FTC exceeded its authority by changing existing law having widespread application by adjudication rather than rulemaking).

272. WEST, *supra* note 84, at 189.

273. *Id.* at 199.

274. *Id.* at 192.

[T]he norm of responsiveness flows from the realization that administration is more than a technocratic process—that agency mandates entail value judgments which should be informed by the consideration of relevant social interests. If administration is legislative in substance, then the administrative process should be legislative as well, serving to accommodate competing demands. As means of ensuring instrumental rationality, devices such as judicialized rulemaking procedures and cost-benefit analysis inhibit such accommodation.

Id. at 195.

Nevertheless, it would be difficult drafting an amendment to the FTC Act requiring notice and comment prior to adopting substantive policy changes. As the deception experience illustrates, a determined chairman could seek to avoid such a requirement by recharacterizing a true policy change as a mere restatement and clarification of present policy.²⁷⁵

IV. THE CAMPAIGN TO REVISE THE UNFAIRNESS DOCTRINE

In a letter dated March 5, 1982, to the Senate Committee on Commerce, Science and Transportation, the commissioners supported amending section 5 of the FTC Act to include a definition of unfair acts or practices consistent with that described in the Commission's December 1980 Policy Statement.²⁷⁶ Commissioner Pertschuk, although agreeing with the Policy Statement, opposed codifying it in the Act fearing it would lead to endless litigation.²⁷⁷ Shortly thereafter the Republican controlled Senate Commerce Committee held hearings.²⁷⁸ Miller testified in favor of a statutory clarification of unfairness along the lines of the FTC letter, or, if that were not possible, eliminating FTC jurisdiction over unfair acts or practices involving commercial speech.²⁷⁹ Advertising groups also supported eliminating the FTC's unfairness jurisdiction over commercial speech. The United States Chamber of Commerce testified in favor of a statutory clarification of unfairness. The National Association of Manufacturers recommended an extension of the moratorium on the FTC's use of its unfairness jurisdiction to promulgate rules governing advertising.

In May 1982, Senator Robert Kasten introduced legislation which incorporated the FTC proposal defining unfairness and granted an exemption from the FTC's unfairness jurisdiction for all commercial advertising.²⁸⁰ The Senate Commerce Committee approved those provisions.²⁸¹ Chairman Miller opposed the exemption, arguing that it was

275. See *supra* notes 228-29 and accompanying text.

276. See *FTC's Letter to Senate Subcommittees on Bill to Restrict Agency's Jurisdiction Over Professionals and Unfair Acts or Practices*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1055, at 570 (Mar. 11, 1982).

277. See *id.* at 568.

278. See *Miller Suggests Revisions In Deception Standard of § 5*, *supra* note 176, at 628.

279. See *id.* at 629.

280. See *Kasten Introduces Measure to Reauthorize FTC, Amend FTC Act*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1063, at 978-79 (May 6, 1982).

281. See *Senate Commerce Committee Approves Exemptions from FTC Jurisdiction for Professionals, Advertisers*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1064, at 1023 (May 13, 1982). Two Republican Senators objected, charging that the bill would weaken the public's belief in the veracity of advertising. See *Senate Commerce Committee Files Report on FTC Authorization Bill*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1067, at 1167 (June 3, 1982).

wrong to exempt any particular group which engaged in unfair acts or practices.²⁸² Miller acknowledged that some had charged that the FTC's authority to police advertising under its unfairness jurisdiction was so broad and vague that advertisers were confused about what was permitted.²⁸³ Miller claimed that this would no longer be a problem because the bill defined unfairness²⁸⁴ and a 1980 Supreme Court case clarified when the government can regulate commercial speech.²⁸⁵ Finally, Miller objected that under the bill the scope of the term "commercial advertising" was unclear.²⁸⁶ The bill also granted state-licensed professionals a complete exemption from FTC antitrust and consumer protection jurisdiction, to which Miller strongly objected.²⁸⁷ It is ironic that Miller, the leader in the battle for deregulation, found himself attacking the Republican Senate for going too far in deregulating the FTC.

Meanwhile, in the Democratic-controlled House, Congressman Florio, Chairman of the Commerce, Transportation and Tourism Subcommittee of the House Commerce Committee, rejected the Senate bill's provisions on advertising as "radical."²⁸⁸ The House Commerce Committee approved a bill²⁸⁹ that contained a definition of unfair acts or practices mirroring that of the Senate Commerce Committee's bill.²⁹⁰ The House bill, however, contained no provision exempting commercial advertising.

The Congress finally resolved the controversy at the end of the session, voting only to continue the moratorium begun in the FTC Improvements Act of 1980, prohibiting the FTC from using its unfairness jurisdiction to issue rules regulating commercial advertising.²⁹¹ Miller failed to win congressional approval of his proposal to codify the Commission's recommended definition of unfairness, which would have restricted the FTC. Congress did, however, ultimately agree with Miller's other proposals and

282. See Letter from James C. Miller, III, to Senator Bob Packwood, May 27, 1982, reproduced in 42 Antitrust & Trade Reg. Rep. (BNA) No. 1067, at 1191 (June 3, 1982) [hereinafter *Miller Letter to Packwood*, May 27, 1982].

283. See *id.*

284. See *id.*

285. See *id.* at 1192 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-66 (1980) (indicating when the government may regulate commercial speech that is neither misleading nor related to unlawful activity)).

286. See *Miller Letter to Packwood*, May 27, 1982, *supra* note 282, at 1192.

287. *Id.* at 1191.

288. *House Subcommittee Reports Measure to Reauthorize FTC*, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1065, at 1071 (May 20, 1982).

289. See *House Commerce Committee Advances FTC Authorization Bill With No Amendment*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1078, at 343 (Aug. 19, 1982).

290. Compare H.R. 6995, 97th Cong. § 2 (1982) with S. 2499, 97th Cong. § 2 (1982).

291. See *Appropriations Conference Committee Rejects Amendment Governing Professions*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1095, at 1121 (Dec. 23, 1982).

defeated measures that would have narrowed the FTC's unfairness jurisdiction in regard to regulating professionals and commercial advertising. Winning two out of three battles with Congress is quite an accomplishment. It is anomalous, however, that the victories the champion of deregulation won maintained the FTC's regulatory strength.

V. THE ADVERTISING SUBSTANTIATION PROGRAM

One of Miller's prime objectives was to significantly change the Commission's advertising substantiation program.²⁹² It is not clear, however, exactly what Miller's objections to the program were or how he wanted to improve it. At his first press conference, he stated that he had "strong reservations" concerning the program because he believed that the requirement of substantiating claims made in advertisements added to the cost of producing the advertisements.²⁹³ He also stated his belief that "consumers are not as gullible as many people think."²⁹⁴ Interestingly, some persons from the advertising industry criticized Miller's statement. They believed the program did not impose unreasonable burdens and, in fact, aided the industry by giving advertisements greater credibility.²⁹⁵ Miller later articulated his concerns about the program more precisely. He stated that it was not clear from the Commission's program what claims needed substantiation and that the Commission "read too much into advertising claims."²⁹⁶ Miller also expressed concern that the FTC might be requiring the advertisers to produce too much data to support their claims.

After a year of study, Miller stated that the staff needed more information and submitted an extensive list of questions that he urged the advertising industry to answer in order to provide needed information.²⁹⁷ In November 1982, Muris released his study of the advertising substantiation policy.²⁹⁸ Muris did not make any recommendations in his study, but did express the view that the FTC had at times gone too far in requiring substantiation.

292. See *supra* notes 90-101 and accompanying text.

293. *Miller Urges Advertising Groups to Help Reform Ad Substantiation*, 43 *Antitrust & Trade Reg. Rep. (BNA)* No. 1087, at 806 (Oct. 28, 1982).

294. *Id.*

295. See *id.*

296. *Id.*

297. See *id.*

298. See *Advertising Substantiation Policy Could Be Improved, FTC Official Claims*, 43 *Antitrust & Trade Reg. Rep. (BNA)* No. 1089, at 894 (Nov. 11, 1982). Dissemination of the Muris study illustrated Miller's increasingly isolated approach to managing the agency. The study was not distributed to the other Commissioners prior to its release to the press. See *id.*

In March 1983, the Commission issued a public request for comments regarding the implementation of the FTC's advertising substantiation requirement.²⁹⁹ By October 1983, the FTC had received forty comments in response to its request.³⁰⁰ Miller was disappointed that none of those comments provided information on consumer expectations about advertising.³⁰¹ As a result, Miller announced that the FTC would conduct two studies in order to obtain information about consumer expectations.³⁰² Finally, in August 1984, the Commission adopted a revised statement of its policy on advertising substantiation.³⁰³ The revised statement made it clear that the FTC was still committed to requiring advertisers to have a reasonable basis for objective claims made in their advertising.³⁰⁴ In addition, the statement established new standards for the quantity of substantiation that would be required.³⁰⁵ The revised statement did not change previous policy, however, in requiring an advertiser to possess adequate substantiation of claims before the claims were made in advertising.³⁰⁶

Miller was opposed to continuation of this policy.³⁰⁷ Miller admitted that he was not "completely happy" with this revised policy, and acknowledged that his objectives in regard to changing the Commission's advertising substantiation policy were only partially successful.³⁰⁸ In addition, the move to consider and revise the policy took a great deal of time and

299. Advertising Substantiation Program, 48 Fed. Reg. 10,471 (1983).

300. *Miller Returns From Tour, Addresses Advertising and Industrial Policy*, 45 Anti-trust & Trade Reg. Rep. (BNA) No. 1134, at 525 (Oct. 6, 1983).

301. *See id.*

302. *See id.*

303. *See Policy Statement Regarding Advertising Substantiation*, 49 Fed. Reg. 30,999 (1984).

304. *See id.* at 31,000.

305. *See id.*

306. *See id.* at 31,000-001.

307. *See MILLER, supra* note 7, at 39. Under certain circumstances, however, the policy statement would grant the Commission the discretion to consider substantiation evidence that the advertiser had developed after initial dissemination of the claim. *See In re Thompson Med. Co.*, 104 F.T.C. 648, 840 (1984).

308. MILLER, *supra* note 7, at 39-40. He stated:

Our analysis revealed a paucity of scholarly work directed to facets of the program and its net consequences for businesses and consumers. Although we had reason to believe the program generated positive net benefits, I wanted to know more about its effects on the flow of information and consequently on competition and consumer welfare. Even with our revision I was troubled by the doctrine's potential for chilling the dissemination of truthful and useful information. Much work remains to be done regarding the consequences of such a restriction on the market for information.

Id.

was managed in a way likely to exacerbate tensions among the commissioners.³⁰⁹

VI. RULEMAKING UNDER MILLER'S CHAIRMANSHIP

A. Rulemaking: Miller Triumphs By Stalling the Process

An aggressive rulemaking agenda was the hallmark of the Pertschuk era at the FTC.³¹⁰ In sharp contrast, Miller had fundamental objections to rulemaking.³¹¹ As demonstrated by Table II,³¹² Pertschuk's rulemaking agenda was largely undermined during Miller's chairmanship as Miller stalled the approval process of the many rules in the pipeline but not promulgated at the time Pertschuk was forced out of the chairmanship and replaced by Miller. The continuing delays occurred despite Miller's announcement that he had instructed the staff to speed up the rulemaking process because he wanted the Commission to consider all proposed rules by May 1982.³¹³ The question remained, however, as to why the endless delays occurred. At least three possible explanations existed: Miller poorly managed the staff; other Commission members frustrated Miller's efforts to accelerate consideration of proposed rules; or the task was simply far more complex than anticipated. A final possible explanation is that while Miller publicly espoused prompt consideration, in reality he purposely stalled the effort.

B. The FTC's Rulemaking Authority: A Brief Historical Review

A brief historical review of the FTC's rulemaking authority provides a perspective on the Commission's slowdown of rulemaking activity. Until 1962, the FTC did not engage in substantive rulemaking. Instead, it issued Trade Practice Rules³¹⁴ and Guides³¹⁵ for voluntary compliance. In

309. See *infra* note 298.

310. See *supra* notes 1, 28 and accompanying text.

311. See *infra* notes 350-60 and accompanying text.

312. The data for Table II was gleaned from the following sources: Semiannual Regulatory Agenda, 49 Fed. Reg. 16,658 (1984); Semiannual Regulatory Agenda, 48 Fed. Reg. 18,694 (1983); Semiannual Regulatory Agenda, 48 Fed. Reg. 48,120 (1983); Semiannual Regulatory Agenda, 47 Fed. Reg. 48,924 (1982); Improving Government Regulations, 46 Fed. Reg. 54,868 (1981); *FTC Publishes New Agenda Assessing Progress on Rules*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1136, at 607 (Oct. 20, 1983); *FTC Publishes New Agenda Assessing Progress on Rules*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1088, at 845 (Nov. 4, 1982); *FTC Releases Agenda of Regulatory Initiatives*, 41 Antitrust & Trade Reg. Rep. (BNA) No. 1038, at A-23 (Nov. 5, 1981).

313. See *FTC Publishes Revision of Rulemaking Timetable*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1072, at 55 (July 8, 1982).

314. See WEST, *supra* note 84, at 111.

315. See *id.* at 112.

TABLE II

Proposed Rule	Staff Projected Time of Final Action	Other action
Holder in due course amend.	11/81: final Comm. action expected by 3/82 10/83: staff recommendations expected by 11/83 4/84: staff recommendations expected by 11/84 10/84: staff recommendations expected by 11/84	
Funeral	11/81: final action projected for 3/82 11/82: rule approved 7/82 & sent to Congress for review 10/83: Congress's review period ended, final action effective 1/84	
Hearing aids	11/81: staff analysis expected by 6/82 11/82: staff recommendations forwarded 10/83: Comm. consideration expected by 12/82 4/84: Comm. consideration expected by 3/84 10/84: Comm. consideration expected by 1/85	
Mobile homes	11/81: staff recommendation expected by 4/82; Comm. consideration by 6/82 7/82: staff recommendation expected by 9/82; Comm. consideration expected by 12/82 10/83: staff recommendation expected by 12/83 10/84: staff recommendation expected by 3/85	
Credit Practices	11/81: staff recommendation expected by 2/82; Comm. consideration expected by 4/82 7/82: staff recommendation expected by 7/82; Comm. consideration expected by 11/2 11/82: staff makes recommendation; Comm. consideration expected by 9/83 4/84: final Comm. consideration expected by 3/84	
Health spas	11/81: staff report expected by 7/82 7/82: staff report expected by 2/83 4/83: staff report expected by 3/84 4/84: staff report expected by 6/84 10/84: staff report expected by 9/84	
Eyeglass amend.	11/81: Comm. action expected by 2/82 11/82: staff recommendation expected by 12/82 4/83: Comm. consideration expected by 6/83 10/83: Comm. consideration expected by 3/84 10/84: Comm. consideration expected by 10/84	
Pre-sale warranty availability	11/81: Comm. considers rule 4/83: Comm. calls for further staff analysis expected by 12/83 10/83: staff's analysis expected by 3/84 4/84: staff analysis expected by 3/84 10/84: staff analysis expected by 9/84	
Used car	7/82: under consideration by Comm. after Congress's rejection 11/82: Comm. to consider alternatives in 10/82 4/83: Comm. consideration of alternatives postponed to 12/83 10/83: litigation pending in Second Circuit 4/84: staff recommendation expected by 5/84 10/84: final Comm. consideration expected by 9/84	

1962, the Agency began promulgating substantive rules which it called Trade Regulation Rules (TRRs).³¹⁶ The FTC did so despite a lack of explicit statutory authority. The FTC justified issuing TRRs in several ways. First, it argued the agency had implicit authority to issue TRRs because the statute required the FTC to prevent unfair and deceptive practices.³¹⁷ Adjudication did nothing to prevent these practices directly; rather, it provided remedies in individual cases after the fact. Second, the FTC contended that since it had the power to establish substantive rules

316. *See id.*

317. *See id.* at 113.

in the course of deciding cases by adjudication, it also had the power to establish such rules through TRRs.³¹⁸ Third, the FTC claimed section 6(g) of the FTC Act granted the authority to promulgate rules.³¹⁹

TRRs can be justified on policy grounds as well. A TRR allows the FTC to "treat entire industries equitably" instead of "arbitrarily singling out individuals" for adjudication.³²⁰ The industry subject to the TRR, and anyone else, has the opportunity to comment on a proposed TRR, which ensures that the FTC has before it information from sources beyond its own agency and that it is exposed to the point of view of the industry affected.³²¹ A TRR provides guidance that enables a company to plan future action.³²² This is superior to adjudication, which deals with problems piecemeal over a long period of time, because the agency can decide only the issues before it in each individual case. Further, TRRs allow the Commission to combat unfair and deceptive practices in a comprehensive fashion by dealing with an entire industry and focusing on a broad range of practices used by that industry.

William F. West offers an additional "political" reason for the FTC's willingness to issue TRRs in the early 1960s. Before that time, the only constituents paying attention to the FTC were the companies the FTC's activities affected.³²³ In the late 1950s and early 1960s, however, consumers became better informed and increasingly active.³²⁴

Lacking clear legislative authority to issue TRRs, at first the FTC promulgated relatively trivial rules.³²⁵ Apparently emboldened, the agency then issued a rule requiring health warnings on cigarette packages.³²⁶ The tobacco industry complained to Congress, and the FTC rule was replaced with a much milder rule.³²⁷ As a result, the FTC lost its nerve and returned to issuing rules of little consequence.³²⁸ In 1969, the American Bar Association (ABA) and a Ralph Nader group issued sepa-

318. *See id.*

319. *See id.* Section 6(g) provides that the FTC can "make rules and regulations for the purpose of carrying out the provisions of this Act." *Id.* Others argued that this provision applied only to "rules of internal practice and procedure." *Id.*

320. *Id.* at 114.

321. *See id.*

322. *See id.*

323. *See id.* at 118.

324. *See id.* at 117. "The rise of consumerism gave the agency a viable alternative source of political support which enabled it to take a more aggressive regulatory stance." *Id.* at 118.

325. *See id.* at 119.

326. *See id.*

327. *See id.* at 120.

328. *See id.*

rate reports sharply critical of the Commission's lack of aggressiveness.³²⁹ The FTC responded to the political pressure these reports generated by issuing significant rules such as the one regulating door-to-door sales.³³⁰ These rules broke new ground, rather than merely codifying FTC case law and industry practice, and often imposed substantial costs upon affected companies.³³¹ Industry then attacked the FTC's authority to promulgate these rules.³³²

The political pressure resulting from the ABA and Nader reports led Congress to consider a FTC bill which eventually included explicit rulemaking authority.³³³ Industry opposed this provision, arguing that the bill granted the FTC too much power to regulate entire industries under the rubric of preventing "unfair and deceptive practices," a tremendously vague standard.³³⁴ Industry criticized rulemaking as unresponsive to changing circumstances, and favored the common law approach of adjudication.³³⁵ Congress rejected industry's position and enacted the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.³³⁶ Not only did the legislation grant the FTC rulemaking authority, but it also authorized the FTC to provide funding to consumer groups to allow them to intervene in rulemaking proceedings.³³⁷ While appearing to be a clear victory for consumers and a strong expression of congressional support for the FTC, West points out that the statute was actually a compromise. While granting rulemaking authority, the statute imposed strict procedural rules which prevented the FTC from becoming too aggressive.³³⁸

After the enactment of the Magnuson-Moss Act, the FTC embarked on an ambitious program to propose many new rules—rules that were comprehensive and adopted a wide variety of strategies to combat unfair and deceptive practices.³³⁹ Within five years of enactment of the statute, the Commission proposed twenty new rules and amendments to the old rules.³⁴⁰ The FTC broke new ground in proposing rules which were

329. *See id.*

330. *See id.* at 121.

331. *See id.*

332. *See id.*

333. *See id.* at 122.

334. *Id.* at 123.

335. *See id.*

336. 15 U.S.C. §§ 2301-2312 (1994).

337. *See WEST, supra* note 84, at 124.

338. *See id.* at 125-39.

339. *See id.* at 146 (comparing the Commission's rulemaking activity before and after the enactment of the Magnuson-Moss Act).

340. *See id.*

based on unfair practices, such as the funeral industry practices rule and the proposed regulation of children's advertising.³⁴¹ Business groups mounted a strong attack against the FTC's rulemaking.³⁴² In the late 1970s, Congress, which had been so willing to side with consumer interests in passing Magnuson-Moss, began to impose restrictions upon the FTC's rulemaking powers. For example, the Federal Trade Commission Improvements Act of 1980 required the FTC to submit final TRRs to Congress, which could then review them and exercise a legislative veto.³⁴³ Congress used that veto power to nullify the Commission's Used Car Rule.³⁴⁴ The Supreme Court, however, subsequently held the legislative veto unconstitutional.³⁴⁵ In addition, the Improvements Act of 1980 imposed stringent procedural requirements relating to the FTC's rule-making procedures.³⁴⁶ That statute also prevented the Commission from using the unfairness doctrine as the basis for regulating advertising for three years³⁴⁷ and prohibited the Commission from regulating children's advertising.

This brief review of the history of rulemaking prior to Miller becoming chairman illustrates that for most of its history, the FTC has not engaged in an aggressive rulemaking program and has always been very much subject to political pressures from Congress and business interests. It would be erroneous to claim that in stalling adoption of final trade regulation rules, Miller was defying a clear mandate from Congress to push strongly ahead and enact many comprehensive rules. By sending a mixed message, Congress shares much of the responsibility for the lack of vigorous activity by the Commission. On the one hand, Congress passed the Magnuson-Moss Act granting the FTC express authority to issue TRRs and urged the Commission to promulgate rules relating to children's advertising and funeral practices.³⁴⁸ On the other hand, Congress has, through actions such as the 1980 Act, given the agency the clear message that it had gone too far. When the FTC followed Congress's suggestions

341. *See id.* at 147-48 (illustrating the FTC's willingness to go beyond traditional constructions of the FTC Act).

342. *See id.* at 151 (noting some of the businesses that attracted the FTC's policies).

343. *See id.* at 152.

344. *See id.*

345. *See* *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983).

346. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 252, 94 Stat. 374 (1980); *see also* WEST, *supra* note 84, at 152.

347. *See* WEST, *supra* note 84, at 153-54 (noting that Congress worked to constrain FTC rulemaking in other ways).

348. *See id.* at 156.

relating to children's advertising and funeral practices, Congress then had a change of heart and criticized the agency for its proposed rules.³⁴⁹

Nevertheless, the FTC's slowdown on rulemaking procedures was consistent with Chairman Miller's own ideological predisposition. While Miller addressed the need for "rational and coherent rules for business behavior,"³⁵⁰ he also stated "that detailed rules, poorly articulated or poorly enforced, can be worse than no rules at all."³⁵¹ More fundamentally, however, Miller disliked the rulemaking process. He favored the common law adjudicatory approach to solving problems in the marketplace.³⁵² He preferred the common law approach because he believed it was consistent with his goal of improving "the functioning of markets . . . by enforcing an efficient set of institutional rules that structure market transactions."³⁵³ He further noted that "an efficient structure is one that allows buyers and sellers jointly to maximize the net value of their exchanges, after taking into account the costs of transacting."³⁵⁴ His preference for common law adjudication over rulemaking, therefore, was directly connected to his preference for an economic approach. Miller believed an economic approach was superior to what he regarded as the ethical approach which the FTC had adopted prior to his administration.³⁵⁵ He claimed an economic approach gives "one a sense of limits and provides much better standards for judgment and evaluation."³⁵⁶ Miller believed that there was nothing "necessarily contradictory or conflicting" between an ethical theory of consumer protection and an economic theory of consumer protection.³⁵⁷ Indeed, he said, "I know of nothing that clearly belongs within the legitimate core of an ethical theory of consumer protection that would not also be found in an economic conception of the same topic."³⁵⁸ As a result, he believed that "in many, if not most, areas the policy implications are the same."³⁵⁹

349. *See id.*

350. MILLER, *supra* note 7, at 3.

351. *Id.* at 8.

352. *See id.* at 11-13 (explaining the Commission's role in enforcing common law principles).

353. *Id.* at 11.

354. *Id.*

355. *See id.* at 24-25 (explaining that an economic approach provides better standards for objectively evaluating an ethical approach).

356. *Id.* at 25.

357. *Id.*

358. *Id.*

359. *Id.* Pertschuk claimed that Reagan's appointees used "economics as a 'veneer' to disguise hidden biases and value judgments." *Pertschuk Reviews Regulators' Principles of New Economics*, *supra* note 171, at 619. He claimed they ignored "human misery and suffering, greed and avarice." *Id.*

In discussing his proposed definition of unfair and deceptive practices, Miller stated his rationale for favoring common law adjudication over rulemaking:

We believed that a statute based on economic principles would eliminate many of the difficulties the commission had suffered in the past. With virtually boundless authority, the commission had been prone to take on whole industries through the rules it made, disciplining innocent and guilty alike, without sufficient concern for the effects on those regulated and on consumers. Although this attitude appeared more often in proposals than in final actions, the threat caused considerable bitterness among business people and led to congressional attacks that resulted in the commission's shutting down for a time. Perhaps more important, it diverted work toward the multiplication of anecdotal horror stories and away from serious analysis of real problems and possible solutions.³⁶⁰

As this quote indicates, Miller justified his preference for adjudication over rulemaking in terms of economics, bitterness, protection from outside pressures exerted by industry and Congress, and administrative efficiency.

C. Illustrative Rulemaking Proceedings

1. Food Advertising

An examination of the FTC's actions in regard to three proposed rules provides further insights into the approach of Miller and his staff directors. In 1974, the Commission began work on a rule governing food advertising.³⁶¹ The Commission approved the staff's proposed rule in 1980.³⁶² By 1982, the FTC still had not promulgated a final rule and Timothy Muris, Director of the Bureau of Consumer Protection for the FTC, recommended that the Commission terminate its proceedings on the rule.³⁶³ Muris defended his recommendation by stating his approach to FTC rulemaking. He maintained "a general presumption against government mandated changes in established practices."³⁶⁴ In addition, he stated that the Commission should entertain "a heavy presumption that markets work . . . [w]hen there is substantial evidence that market forces cannot eliminate actions that significantly injure consumers and substan-

360. MILLER, *supra* note 7, at 25.

361. See Muris Urges FTC Commissioners to Drop Food Ad Rulemaking, End Labeling Rule Extension, 42 Antitrust & Trade Reg. Rep. (BNA) No. 1069, at 1262 (June 17, 1982).

362. See *id.*

363. See *id.* at 1261.

364. *Id.*

tial evidence that the Commission's remedy will improve consumers' well being, the Commission should act."³⁶⁵ Muris would not rely upon anecdotal evidence, but would instead require "methodologically sound surveys."³⁶⁶ Not only would he require proof that the benefits would outweigh the costs, but also that the "proposed remedy [would be] likely to work."³⁶⁷

Muris then applied his standards for rulemaking to the food advertising proposal. This proposed rule required advertisements to provide certain information relating to cholesterol, fatty acids, claims that food provide energy, claims that food is low in calories and that a product is "natural."³⁶⁸ According to Muris, the evidence in the record did not sufficiently prove that consumers failed to understand the claims made in advertisements and thus were injured.³⁶⁹ He also declared that it would be so costly to comply with the proposed rule, that the benefits probably did not outweigh the costs. Muris, therefore, suggested that the Commission instead use a case-by-case adjudicatory approach.

Muris's staff disagreed with this approach to rulemaking as well as its application to the food advertising rule. His staff claimed "that Muris' demand for statistically projectable consumer surveys '[was] unduly restrictive, inflexible, and legally inappropriate.' To satisfy Muris, the staff predicted, would require four studies costing \$75,000 each."³⁷⁰ While conceding that the record was not as definitive as one might wish, the staff claimed that there was sufficient evidence showing that consumers were likely to be misled by present advertising claims in the areas covered by the proposed rule.³⁷¹

Finally, at the end of 1982, the Commission decided to terminate its rulemaking proceeding on the proposed food advertising rule.³⁷² Commissioner Clanton, who originally voted in favor of authorizing the staff to prepare the rule, cast the deciding vote.³⁷³ Clanton developed a growing skepticism about the usefulness of broad rules.³⁷⁴ In regard to the food advertising proposal, he came to believe that consumers' concerns

365. *Id.*

366. *Id.* at 1262.

367. *Id.*

368. *See id.*

369. *See id.*

370. *FTC Delays Food Rule Meeting; Staff's Recommendations Differ*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1094, at 1085 (Dec. 16, 1982).

371. *See id.*

372. *See FTC Junks Food Rule; Clanton's Change of Mind Results in Tie Votes at Table*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1095, at 1124 (Dec. 23, 1982).

373. *See id.*

374. *See id.*

were not sufficiently widespread to justify the rule.³⁷⁵ Clanton suggested the Commission monitor the situation and act on a case-by-case adjudication basis.³⁷⁶ Commissioner Bailey responded by noting that the FTC originally began considering adoption of a rule because of its dissatisfaction with trying to resolve this issue on a case-by-case basis.³⁷⁷

2. Funeral Industry Practices

The Commission's debate over its rule governing funeral industry practices also illustrates the split within the Commission on the appropriateness of rulemaking and the standards for such action. In July, 1982, in a three-to-one vote, the Commission approved the Funeral Practice Rule, with Chairman Miller in opposition.³⁷⁸ Miller claimed that the record no longer supported the rule because of a new survey which indicated that only six percent of consumers who requested price information were denied that information.³⁷⁹ Muris joined Miller in claiming that this study would make the rule subject to being held invalid if challenged in court.³⁸⁰ Pertschuk, however, attacked Muris's approach to what evidence was necessary to justify rulemaking. According to Pertschuk, Muris required "a series of clinically elegant, massive, and definitive statistical surveys of nationally projectable probability samples to confirm the findings we have already made based upon the less pure rough and tumble of testimony, cross-examination, comments, and numerous studies."³⁸¹ Pertschuk further characterized Muris's position as requiring the disapproval of "any conceivable theory that might demonstrate [funeral industry] behavior to be benign."³⁸² Pertschuk argued that if the Commission waited for the "perfect proof" prior to rulemaking, it "may well wait forever."³⁸³

Commissioner Bailey also criticized Muris's reliance upon the survey, concluding that when consumers asked for price information, they almost always were provided with it.³⁸⁴ She argued that Muris's approach completely ignored the psychological state of consumers when they have to

375. *See id.*

376. *See id.*

377. *See id.*

378. *See FTC Approves New Version of Rule Governing Funeral Directors*, 43 *Antitrust & Trade Reg. Rep. (BNA)* No. 1075, at 272 (July 29, 1982).

379. *See id.*

380. *See id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *See id.*

make decisions regarding funeral arrangements and expenses.³⁸⁵ She felt that the Commission should rely on the information in the record which showed that funeral directors do not focus on the price of the goods and services they are selling, but rather sell an entire package of goods and services without itemizing the cost of individual items.³⁸⁶ Far from being a team player, Miller continued to oppose the rule, stating at a press conference several months later that if he were in Congress, he would veto the rule.³⁸⁷

3. *Credit Practices Rule*

The dynamics that resulted in the unanimous promulgation of the Credit Practices Rule provide a contrast to the divisiveness of the process resulting in the Funeral Industry Rule. The enactment of the Credit Practices Rule demonstrated that the Commission was able to work together in a collegial, if not congenial, fashion to hammer out a compromise not altogether satisfying to any commissioner, but containing significant substantive provisions. Unlike his dogged refusal to accept the Funeral Industry Rule, Miller reluctantly joined the other commissioners and voted to approve the Credit Practices Rule. The approval of the rule also was very much the result of changes over time, political pressures, negotiation, and compromise.

During eight years of investigation and research, the staff compiled a record consisting of approximately 500,000 pages.³⁸⁸ Under Miller's administration, the directors of both the FTC Bureau of Consumer Protection and the Bureau of Economics opposed the rule. Muris proposed terminating the rule.³⁸⁹ FTC sources gave the rule "a snow ball's chance in hell" of being adopted.³⁹⁰ In addition to opposition from the directors, Reagan appointees, Miller and Douglas, were expected to oppose the rule, whereas Pertschuk and Bailey favored the rule.³⁹¹ The future of the rule, therefore, was in the hands of David Clanton, a Ford appointee. Given this split in the positions of the Commissioners, negotiations ensued. Clanton voted in favor of a rule prohibiting six types of contract

385. *See id.*

386. *See id.* at 272-73.

387. *See FTC Chairman Places Blame for Political Problems on Legacy of Past*, *supra* note 155, at 769.

388. *See FTC Staff Is Divided Over Proposed Credit Practices Rule*, 44 *Antitrust & Trade Reg. Rep. (BNA)* No. 1112, at 879 (Apr. 28, 1983).

389. *See id.* at 880.

390. *Id.* at 879.

391. *See Clanton Holds Swing Vote in Impending FTC Decision on Credit Rule*, 44 *Antitrust & Trade Reg. Rep. (BNA)* No. 1118, at 1117 (June 9, 1983) [hereinafter *Clanton Holds Swing Vote*].

provisions, but also proposed that the staff prepare disclosure statements so the Commission could consider requiring such statements instead of instituting an outright ban.³⁹² Miller and Douglas preferred Clanton's disclosure proposal over a ban.³⁹³ Immediate action was necessary for the commissioners to achieve a compromise. The Commission worked during the summer of 1983 to reach an agreement before a deadline of September 26, 1983, when Clanton's term would expire. In addition, political pressure influenced the compromise process because the Republican Chairman of the Senate Banking Committee strongly opposed the rule.³⁹⁴ By the third week of July 1983, when the Commission next met to consider the rule, Clanton decided that disclosure statements could not protect consumers from overreaching creditors.³⁹⁵ Consequently, Miller lacked the votes either to kill the rule or to eviscerate it by requiring disclosure statements. Instead of voting in opposition, both Miller and Douglas voted with the others, and the rule passed unanimously.³⁹⁶ The commissioners believed that timing was still a problem, however, because the rule could not be enacted until the Commission approved a statement of basis and purpose for the rule. Proponents feared if approval was delayed until Clanton's term expired, the compromise that created the rule could fall apart.³⁹⁷ To dissuade Miller from delaying the rule's final promulgation, fifteen Democratic congressmen sent a letter to Miller urging prompt action.³⁹⁸

It is not apparent why the five commissioners, with substantially differing views, arrived at a compromise on the Credit Practices Rule when they clashed bitterly and were dead-locked on other matters. The agency's compromise may be attributed to the Commission's structure.

392. See *Commission Switches Gears During Credit Rule Debates*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1119, at 1164 (June 16, 1983). Clanton's role in keeping the proposed rule alive is surprising, given his growing hostility to industry-wide rules as illustrated by his views relating to the proposed food advertising rule. See *supra* notes 373-76 and accompanying text.

393. See *Commission Switches Gears During Credit Rule Debates*, *supra* note 392, at 1164.

394. See *Clanton Holds Swing Vote*, *supra* note 391, at 1118.

395. See *FTC Okays Consumer Credit Rule, Bars Certain Collection Practices*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1124, at 87 (July 21, 1983). The commission did adopt a disclosure statement requirement in notices to co-signers. See *id.* at 86.

396. See *id.* Commissioner Clanton rejected the co-signer notice requirement. See *id.* 397. See *15 House Democrats Praise FTC for Action on Credit Rule*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1128, at 276 (Aug. 18, 1983). The proponents' fears were unjustified. The commissioners had difficulty in agreeing on the statement of basis and purpose, which prevented a final vote on the rule until February, 1984, by which time Terry Calvani had replaced Clanton. Calvani did not participate in the rulemaking debates and did not vote. All of the other commissioners approved the rule on the final vote.

398. See *id.*

When promulgating a TRR, the FTC works toward completing the job Congress and the President started by passing a law containing a vague general standard. It is therefore fitting that the FTC works within a structure allowing it to engage in the same give-and-take that Congress and the President experience. In the case of the Credit Practices Rule, that structure guaranteed the rule would be considered within an institutional context conducive to compromise. In contrast, if there were a single administrator of the FTC instead of a commission, and if we assume past chairmen would have been the administrator, Pertschuk may have promulgated a much stronger rule. However, Congress likely would have responded to a stronger Credit Practices Rule with preemptive legislation. Similarly, Miller may have simply repealed the rule if he were the administrator.

D. Miller's Reluctance in Rulemaking

As we have seen, Miller preferred adjudication over rulemaking, in part, because he believed that Congress and industry attempted to pressure FTC rulemaking efforts.³⁹⁹ Miller's position seems to suggest that the FTC should avoid rulemaking brought on by substantial pressure from outside sources. But if the FTC refuses to act under those circumstances, one must question why Congress established the FTC as an "independent" agency. Several years after leaving the Commission, Miller expressed his views on the effectiveness of independent agencies. Miller complained that "appointees to independent agencies are fair game for congressional theatrics and their supporters in the media."⁴⁰⁰ Rather than being a target for Congress in the media, Miller stated, "I believe it would be wise to eliminate completely the distinction afforded independent agencies. The executive as well as adjudicatory functions of independent agencies can be accomplished perfectly well by executive officials serving at the pleasure of the President."⁴⁰¹ Miller complained that Congress dominated the independent agencies.⁴⁰² To avoid congressional dominance in rulemaking and even less formal policymaking, Miller proposed that the President have control over the independent agencies.⁴⁰³ Miller felt extremely vulnerable as the head of an independ-

399. See *supra* note 360 and accompanying text.

400. Symposium, *Independent Agencies—Independent From Whom?*, 41 ADMIN. L. REV. 491, 503 (1989) [hereinafter *Independent Agencies*].

401. *Id.*

402. See *id.* at 504.

403. See *id.* at 505. Miller stated:

I think the President and/or his assigns should have complete authority to direct the independent agencies. For example, if the President called up and said to the

ent agency subject to congressional oversight. He regretted "[b]eing outside the shelter and protection afforded by the President."⁴⁰⁴ This feeling of vulnerability and desire for presidential protection explained Miller's reluctance to resort to rulemaking which would subject him to congressional attack.

While it is understandable that Miller would feel this way, Professor Peter Strauss has explained that the modern reality of governing makes congressional oversight more crucial than ever. Strauss explains that because Congress is presented with tremendously complex problems it has resorted to establishing processes rather than directly participating in problem solving.⁴⁰⁵ Because it cannot directly participate in the rule-making process, Congress feels a need to oversee the agencies to which it has delegated power to insure that they are adequately carrying out their duties. Miller's proposal to end agencies' independence to protect their heads from congressional attack is not responsive to Congress's continuing need to exercise oversight.

It is apparent, however, that Miller's objection to rulemaking goes far deeper than the Commission's reluctance to face criticism from industry and Congress. As demonstrated in the previous discussion of the proposed food advertising rule and the funeral industry rule, Miller had fundamental objections to marketplace regulation through rulemaking. He clearly preferred adjudication on a case-by-case basis to permit the law to develop in a manner comparable to the way the courts develop the common law. In light of this preference, Miller's lack of forthrightness in his approach to rulemaking certainly may be called into question. Rather than endlessly stalling the rulemaking process, arguably he should have attempted to terminate the rulemaking proceedings on several rules, as he did for the food advertising rule. Instead, Miller engaged in the charade of continually postponing rulemaking completion deadlines. These stalling techniques are comparable to the approach he took when issuing the new rules on deception. He claimed that the rules did not change current law, but merely restated the present interpretation of those rules. Likewise, in regard to rulemaking, instead of forthrightly calling for a halt to the many rules that he apparently objected to, he purported to move

FTC, you've got this deception standard before you and I think you should tailor it in such and such a way, I would feel obligated to carry out his wishes.

Id.

404. *Id.* at 503. According to Professor Robinson, a President has little incentive to become involved in agency decisionmaking. See Robinson, *supra* note 10, at 248. Other research suggests the President does exert influence over agencies including the FTC. See generally Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197 (1982).

405. See *Independent Agencies*, *supra* note 400, at 520.

forward when he most likely intended to insure that the rules never would be enacted.

This lack of forthrightness was not necessarily a bad strategy. Calling for the termination of ongoing rulemaking proceedings when he did not possess a majority of the votes to bring about the termination would have undermined Miller's authority. On the other hand, Miller assumed office with clearly stated goals, promising a strong management style which, presumably, would exclude saying one thing while meaning and doing something quite different. It is questionable whether one can be a strong leader if one engages in that type of conduct.

VII. THE PROMISE OF AGGRESSIVE ADJUDICATION

Although Miller showed tremendous reluctance to lead an aggressive rulemaking program to address consumer protection, he had promised to embark on an aggressive program to adjudicate serious cases of consumer fraud. An example of this new focus occurred one year after Miller became chairman. For the first time, the FTC began recording phone conversations its investigators engaged in with persons allegedly using deceptive practices to sell oil and gas leases.⁴⁰⁶ Miller had not only criticized widespread rulemaking proceedings, but he also had criticized past FTC adjudicatory actions in what he regarded as gray areas not involving serious instances of consumer fraud. Under Miller's leadership, therefore, the Commission embarked on an effort to bring cases involving what was characterized as "hard-core fraud."⁴⁰⁷

Other cases also showed that the Miller FTC might continue aggressive enforcement activity. For example, after receiving many complaints from consumer groups, the media, and automobile dealers, the FTC launched a campaign against deceptive car advertisements that offered low interest rates but omitted crucial buyer qualification requirements, as well as other lending restrictions.⁴⁰⁸ In response, the FTC sent letters to those automobile dealers who issued the advertisements asking for voluntary compliance.⁴⁰⁹ In addition, the FTC informed Better Business Bureaus nationwide that it was investigating these advertisements and drafted a new fact sheet to assist consumers who might be purchasing automobiles.⁴¹⁰ Amanda Pedersen, Deputy Director of the Bureau of

406. See *FTC Will Record Conversations to Get Evidence in Gas Lease Swindles*, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1086, at 774 (Oct. 21, 1982).

407. *Id.*

408. See *FTC Begins Investigation of Misleading Ads for Auto Credit*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1107, at 642 (Mar. 24, 1983).

409. See *id.*

410. See *id.*

Consumer Protection, expressed the FTC's view that consumer education was essential to consumer protection.⁴¹¹ She defended the Commission's use of voluntary compliance letters rather than immediately commencing enforcement proceedings by explaining it was hoped that many of the dealers who used the advertisements were acting honestly, but in ignorance of FTC requirements.⁴¹²

An FTC investigation of Truth in Lending advertising violations by homebuilders and real estate brokers discovered that compliance with the Truth in Lending Act was very low in certain cities. The Commission embarked on a program that targeted sixteen cities.⁴¹³ Whereas, in the past, the FTC would have instituted enforcement proceedings against those companies violating the Act, the Miller FTC first sought voluntary compliance.⁴¹⁴ The Commission claimed that this program was highly successful in substantially raising the compliance levels of the firms targeted. Miller stated that the purpose of the program was "education instead of prosecution."⁴¹⁵ Those found in violation of the Act were contacted by letter and phone, and informed of their violations.⁴¹⁶ The Commission also distributed a booklet explaining how to comply with the Truth in Lending Act in consumer credit advertisements.⁴¹⁷

On the one hand, one could criticize the Commission's efforts as weak because the Commission did not receive any written consent agreements. The names of the firms in violation of Truth in Lending were not publicized as they would have been in formal FTC proceedings. On the other hand, one could argue this was a far more efficient method of assuring compliance with Truth in Lending. The FTC's efforts directly reached 1,300 companies in sixteen cities. Separate enforcement actions against even a fraction of that number of firms would have taken far more resources than the FTC possessed. Nevertheless, the effectiveness of voluntary programs cannot be ascertained without periodic follow-up studies to determine whether there was continued compliance. Unfortunately, the FTC lacked the resources to institute systematic follow-up investigations

411. *See id.* at 643.

412. *See id.* at 642.

413. *See FTC Touts Success of Voluntary TILA Compliance*, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1120, at 1209 (June 23, 1983).

414. *See id.*

415. *Id.*

416. *See id.*

417. *See id.* The federal publication was entitled *How to Advise Consumer Credit*. *See id.*

to determine whether its voluntary program had resulted in long-term deterrence.⁴¹⁸

The above FTC initiatives illustrate that aggressive enforcement proceedings in the Miller years often meant resorting to voluntary compliance measures. Such actions should be considered along with other cases indicating a weakening of enforcement resolve. For example, in the case of *In re Kroger Co.*,⁴¹⁹ the FTC modified its prior order by substantially cutting back on its compliance requirements.⁴²⁰ The Commission had found that Kroger's advertising of lower prices was based on inadequate methodological surveys and was structured to favor Kroger over its competitors. Pertschuk attacked the modified order, characterizing it as "an illusory order."⁴²¹ He believed that the record supported the original order.⁴²² He also objected to the provision in the modified order which included a two-year sunset clause limiting the duration of those requirements which still remained in the revised order.⁴²³ Pertschuk was particularly concerned with the order because Kroger had conducted an internal survey indicating the true comparison of prices.⁴²⁴ Thus, Kroger had information in its records revealing that its advertised survey prices were different from its own internal survey.

In the cases of *In re Sterling Drug, Inc.*⁴²⁵ and *In re Bristol-Meyers Co.*,⁴²⁶ the Commission found the advertising claims made by these companies to be deceptive. The Commission required that the companies support the advertising of their products' superior results with two well-controlled clinical tests.⁴²⁷ In rendering its decision, however, the Commission overruled part of its prior substantiation doctrine as established in *In re American Home Products Corp.*⁴²⁸ *American Home Products* had set forth a far easier standard for triggering the two clinical tests requirement.

Another case indicating that the FTC under Miller might not be acting as aggressively as prior commissions is *In re Encyclopedia Britannica*,

418. Bank officers acknowledged that even in 1996, lenders often did not comply with the Truth in Lending Act. See Jaret Seiberg, *Bankers Seen Stumbling Through a Mine Field of Advertising Regulations*, AM. BANKER, Mar. 28, 1996, at 18.

419. 100 F.T.C. 573 (1982).

420. See *id.* at 573-75.

421. *Id.* at 575 (Pertschuk, Comm'r, dissenting).

422. See *id.*

423. See *id.* at 577-78.

424. See *id.* at 576.

425. 102 F.T.C. 395 (1983).

426. 102 F.T.C. 21 (1983).

427. See *In re Bristol-Meyers Co.*, 102 F.T.C. 21, 391-92 (1983); *In re Sterling Drugs, Inc.* 102 F.T.C. 395, 804-05 (1983).

428. 98 F.T.C. 136 (1981), *aff'd*, 695 F.2d 681 (3rd Cir. 1982).

Inc.,⁴²⁹ a 1982 case in which the FTC modified an order issued in 1976. The revised order loosened the requirement that the company's salesmen inform consumers of the true purpose of their visit.⁴³⁰ In addition, the revised order cut back on what the company had to disclose to perspective employees at their initial interview.⁴³¹

It is difficult to determine whether some of the Commission's other decisions represent a weak FTC enforcement program or a strong one. For example, in *In re General Motors Corp.*,⁴³² the Commission ordered General Motors to set up a nationwide arbitration program for automobile purchasers who had complaints about their cars' engine and transmission performances.⁴³³ Consumer groups and the state attorneys general opposed the arbitration program.⁴³⁴ Pertschuk objected to individual case-by-case arbitration in a situation such as this where a common defect was involved. He asserted, "The only rational and equitable remedy for the common injury suffered in a case like this is automatic compensation for damages, not standardless mini-trials pitting individual consumers against the largest company in the world!"⁴³⁵ He noted that the case had led to the formation of several consumer groups that organized consumers who purchased the General Motors cars involved in the proceeding and that drafted and distributed self-help arbitration manuals to the car owners.⁴³⁶ Commissioner Bailey filed a separate statement, writing that the settlement would have been more acceptable if it provided for direct redress.⁴³⁷ Despite its flaws, Bailey found that the settlement was the best that could be obtained with General Motors' consent, and at least would provide "immediate, fair, and certain means of compensating" the owners of the cars in question.⁴³⁸

429. 100 F.T.C. 500 (1982).

430. *See id.* at 500-05.

431. The FTC had a great deal of difficulty determining the appropriate remedies in this case. The FTC modified its order against the company three times within a period of eight years. *See In re Encyclopedia Britannica, Inc.*, 111 F.T.C. 1, 23-25 (1988) (Oliver, concurring in part and dissenting in part).

432. 102 F.T.C. 1741 (1983).

433. *See id.* at 1761-62.

434. *See id.* at 1743 (Pertschuk, separate statement).

435. *Id.* at 1744 (Pertschuk, separate statement).

436. *See id.*

437. *See id.* at 1745 (Bailey, separate statement). Carol Crawford, Director of the FTC Bureau of Consumer Protection, opined that it was not clear that the Commission would prevail if the case went to court. *See FTC Approves Settlement of GM Automobile Defect Case*, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1141, at 843 (Nov. 24, 1983).

438. *In re General Motors Corp.*, 102 F.T.C. at 1741, 1745 (1983) (Bailey, separate statement).

Commissioner Douglas also filed a separate statement, explaining his understanding of the circumstances under which the Commission could grant consumers direct relief.⁴³⁹ He stated that the Commission had obtained direct consumer redress only in those cases where the company agreed to it during a negotiation process.⁴⁴⁰ Douglas believed that the Commission had no power to order direct redress administratively.⁴⁴¹

From these statements it appears that at least three of the Commissioners did not regard the arbitration portion of the consent order in *General Motors* as an indication of vigorous FTC enforcement. Rather, it was the optimum resolution of the case in order to avoid many years of litigation and probable appeals.

Miller's most important litigation victory was the Commission's incorporation of its 1983 deception policy statement into FTC case law in *In re Cliffdale Associates, Inc.*⁴⁴² In the opinion, Chairman Miller claimed that the elements of the deception standard contained in the 1983 policy statement thoroughly spelled out "the factors actually used in most earlier Commission cases identifying whether or not an act or practice was deceptive, even though the language used in those cases was often couched in such terms as 'a tendency and capacity to deceive.'"⁴⁴³ Miller criticized the "tendency and capacity" test as "circular and therefore inadequate to provide guidance."⁴⁴⁴ Miller then applied the new test to the facts of *Cliffdale* and ruled that the record supported a finding of deception.⁴⁴⁵

Commissioner Pertschuk objected to Miller's adoption of the new deception standard, arguing that the new standard departed significantly from the old standard.⁴⁴⁶ Commissioner Bailey filed a separate statement, declaring, "I must disassociate myself from the confusing and wholly unorthodox reformulation of the traditional test for finding deception."⁴⁴⁷ She noted that in this case the 1983 policy statement was being

439. See *id.* at 1745 (Douglas, separate statement).

440. See *id.* at 1747.

441. See *id.* For the Commission to obtain direct consumer redress absent a negotiated settlement, the Commission would have to first file an administrative complaint. If that was successful, the Commission would have to litigate a second case in federal court and prove that General Motors "had acted dishonestly and fraudulently with respect to each component." *Id.* at 1748.

442. 103 F.T.C. 110 (1984).

443. *Id.* at 165 (citing *Sears Roebuck and Co.*, 95 F.T.C. 406 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982)).

444. *Id.* at 164.

445. See *id.* at 166. The October 14, 1983 letter to Congressman Dingell regarding the FTC's enforcement of its deception policy was attached as an appendix to this opinion. See *id.* at 174-84.

446. See *id.* at 185 (Pertschuk, concurring in part and dissenting in part).

447. *Id.* at 189 (Bailey, concurring in the result in part and dissenting in part).

pronounced "not just [as] current agency enforcement policy, but also the legal standard for future Commission deception cases."⁴⁴⁸ She argued at length that the new deception policy was a substantial departure from prior law. She claimed that although the policy statement purported to protect vulnerable groups of consumers, it was "analytically unsuited for such purposes."⁴⁴⁹

In subsequent cases, the Commission applied the deception standard from the 1983 policy statement as incorporated in the *Cliffdale* decision.⁴⁵⁰ The policy statement, however, continued to be a source of contention among the commissioners. For example, in *In re Southwest Sunsites, Inc.*,⁴⁵¹ Bailey applied the *Cliffdale* deception standard.⁴⁵² In a footnote, however, she insisted that she still did "not endorse the use of this standard."⁴⁵³ She noted that the respondent's conduct in the case before her violated both the old and the new deception standards.⁴⁵⁴

Miller's success in changing the law of deception was confirmed as federal courts began applying the *Cliffdale* standard. This was a remarkable victory because prior to the adoption of the 1983 policy statement in *Cliffdale*, no court had interpreted the deception standard as expressed in the policy statement. Moreover, the new standard was issued in the form of a letter to a congressional committee, rather than being published in draft form with an opportunity for public comment. These factors did not deter the Ninth Circuit, which found that "[t]he new standard became binding on the FTC when it was adopted in *Cliffdale Associates, Inc.*"⁴⁵⁵ The Ninth Circuit formally adopted the *Cliffdale* deception standard in the subsequent case of *Federal Trade Commission v. Pantron I Corp.*,⁴⁵⁶ without any discussion of whether this standard was a substantial departure from the old standard or any potential differences in application between the two standards.

The court in *Federal Trade Commission v. Amy Travel Service, Inc.*⁴⁵⁷ found that the new standard did not differ substantially from the old.⁴⁵⁸ It supported this conclusion by quoting from the decision in *Cliffdale*, in

448. *Id.* at 189 n.1.

449. *Id.* at 195.

450. *See, e.g., In re Thompson Medical Co.*, 104 F.T.C. 648, 818 (1984).

451. 105 F.T.C. 7 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986).

452. *See id.* at 147 n.79.

453. *Id.*

454. *See id.*

455. *Southwest Sunsites, Inc. v. Federal Trade Comm'n*, 785 F.2d 1431, 1435 n.2 (9th Cir. 1986).

456. 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1794 (1995).

457. No. 87-C 6776, 1988 U.S. Dist. LEXIS 13371 (N.D. Ill. Feb. 10, 1988).

458. *See id.* at *41.

which the majority claimed that the elements in the new standard were actually used in most earlier Commission cases, even though terms such as "tendency and capacity to deceive" were used instead of the language of the new standard.⁴⁵⁹ The court ignored the arguments made by the dissenting Commissioners in *Cliffdale*, which contended that there were very substantial differences in the meanings of the words used in the two standards.

The *Amy Travel* court's assumption that the new standard was identical to the old one conflicts with *Southwest Sunsites*.⁴⁶⁰ In *Southwest Sunsites*, the petitioners argued against application of the *Cliffdale* deception standard, contending that applying that standard violated section 5 of the Administrative Procedure Act (APA).⁴⁶¹ They noted that the APA required parties to be "timely informed of . . . the matters of fact and law asserted."⁴⁶² The petitioners also claimed that their due process rights were violated because the FTC "based its decision on a new theory of deception that was significantly different from the one litigated by the parties."⁴⁶³ The court found that "[e]ach of the three elements of the new standard challenged by petitioner impose[d] a greater burden of proof on the FTC to show a violation of Section 5."⁴⁶⁴ The court then explained how the new standard differed from the old one. In the present case, the court pointed out that "[t]he Commission reversed the ALJ's findings on a theory more narrow than, but completely subsumed in, the prior theory. All evidence relevant to the old theory was necessarily relevant to the new."⁴⁶⁵ The court, therefore, rejected the petitioners' argument that they had been subject to a different standard without opportunity to respond.

It is important to understand the basis upon which the court rejected the petitioners' claim that the FTC should not be able to apply its new standards without complying with the APA. That argument was rejected because the petitioners were not harmed by application of the new standard, which made it even harder for the FTC to prove a violation.⁴⁶⁶

459. See *id.* at *41-42.

460. See *Southwest Sunsites*, 785 F.2d at 1436.

461. See *id.* at 1435.

462. 5 U.S.C. § 554(b)(3) (1994).

463. *Southwest Sunsites*, 785 F.2d at 1435.

464. *Id.* at 1436.

465. *Id.*

466. The court's conclusion in *Southwest Sunsites* was misconstrued in subsequent cases such as *Amy Travel*, which interpreted *Southwest Sunsites* as finding that both the new and old standards were identical. *Amy Travel*, No. 87-C 6776, 1988 U.S. Dist. LEXIS 13371 (N.D. Ill. Feb. 10, 1988).

The Tenth Circuit clarified the status of the 1983 policy statement in *Amrep Corp. v. Federal Trade Commission*.⁴⁶⁷ The court ruled that because the 1983 policy statement was not the result of formal rulemaking or adjudication, it had no binding effect and was comparable to a press release.⁴⁶⁸ The case before the Commission in *Amrep* was decided after the Commission issued the 1983 policy statement, but before it adopted that statement in the *Cliffdale* case. Therefore, the *Amrep* court held that the Commission was correct in applying the old deception standard.⁴⁶⁹ The court seemed implicitly to accept *Amrep's* argument that the policy statement represented a new deception standard, but nevertheless held that the Commission was not bound by the new standard.⁴⁷⁰

VIII. EVALUATING MILLER: OBJECTIVES AND ACCOMPLISHMENTS

At his confirmation hearing and early in his chairmanship at the FTC, Miller stated several objectives that he hoped to achieve at the FTC. These objectives included providing strong leadership for the Commission, increasing the use of economic analysis in determining the Commission's activities, improving the advertising substantiation program, reducing rulemaking, and reforming the FTC's approach to adjudicating cases. In light of the previously mentioned description of FTC activities under Miller, it is possible to evaluate Miller's success in reaching those objectives.⁴⁷¹ While there were some failures, Miller was able to depart with a legacy that has influenced the FTC up to the present.

A. A Strong Leader

From the first days of his administration, Miller demonstrated that he intended to follow a strong chairman model in running the FTC.⁴⁷² His objective was to be an aggressive leader, both internally in order to direct the FTC down a new path, and externally in order to improve the Commission's relations with business and Congress. Miller exhibited strong leadership by placing persons who enthusiastically supported his objectives in top management positions, thus enabling Miller to successfully redirect the agency. As a testament to Miller's success in this area, many

467. 768 F.2d 1171 (10th Cir. 1985).

468. *See id.* at 1178.

469. *See id.*

470. *See id.*

471. This section evaluates Miller's performance by comparing his objectives with his achievements. This is different than evaluating the work of the FTC itself. The latter type of evaluation poses many difficult conceptual problems. *See generally* GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 83-84 (1991).

472. *See supra* notes 109-20 and accompanying text.

staff members who disagreed with the redirection resigned from the agency.⁴⁷³ Moreover, many of the staff that remained were isolated from the Chairman and top management.⁴⁷⁴

The reactions of the staff that Miller inherited did not prove that he was an unsuccessful internal manager. His stated goals did not include fostering a congenial working relationship between the staff and the chairman. Even if his internal management policies resulted in experienced and talented staff resigning and decreased morale and effectiveness among remaining staff, this was consistent with Miller's goal of "an overall reduction in staff activity."⁴⁷⁵

In addition to poor relations with many staff members, Miller had strained relations with two members of the Commission, namely Pertschuk and Bailey, a situation that impeded many Commission initiatives. This did not, however, reflect a failure in achieving his goals because Miller's goals did not include encouraging collegiality between commissioners and the chairman.

Another goal was to improve the Commission's relationship with business.⁴⁷⁶ Miller was successful in achieving this goal. In contrast to the period from 1969 until he took office, Miller established a non-adversarial relationship with the business community.⁴⁷⁷ He was able to improve the Commission's relations with business in several ways. He adopted policies that were more consistent with the wishes of the business community. For example, he advocated narrower definitions of deceptive practices, pushed for the closure of several regional offices, and stopped the progress of many rulemaking proceedings. In addition, instead of attempting to impose the FTC's requirements upon businesses through adjudication, he was able to reach voluntary compliance settlements with businesses. These settlements reflected a compromise between industry desires and Commission requests.⁴⁷⁸

Another stated goal was to improve relations between Congress and the Commission. Miller failed to achieve this goal. Whether Congress was controlled by Democrats or Republicans, Miller was unable to achieve legislative victories, and had a hostile relationship with congressional oversight committees during much of his tenure. This was a major failure in his leadership, given Congress's crucial role in implementing his objectives, such as codifying the definitions of unfair and deceptive, as

473. See HARRIS & MILKIS, *supra* note 2, at 199.

474. See *id.*

475. *Id.* at 199-200.

476. See *supra* note 71 and accompanying text.

477. See HARRIS & MILKIS, *supra* note 2, at 206.

478. See *supra* notes 414-18 and accompanying text.

well as the vital role that Congress played in determining the budget, direction, and fate of the FTC.

B. Increased Use of Economic Analysis in FTC Policies and Practices

The second Miller objective was to impose economic analysis, especially cost-benefit analysis, upon the Commission's activities. Miller characterized many of those who opposed cost-benefit analysis as appearing "carried away by a feverish moralism that disdained rational analysis;" he expressed concern that "[w]ithout some check, . . . regulatory decision makers may be tempted to pander to such moralism—or to other special interests."⁴⁷⁹ Miller was successful in requiring economic justification for agency activity by significantly increasing the role of the Bureau of Economics.⁴⁸⁰ Under Miller, the Bureau of Economics assigned an economist to each rulemaking proceeding and conducted a cost-benefit impact study for each rule. Not only did the injection of Miller's style of economic analysis lead to the termination and suspension of many rules, but it also halted the types of initiatives started under Pertschuk.⁴⁸¹ Furthermore, the imposition of economic analysis was another factor which led to the improvement of relations between the Commission and the business community.⁴⁸²

C. Improvement of the Advertising Substantiation Program

The third Miller objective was to significantly change the Commission's advertising substantiation program. As Miller himself admitted, the Commission's three year study of the program was unsatisfactory. Miller did not receive the support and information he requested from industry, and he disagreed with some of the substantive aspects of the FTC's revised policy statement.⁴⁸³ Clearly, he did not meet his objectives for this program.

D. Reduction in Rulemaking

Miller's fourth objective was to reduce the Commission's rulemaking activity. He was very successful in this regard, however, it is important to keep in mind certain facts. First, the extensive rulemaking agenda that Miller inherited was not the result of feverish activity on the part of the Pertschuk Commission. Rather, most of these rules were initiated in pre-

479. MILLER, *supra* note 7, at 91.

480. See HARRIS & MILKIS, *supra* note 2, at 203.

481. See *id.*

482. See *id.*

483. See *supra* notes 301-09 and accompanying text.

vious Republican administrations.⁴⁸⁴ Second, it must be noted that a few significant rules were approved during the Miller years.⁴⁸⁵ Third, despite vigorous opposition from organized professionals, Miller fought hard to insure that these professionals would remain under the jurisdiction of the FTC and subject to Commission rulemaking.⁴⁸⁶ Although this was an important victory, it conflicted with his overall objective to reduce rulemaking.

E. Adjudication Reform

A fifth Miller objective was to reform the FTC's method of adjudicating cases. Miller did not want the Commission to develop any new theories. Instead, he wanted the FTC to adopt a common law approach. In addition, he hoped that Congress would codify a new legislative definition of deception for the FTC to apply in its cases. Although Congress refused to do this, the Commission formulated and adopted a new definition of deception.⁴⁸⁷ Instead of developing novel theories to impose upon businesses, the FTC favored cooperation and compromise in its cases against businesses.⁴⁸⁸ Thus, Miller was successful in achieving his objectives regarding the FTC's approach to adjudication.

F. Miller's Legacy

In light of the above discussion, it is appropriate to consider what sort of legacy Miller's administration left to the FTC. In the area of rulemaking, Miller seems to have left a lasting imprint. Since his departure, the FTC has not engaged in new rulemaking initiatives.⁴⁸⁹ It must be remembered, however, that there had been considerable congressional pressure upon the FTC to restrain its rulemaking activities even before Miller became chairman.⁴⁹⁰ Moreover, rather than terminating most rulemaking proceedings, Miller succeeded only in stalling their progress.

484. See HARRIS & MILKIS, *supra* note 2, at 190.

485. See *supra* notes 388-98 and accompanying text (discussing the adoption of the Credit Practices Rule).

486. See HARRIS & MILKIS, *supra* note 2, at 190, 206.

487. See, e.g., *In re Thompson Med. Co.*, 104 F.T.C. 648, 818 (1984); *In re Cliffdale Assocs.*, 103 F.T.C. 110, 164-65 (1984).

488. See *supra* notes 476-78 and accompanying text.

489. The FTC has promulgated rules pursuant to specific legislative directives rather than identifying areas on its own. See, e.g., Telemarketing Sales Rule, 16 C.F.R. pt. 310 (1996) (regulating telemarketing pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act); Labeling Requirements for Alternative Fuels and Alternative Fueled Vehicles, 60 Fed. Reg. 26,926 (1995) (to be codified at 16 C.F.R. pt. 309) (establishing uniform labelling requirements pursuant to the Energy Policy Act of 1992).

490. See HARRIS & MILKIS, *supra* note 2, at 190-93.

As a result, the chairman who succeeded Miller could have aggressively pushed ahead for enactment of those rules. Although this did not occur, Miller's failure to terminate the proceedings left open that possibility.⁴⁹¹

Finally, the FTC's policy statement redefining deception has endured. Many cases have adopted the new standard without extensive discussion or criticism.⁴⁹² This lack of critical discussion is notable because several courts, despite Miller's protestations to the contrary, have recognized that the policy statement reflects, not a mere restatement of the old standard, but a "new standard,"⁴⁹³ or a "new interpretation."⁴⁹⁴ Most federal courts, however, have not yet decided whether, or to what extent, the policy statement should be adopted. Moreover, in *Federal Trade Commission v. Pantron I Corp.*, the Ninth Circuit, while adopting those portions of the policy statement which applied to the case before it, was careful to note that it was not voicing any opinion on the appropriateness of the standard regarding issues not before the court.⁴⁹⁵ In fact, the court noted Commissioner Pertschuk's disagreement with the deception policy statement in regard to those issues which were not before the court. Nevertheless, the redefinition of deception in the policy statement has had a lasting effect on both FTC adjudication and cases heard by the federal courts.

IX. POLICY IMPLICATIONS

Miller's administration of the FTC raises many important policy issues. Exploring these issues within the framework of various theories related to administrative agencies offers insight into the significance of Miller's chairmanship.

491. See *id.* at 210.

492. See, e.g., *Federal Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1794 (1995); *Kraft, Inc. v. Federal Trade Comm'n*, 970 F.2d 311, 321-24 (7th Cir. 1992); *Federal Trade Comm'n v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992); *Federal Trade Comm'n v. US Sales Corp.*, 785 F. Supp. 737, 748-49 (N.D. Ill. 1992); *Federal Trade Comm'n v. National Bus. Consultants*, 781 F. Supp. 1136, 1142 (E.D. La. 1991); *Federal Trade Comm'n v. Atlantex Assocs.*, No. 87-0045-CIV-NESBITT, 1987 U.S. Dist. LEXIS 10911, at *24-25 (S.D. Fla. Nov. 25, 1987); *Federal Trade Comm'n v. Rocky Mountain Circulation*, No. 86-F-798, 1987 U.S. Dist. LEXIS 15935, at *4 (D. Colo. Jan. 23, 1987).

493. See *Southwest Sunsites, Inc. v. Federal Trade Comm'n*, 785 F.2d 1431, 1435 n.2 (9th Cir. 1986).

494. *State ex rel. Nixon v. Telco Directory Publ'g*, 863 S.W.2d 596, 604 (Mo. 1993) (Thomas, J., concurring in result in part and concurring in part); see also *Amrep Corp. v. Federal Trade Comm'n*, 768 F.2d 1171, 1178 (10th Cir. 1985) (implicitly recognizing the deception policy statement as the new interpretation by refusing to apply it in a case which arose before the policy statement had been formally adopted in an FTC adjudication).

495. See *Pantron I*, 33 F.3d at 1095-96.

A perennial issue in the study of administrative agencies is whether agency performance would improve if an agency were converted from the commission model to a single administrator. Those who favor such a change believe that, under a single administrator, an agency would have stronger leadership, accountability, direction, and coordination.⁴⁹⁶ If Miller did not have to contend with opposition from Pertschuk and Bailey, he could have more effectively and efficiently carried out his program.⁴⁹⁷ A single administrator could implement the President's program without obstruction. In the case of the FTC, however, an unrestrained, strong and aggressive leadership by a single administrator probably would have been met by an equally strong reaction from Congress. For instance, Congress traditionally has wavered between supporting the FTC's consumer protection agenda and then, when finding that the FTC went too far, seeking to cut back on the FTC's activities.⁴⁹⁸ The commission model seems to offer some insulation from congressional attack. Because the members of the Commission represent both political parties as well as one independent, it at least has the appearance of impartiality, resulting in less political pressure.⁴⁹⁹

There is some question, moreover, whether a single administrator would carry out the policies of the President who appointed him, or his own personal agenda. Often the administration has no particular policy position on many of the issues that come before an agency.⁵⁰⁰ Miller complained that he received little direction from the President and, at times, was accountable to no one.⁵⁰¹ The commission model avoids the possibility of excesses by a single administrator who lacks strong direction from the administration that appointed him.

The commission model offers other advantages as well. If there is a single administrator, transition from one administrator to the next may be difficult, especially if the new administrator has a substantially different style and philosophy. In contrast, the commission system, with its staggered appointments, provides the potential for stability and continuity. In addition, those who have been in office for some time can develop

496. See WELBORN, *supra* note 5, at 148.

497. See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257. Professor Verkuil proposes that a commission should handle an agency's adjudicatory functions, while a single administrator should be responsible for rulemaking. See *id.* at 267. Professor Miller fears such an administrator's relative lack of accountability. See Geoffrey P. Miller, *Introduction: The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 221.

498. See HARRIS & MILKIS, *supra* note 2, at 194-95.

499. See WELBORN, *supra* note 5, at 7.

500. See *id.* at 146.

501. See *Independent Agencies*, *supra* note 400, at 502.

expertise.⁵⁰² Moreover, the quality of the agency's work presumably is improved when it is the product of several commissioners who approach problems from different perspectives.⁵⁰³ While a single administrator could operate more efficiently, the collegial decisionmaking of a bipartisan commission is structured to produce better programs that are "consensual, reflective and pluralistic . . . shared opinions rather than decisive ukases . . . more concerned with the values of fairness, acceptability and accuracy than with the single dimension of efficiency."⁵⁰⁴

Despite the theoretical advantages of the commission model over the single administrator model, the situation at the FTC during the Miller years indicates that there are significant disadvantages to the commission system when there is a bitter and hostile split between the chairman and the commissioners. One such split occurred because of the opposition of Commissioners Pertschuk and Bailey. Professor David Welborn's research finds, however, that this situation was unusual. Such conflict and confrontation between the chairman and the members of the commission does not ordinarily occur⁵⁰⁵ because the chairman and the members of a commission usually do not remain at the agency long enough to develop vested interests and a strong allegiance to certain issues, which is necessary before a member is willing to confront another commissioner.⁵⁰⁶ On the other hand, where one person is chairman for an extended period and several of the commissioners also remain at the agency for a substantial period, there is more potential for conflict to develop.⁵⁰⁷

Professor Welborn found that conflict generally does not arise even when a chairman effectuates changes in the agency unless the members of the commission perceive the changes "as diminishing their place in the agency."⁵⁰⁸ Commission members typically are not disturbed by a chairman who increases his or her role. Rather, commission members become upset when staff members are felt to be impinging upon their roles.⁵⁰⁹

Conflict between the chairman and members of the commission, therefore, is not expected and can be avoided by a spirit of collegiality. Professor Welborn found that the "[c]ollegiality requires a certain civility toward colleagues."⁵¹⁰ The chairman can promote collegiality and avoid

502. See WELBORN, *supra* note 5, at 7.

503. See *id.*

504. Verkuil, *supra* note 497, at 260-61.

505. See WELBORN, *supra* note 5, at 135.

506. See *id.* at 136.

507. See *id.*

508. *Id.* at 134.

509. See *id.*

510. *Id.* at 135.

conflict and confrontation by acknowledging that each member has a valuable contribution to make, by informing the members of what the chairman intends to do, and by allowing the members to participate in the work of the agency. Style is important: "consult and do not demean."⁵¹¹ If the chairman acts in this way, the members will trust the chairman and allow him or her "considerable discretion."⁵¹² These lessons, gleaned from studying several federal regulatory agencies, suggest that Chairman Miller could have succeeded in developing a productive working relationship with Commissioners Pertschuk and Bailey. Even if this was not possible, Professor Welborn's research suggests that the problem which arose under Miller's leadership of the FTC is not typical, and, therefore, the conflict at the FTC should not be used as an argument to abolish the commission system and replace it with a single administrator.

The nature of the working relationship among FTC commissioners in recent years provides further evidence that the antagonism which hampered the agency's operation under Miller was related to the personalities involved, rather than the commission structure. No longer do FTC opinions frequently contain dissenting opinions revealing deep ideological splits among commission members.⁵¹³ Commissioner Christine Varney

511. *Id.*

512. *Id.*

513. The consumer cases from 1986 to 1992 contain few dissenting opinions. When there is a dissent, the dissenting commissioner often concurred in a substantial portion of the majority's handling of the case, but would have gone somewhat further in providing sanctions against the respondent company. Often commissioners did not dissent, but published separate statements to express their individual perspective on an issue or to suggest an alternative approach. *See e.g., In re Sandoz Nutrition Corp.*, 115 F.T.C. 741, 759 (1992) (Owen concurring in part, dissenting in part) (questioning the efficacy of disclosures on television and radio ads); *In re National Center For Nutrition*, 115 F.T.C. 722, 736 (1992) (Azcuena, concurring) (cautioning that unlike the respondent's claims, other diet companies' claims may be valid; therefore, their ads would not be subject to the same requirements the F.T.C. had imposed upon respondent); *In re Sun Company*, 115 F.T.C. 560, 569, 571 (1992) (Owen, dissenting) (favoring a stronger remedy); *Id.* at 571 (Yao, concurring) (suggesting consumer education would be beneficial in addition to the majority's remedy); *In re CPC Int'l Inc.*, 114 F.T.C. 1, 9 (1991) (Owen, dissenting in part, concurring in part) (calling for more empirical evidence showing how consumers interpreted the respondent's ads); *In re Guild Mortgage Co.*, 113 F.T.C. 1183, 1201 (1990) (Strenio, dissenting) (favoring a stronger remedy); *In re Budget Rent A Car Corp.*, 113 F.T.C. 1109, 1114 (1990) (Azcuena, concurring) (favoring an additional disclosure requirement); *In re Jeep Eagle Corp.*, 113 F.T.C. 792, 803 (1990) (Azcuena, separate statement) (opining that there was no reason to believe a violation of law occurred); *In re Heilig-Myers Co.*, 112 F.T.C. 579, 584-85 (1989) (Strenio, dissenting) (believing majority's remedy was too lenient); *In re Silo, Inc.*, 112 F.T.C. 175, 178 (1989) (Strenio, dissenting) (demanding injunction as well as majority's civil penalty); *In re R.J. Reynolds Tobacco Co.*, 111 F.T.C. 584, 589 (1989) (Oliver, separate statement) (favoring court enforcement, not majority's order to show cause); *In re General Nutrition, Inc.*, 111 F.T.C. 387, 416 (1989) (Azcuena, dissenting) (favoring remedy which would go further in restricting respondent's conduct); *In re Removatron Int'l*

has pointed out that the FTC's current approach can be characterized as problem solving. Most decisions now are unanimous and the Commission operates in a bipartisan fashion.⁵¹⁴ When the Commission considers whether to issue regulations and the content of those regulations, they meet with industry, consumers, and state attorneys general in order to determine how best to proceed.⁵¹⁵ Varney attributes the collegial atmosphere in which commissioners work to the leadership of the present and immediate past chairmen.⁵¹⁶

Critics have charged that the regulators are often "captured" by the industry they are supposed to be regulating.⁵¹⁷ Critics of Miller could point to several factors indicating that the FTC was held captive by industry during the Miller years. For example, Miller himself said at the commencement of his administration that he wanted to halt what he perceived as the adversarial relationship between the FTC and businesses. In addition, his actions indicated a willingness to take the FTC in directions favorable to industry. Industry opposed comprehensive and widespread rulemaking; Miller also opposed such rulemaking and, as we

Corp., 111 F.T.C. 206, 312 (1988) (Azcuenaga, concurring in part, dissenting in part) (favoring substantiation by two clinical tests rather than the majority's one required test); *Id.* at 317 (Strenio, concurring in part, dissenting in part) (favoring substantiation by two clinical tests rather than the majority's one required test); *In re Encyclopedia Britannica, Inc.*, 111 F.T.C. 1, 23 (1988) (Oliver, concurring in part, dissenting in part) (favoring modification of more of original order than majority); *Id.* at 25 (Calvani, dissenting) (disagreeing with majority on modification of one paragraph of the order); *Id.* (Azcuenaga, concurring in part and dissenting in part) (favoring modifying one more paragraph than majority); *In re Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 620 (1988) (Strenio, concurring) (concurring in regard to majority's finding of unfair acts or practices; favoring not reaching issue of unfair methods of competition); *In re Ogilvy & Mather Int'l*, 110 F.T.C. 528, 538-40 (1988) (Oliver, concurring in part, dissenting in part) (objecting to treating ad agency more harshly than its client); *In re Volkswagen of Am., Inc.*, 110 F.T.C. 392, 474 (1988) (Oliver, concurring) (objecting to active government supervision of arbitration proceeding over extended period of time); *In re McCoy Industries*, 109 F.T.C. 101, 115 (1987) (Strenio, dissenting) (favoring inclusion of monetary redress as well as cease and desist order); *In re C & D Elec., Inc.*, 109 F.T.C. 72, 78 (1987) (Azcuenaga, dissenting) (opining that consent agreement was in reality an attempt by Commission to stop unlawful conduct by consumers); *In re Orkin Exterminating Co.*, 108 F.T.C. 263, 372 (1986) (Oliver, separate statement) (concurring in order, but disagreeing with its application of the unfairness standard to facts of case); *Id.* at 380-81 (Calvani & Strenio, concurring) (favoring restitution as well as majority's cease and desist order).

514. Remarks of Commissioner Christine Varney before the Consumer Financial Services Committee, Business Law Section, American Bar Association Annual Meeting, Orlando, Florida (Aug. 3, 1996) (on file with author).

515. *See id.*

516. Interview with Commissioner Christine Varney, Orlando, Florida (Aug. 3, 1996) (on file with author).

517. *See* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 102 (1978).

have seen, stopped the forward movement of most rulemaking proceedings. In addition, Miller preferred compromise and voluntary compliance in adjudicatory proceedings. Most importantly, Miller's fundamental economic philosophy was consistent with industry preference for substantial deregulation. Miller believed "that economic efficiency and a competitive marketplace were equivalent to the interests of consumers."⁵¹⁸

Richard Harris and Sidney Milkis, however, believe that it is "misleading" to regard these factors as proof that the FTC was captured by business interests.⁵¹⁹ They cite as proof Miller's strong opposition to the movement, led by the American Medical Association, to amend the FTC Act to exempt the commercial activity of professions from FTC jurisdiction.⁵²⁰ In fact, before becoming Chairman of the FTC, Miller headed the Reagan transition team which reported to the President what reforms were needed at the FTC. The transition report supported the FTC's efforts to prevent trade restraints by the professions.⁵²¹ According to the transition report, the professions acted as if they were guilds.⁵²² Miller feared that if the professions were allowed to engage in self-regulation absent Commission jurisdiction, they would engage in anti-competitive practices.⁵²³

Harris and Milkis may, however, go too far in claiming that Miller's opposition to an exemption for the professions proves that the agency was not captured by business interests. At most, it simply may prove that Miller opposed exempting certain businesses from FTC jurisdiction while retaining others under its jurisdiction. It may demonstrate that, although Miller was not captured by the particular professional associations seeking exemption, he was captured by others. Even assuming that Miller's opposition to exempting the professions means that the FTC was not "captured" by industry as that term is generally understood, and further assuming that Miller's economic philosophy rather than pressure from business motivated his actions, it is nevertheless clear that, for the most part, Miller's policies coincided with those favored by the business community. At the very least, this leads to the perception that the FTC was captured by industry. That perception likely led Congress and consumer groups to presume automatically that any FTC action during the Miller years would favor business.

518. HARRIS & MILKIS, *supra* note 2, at 188.

519. *See id.* at 206.

520. *See id.*

521. *See id.* at 206-07.

522. *See id.* at 190.

523. *See id.*

The experience of the FTC under Chairman Miller also has implications for the FTC's status as an independent agency. The threshold question which arises in considering this issue is determining from whom the FTC should be independent. It is generally understood that Congress established the FTC and similar agencies separate from executive branch agencies and cabinet departments so that they may be independent of presidential control.⁵²⁴ Miller, in contrast, believed that the agency should be restructured so that it was independent of Congress. Miller claimed that Congress dominated the independent agencies.⁵²⁵ He stated that the President "should have complete authority to direct the independent agencies,"⁵²⁶ thus affording the agency protection from "'hits' by members of Congress and the media."⁵²⁷ In addition to the independent agencies' vulnerability to Congress, Miller criticized the status of independent agencies because it seemingly omitted accountability overall.⁵²⁸ Because of these deficiencies, Miller felt that "the independence of independent agencies [was] a bad idea."⁵²⁹

The experience of the FTC under Miller provided many examples of congressional interference with Miller's attempt to run the agency. Miller's ability to carry out administration policies would have been simplified greatly had Congress not interfered so extensively. Miller's proposal that he be accountable to the President instead of to Congress, however, was unrealistic. Congress passes legislation that defines the FTC's authority, and is the only body that can appropriate money to run the agency. The FTC's history indicates that Congress would never grant the agency *carte blanche* to carry out the President's wishes using the money Congress appropriated. Although Miller believed the President should have the sole authority to direct agencies such as the FTC, he also complained that the agency did not receive much guidance from the Pres-

524. See Geoffrey P. Miller, *supra* note 497, at 217; Aulana L. Peters, *Independent Agencies: Government's Scourge or Salvation?*, 1988 DUKE L.J. 286, 290-91.

525. See *Independent Agencies*, *supra* note 400, at 504. Some in Congress have regarded the independent agencies as "'arms of Congress.'" Verkuil, *supra* note 497, at 259. For a criticism of the "arm of Congress" viewpoint, see Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 64. A study of the FTC from 1966 to 1979 found that the FTC was influenced by Congress's oversight subcommittee. See generally Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

526. *Independent Agencies*, *supra* note 400, at 505.

527. *Id.* at 503.

528. See *id.* at 502.

529. *Id.*

ident.⁵³⁰ If the FTC were truly independent of Congress and subject only to a President who provided no supervision, then the FTC would be accountable to no one—a situation which Miller deplored.⁵³¹

Another problem with Miller's proposed solution is that if the FTC were protected from congressional oversight or pressure, Congress would be able to act only in the most heavy-handed manner by either slashing the FTC's budget or enacting drastic statutory changes in the FTC's authority. Furthermore, to the extent the FTC truly might be insulated from Congress and ignored by the executive branch, the FTC would be at liberty to adopt extremist policies free from the moderating influences of the political process. There is no question that the present structure subjects the FTC to substantial pressure from Congress. Unfortunately, this greatly complicates the work of the FTC for Congress itself cannot always determine what role it wants the FTC to take.⁵³² Miller's solution, however, creates its own set of problems.

The FTC under Miller also provides a framework for considering public choice theory under which regulators are presumed to act in their self-interest.⁵³³ According to this theory, regulators also seek to create sound public policy and act in a manner not antagonistic to powerful legislators.⁵³⁴

Professor Peter Letsou applies public choice theory to the FTC's Credit Practices Rule, which was adopted in 1984. According to this theory, policymakers "sell regulation to the highest bidders."⁵³⁵ The groups who usually win regulatory "auctions" are "those with the lowest organizational costs, generally those with relatively few members, but with large per capita stakes in the outcome of the regulatory battle."⁵³⁶ Professor Letsou identifies groups that would benefit from the Credit Practices

530. *See id.* at 504. Joseph Grundfest, former member of the Securities and Exchange Commission, also noted that, as a Commissioner, almost all of the feedback he received was from Congress and very little was from the executive branch. *Id.* at 506-07.

531. *See id.* at 502.

532. *See* HARRIS & MILKIS, *supra* note 2, at 194-95.

533. *See* Letsou, *supra* note 20, at 624. This simplistic theory of human behavior has been subject to criticism. For example, if agency officials share the same behavioral characteristics as the rest of us, "we must assume an indeterminate range of preference orderings. How, then, can we predict what choices a bureaucrat will make?" ROBINSON, *supra* note 471, at 84-85. "The assumption that the dominant incentive of public officials is private gain smacks of a naive cynicism This assumption is not only a caricature; to the extent it gains currency, it threatens to undermine the norms that sustain public spirit." Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 401 (1988).

534. *See* Letsou, *supra* note 20, at 651.

535. *Id.* at 627.

536. *Id.* at 627-28.

Rule. One group is legal aid organizations, which benefit because the rule "both increase[s] the level of job satisfaction enjoyed by legal aid attorneys and help[s] legal aid organizations demonstrate the value of their services to those who provide the funding necessary to continue and expand legal aid services to the poor."⁵³⁷ The other group which would be a successful bidder at the regulatory auction are banks and other non-finance company lenders.⁵³⁸ According to Professor Letsou, the restrictions imposed by the Credit Practices Rule impact mainly consumer finance companies, which rely on remedies such as wage assignments and security interests in household goods.⁵³⁹ Other types of lenders, therefore, favor the rule because they compete with finance companies.⁵⁴⁰ In addition, the FTC itself favors the rule because it gives them "substantial administrative powers."⁵⁴¹ Another public choice advocate, William Niskanen, adds that because regulators act in a self-interested, utility maximizing manner, they favor actions which will justify increasing their budget.⁵⁴² Professor Letsou acknowledges that regulators, in addition to adopting regulations which increase their power and prestige, also desire to adopt regulations which are good public policy. Niskanen agrees, but claims regulators are unable to implement good public policy because of bureaucratic constraints.⁵⁴³

Professor Letsou argues that often regulators enact rules that actually harm consumer welfare. According to Letsou, regulators did this in enacting the Credit Practices Rule, by paying too much attention to the "losses suffered by defaulting borrowers when property from their existing endowments is seized and sold by lenders exercising coercive remedies," and undervaluing the "expectational benefits enjoyed by non-defaulting borrowers."⁵⁴⁴ In other words, the Credit Practices Rule, according to Professor Letsou, actually hurt most consumers because, by depriving finance companies of their coercive remedies, interest rates increased for all consumers. Professor Letsou also points out that the staff were strong advocates of the rule for twelve years and maintains that

537. *Id.* at 630.

538. *See id.*

539. *See id.* at 632-33.

540. *See id.* at 631. Actually, the following trade associations formally opposed the rule: the American Bankers Association, the American Retail Federation, the National Retail Merchants Association, the National Automobile Dealers Association, and the American Financial Services Association. Only the latter represented finance companies. *See Clanton Holds Swing Vote*, *supra* note 391, at 1117-18.

541. Letsou, *supra* note 20, at 637.

542. *See* ROBINSON, *supra* note 471, at 85 (summarizing WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38-39 (1971)).

543. *See id.*

544. Letsou, *supra* note 20, at 657.

FTC implementation of the Credit Practices Rule increased the authority of the agency.⁵⁴⁵

Consideration of the internal environment at the FTC when the Credit Practices Rule was adopted casts doubt on the ability of public choice theory to adequately explain events at the FTC during the Miller years. Letsou seems to assume that the FTC staff had the power to push through the rule, regardless of which chairman presided during the twelve years the rule was being formulated. Under Miller, however, the staff was stripped of its influence, and FTC rulemaking was subject to Chairman Miller's control. Moreover, Miller appointed management personnel who carried out his wishes, regardless of the staff's plans.

Professor Letsou also includes legal aid organizations as an important factor in securing enactment of the Credit Practices Rule.⁵⁴⁶ The efforts of the legal aid organizations were facilitated greatly because the FTC provided funds for some of these organizations through its Intervenor Funding program.⁵⁴⁷ What Letsou ignores, however, is that once Miller became chairman, the friendly reception which legal aid organizations had received under Pertschuk's administration ceased, and Miller proposed that Congress repeal the Intervenor Funding provision.⁵⁴⁸ In addition, Letsou's assertion that non-finance companies favored the rule is incorrect. In fact, they actively opposed the rule.⁵⁴⁹ Finally, Letsou

545. *Id.* at 655. Professor Letsou stated that:

Both sources of power and prestige appear to be important in explaining the adoption by the FTC of its Credit Practices Rule. The Credit Practices Rule clearly expanded the power and prestige of the FTC. As the agency charged with enforcing the rule, the FTC acquired expansive new powers over the consumer lending industry when the rule was adopted. Thus, it should not be surprising that the FTC staff vigorously promoted the Credit Practices Rule over a twelve year period encompassing the administrations of four presidents with very different ideological agendas—Nixon, Ford, Carter, and Reagan.

Id. (footnotes omitted); see also Richard L. Peterson, *Rewriting Consumer Contracts: Creditor's Remedies*, in *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 184, 200-03 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981) (discussing the increase in FTC regulatory authority under the Trade Regulation Rule on Creditors' Remedies).

546. See Letsou, *supra* note 20, at 631.

547. See Report of the Presiding Officer on Proposed Trade Regulation Rule: Credit Practices, 43 Fed. Reg. 47,197 (to be codified at 7 C.F.R. pt. 444).

548. See HARRIS & MILKIS, *supra* note 2, at 205. The Intervenor funding provision was repealed in 1994 P.L. 103-312. Professor Braucher has described the inferior position of legal aid organizations participating in the proceedings as "less organized and less well-financed" and that generally "the benefits of regulation often are harder to identify and quantify than the costs." Braucher, *supra* note 533, at 403. The numbers of comments submitted by creditor representatives "vastly outnumbered" those submitted by consumer representatives. *Id.*

549. See *supra* note 540.

claims that the FTC adopted the Credit Practices Rule to expand the power and prestige of the agency.⁵⁵⁰

This application of public choice theory ignores several important factors. As we have seen, Miller's fundamental approach to consumer protection was to permit the marketplace to operate free of government intervention. Miller did not want to increase the power of the FTC. The theory also fails to consider several of the factors which led to enactment of the rule. Time, political pressure, negotiation, and compromise all played roles.⁵⁵¹ The structure of the FTC as an independent agency with a bipartisan multi-member commission whose members serve for staggered terms, provided a collegial, give-and-take institutional structure which resulted in the final rule.

Even assuming regulators act primarily in their own self-interest, such behavior can vary greatly depending upon whose reward system the regulators most value. Letsou could have modified his analysis to account for the change which occurred when the Credit Practices Rule passed from the hands of activist-bent Pertschuk to deregulation-bent Miller.⁵⁵² Professor Glen Robinson finds the resulting revised model based on public choice theory unsatisfactory.

It reduces the model to the following rather unhelpful proposition: bureaucrats will seek rationally to advance their preferences in conformity with the reward system that prevails in the political environment in which they operate; the political environment normally (i.e., historically) has rewarded growth in output, but sometimes it has not.⁵⁵³

Finally, the public choice model does not account for the fact that it is difficult for officials in an agency such as the FTC to determine "the reward system that prevails in the political environment in which they operate."⁵⁵⁴ The FTC operates in an environment subject to pressure from the President, Congress, the businesses it regulates, the media, and public opinion. Taking action which results in rewards from one group often results in howls of protest from one or more of the other groups. Further,

550. See Letsou, *supra* note 20, at 655.

551. See *supra* note 391-98 and accompanying text (discussing examples of political pressure and compromise in the FTC Rulemaking process).

552. See ROBINSON, *supra* note 471, at 86 (stating that "bureaucratic retrenchment reflects a change in the external political signals that ultimately control the bureaucrat's reward structure").

553. *Id.*; see Jerry Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, in FOUNDATIONS OF ADMINISTRATIVE LAW 77, 81 (Peter H. Schuck ed., 1994) (characterizing public choice theory as "a nonstarter as a basis for constructing a good explanation of administrative process").

554. ROBINSON, *supra* note 471, at 86.

the power and influence of groups vary over time.⁵⁵⁵ Some organizations substantially change their positions on the role of the FTC. For example, Congress both criticizes the FTC for not doing enough to combat fraud, and imposes restraints when it decides the FTC is being too aggressive.⁵⁵⁶ Despite the tough stance he took at the commencement of his term, Miller apparently felt the pressure of these conflicting reward systems. Reflecting on his years at the FTC, Miller stated he would have preferred presidential protection from Congress and the media.⁵⁵⁷ These pressures may have played a role in Miller's willingness to compromise on the Credit Practices Rule.

This critique of the application of public choice theory to the FTC's Credit Practices Rule illustrates the importance of viewing law over time and within the institutional context in which it occurs. Institutions change over time and it is crucial to be aware of those changes both in terms of internal management policies, the philosophy and objectives of the leaders of the agency, and the outside pressures influencing the agency's actions. It is impossible to fully appreciate the significance of an agency's actions if one applies a theory that does not adequately consider the specific structural characteristics of the institution, and the changes over time. For a theoretical model to provide useful insights, initial assumptions should be relaxed or replaced "to permit the model to better approach the untidy reality in which the legal system operates."⁵⁵⁸

The theory of comprehensive rationality⁵⁵⁹ better reflects the approach which Miller attempted to follow. He wanted FTC policy to be based entirely on his view of rational, objective, empirically driven, cost-benefit analysis. He eschewed outside influences from Congress and the public and internal influences from career staff and commissioners with whom he did not agree. As we have seen, however, ultimately, he found that he could not lead the FTC in that manner. On at least certain issues, he was forced to adopt behavior consistent with the social constructionist theory,⁵⁶⁰ which stresses the influence of dynamic social interaction, and results in the accommodation of at least some congressional concerns.

555. The power and influence of both consumer and business groups have ebbed and flowed. *See supra* notes 36-42 and accompanying text (discussing the fluctuation of power in the consumer's movement).

556. *See supra* text accompanying notes 22-27.

557. *See supra* notes 403-04 and accompanying text (stating Chairman Miller's attitude regarding congressional pressure).

558. Woodward, *supra* note 3, at 426.

559. *See supra* notes 77-78 and accompanying text (discussing the theory of comprehensive rationality).

560. *See supra* notes 79-83 and accompanying text (discussing the social constructionist theory).

Thus, Miller's administration raised several important policy implications and provided a testing ground for various theories of administrative agency behavior. This study of the Miller FTC allows several conclusions about the FTC's structure and operation.

X. CONCLUSION

In section 5 of the FTC Act, Congress granted the FTC broad discretion to interpret and enforce the Act by purposely not defining the unfair and deceptive acts prohibited by the section. The terms "unfair" and "deceptive" are necessarily vague to grant the FTC the flexibility needed to proscribe the ever-changing types of schemes devised by clever and inventive con artists. This study documents Miller's failures and achievements as he took advantage of that discretion to alter the direction of the FTC's consumer protection program. Because his victories have endured, an understanding of them is necessary to fully appreciate the FTC's current activities.

In addition, Miller's term as Chairman of the FTC raises fundamental questions about the structure and operation of the agency because he directly challenged both these elements. He wanted the FTC to be independent of Congress and converted into a department of the executive branch. By taking actions which conflicted with commission members, he sought to run the FTC as if he were a single administrator despite its existing structure. He changed the standard governing enforcement policy and stalled the FTC's rulemaking activities.

Given the FTC's need for broad discretion to prohibit acts and practices, the definition of which must be left vague in order to respond effectively to consumers' need for protection, the FTC's present structure is suitable to its mission. Changing the FTC from a commission to a single administrator, or from an independent agency to one within the executive branch, would create a host of problems.⁵⁶¹ Foremost, such changes would allow the agency head to exert too much unilateral power over the direction of the agency. A "conservative" head could force the agency to grind to a halt, forsaking its congressionally mandated mission. Congress could respond by enacting legislation to counter this problem, but such statutory change requires a great deal of time and resources, and probably could not be accomplished until after that person resigned. An "activist" head could subject industry to new comprehensive restrictions far beyond anything justified by abuses discovered in the marketplace. Industry would certainly appeal to the courts and Congress for relief, but

561. See *supra* notes 496-507, 524-29 and accompanying text.

the agency's structure should not be susceptible to allowing its head to act beyond his or her authority. As this study demonstrates, even within the present structure, the chairman can be enormously influential. Because of the broad discretion given the FTC, this power should be subject to the constraints inherent in the independent agency and commission structure.

In one area, however, legislative reform is warranted. Under Miller, the FTC significantly changed the standards by which deceptive practices are judged. This change was implemented despite Congress's rejection of Miller's request for comparable congressional revisions to the FTC Act. The change was applied to cases absent any opportunity for the public, including state officials, to formally respond prior to its issuance. The FTC's unilateral action was in sharp contrast to its struggle to devise better standards for advertisement substantiation, in which Miller acknowledged the critical need for comment.⁵⁶² The manner in which the FTC imposed its new deception policy precluded the agency from being responsive to the public.⁵⁶³ It prevented the state attorneys general and the public from presenting their views, thus alienating those with whom the FTC should be cooperating and coordinating activities. Furthermore, the new deception policy exacerbated divisions within the Commission. It deprived the FTC of detailed technical market and legal analyses, as well as independent empirical data which might have resulted in a revised enforcement policy satisfactory to all parties.⁵⁶⁴

The FTC Act should be amended to require the agency to provide notice and an opportunity for comment prior to adopting substantive changes in policy relating to the definition and enforcement of its authority to protect consumers under section 5 of the Act. This amendment may not always achieve its objective. If such an amendment had been in effect during Miller's chairmanship, he would have claimed his deception policy was not a substantive change, but merely a restatement and clarification of current law. The adoption of this amendment, however, would

562. See *supra* note 188 and accompanying text (noting Chairman Miller's support for public comment on the ad substantiation program).

563. See *supra* notes 215-17 and accompanying text. The Ninth Circuit has ruled that the FTC exceeded its authority when it changed an existing law that had widespread application through adjudication rather than through rulemaking. *Ford Motor Co. v. Federal Trade Comm'n*, 673 F.2d 1008, 1010 (9th Cir. 1981). The Senate Report on the FTC Act Amendments of 1994 rebuked the Ninth Circuit, stating that the *Ford* decision was "plainly incorrect." S. Rep. No. 103-130, at 10 (1994), reprinted in 1995 U.S.C.C.A.N. 1776, 1785. Regardless of whether the FTC has the power to change laws with widespread application through adjudication, a policy issue arises as to whether the FTC should change such laws through adjudication instead of rulemaking.

564. See *supra* notes 271-75 and accompanying text (describing the advantages of better rulemaking through public notice and comment).

have given objectors grounds upon which to appeal to the courts to compel notice and comment. This statutory change would help to ensure that the FTC is responsive to the public without unduly interfering with its policy making process.

