

**ORAL HISTORY OF
JOAN Z. BERNSTEIN - FOURTH INTERVIEW
FEBRUARY 11, 1999**

Professor Jackson: Today is February 11, 1999, and I am conducting the fourth interview in the oral history of Jodie Bernstein, who is clearly much more on top of when and where we are than I am this morning. Let me confirm on the record, since I didn't write a transmittal letter, that I've given you the rough draft transcript of our third session and thank you for returning the transcripts of the first two sessions to us with your edits for final production, and that's in process.

Jodie, what I would like to do now is return to something we were talking about at the very end of our last session. We had leapfrogged from your period at the FTC in the '70s up to your current tenure at the FTC, and you were describing what I have come to think of as the de-encrustation process that you and Bob may have started just before you came, if I understood the sequence, but that you and Bob Pitofsky had worked at simplifying the procedures as I understand it for rule-making or rule amending, and maybe you could just clarify that.

Ms. Bernstein: On that point, the commission under Janet Steiger's leadership had undertaken a reform program that was to, over an extended period of time, review the existing rules and guides that the agency had adopted over its many years for purposes of evaluating whether they were still necessary, whether they should be streamlined, whatever. And so the agency, it was in '94, I believe, that they only started that, and we arrived in '95. So it had been set up as a ten-year program that would review x-number of rules over x-period of time and as Bob and I were looking at all portions of the bureau and deciding which things we wanted to try to evaluate ourselves for purposes of whether they were on track. Reform has been an

initiative of his and of mine and always making government relevant all the time, and so we undertook to review what had been put in place. And in fact, I think we started to take a look at it even before I had gotten here, but it was only about a month before. And what we found was interesting to me because the law is that if you are evaluating a Magnuson-Moss rule, you need to go through the same procedures as you went through to adopt a rule. And the procedural requirements are onerous.

Professor Jackson: Is that requirement, let me make sure I understand it, under Magnuson-Moss if you want to amend a rule that was initially adopted, amend or repeal a rule initially adopted pursuant to Magnuson-Moss, the procedures required are identical.

Ms. Bernstein: Correct.

Professor Jackson: Okay, and is that a matter of statutory law or regular or internal rule?

Ms. Bernstein: It's partly by court decision, not for this agency but others and it was partly by, it seemed to me, and this is the way it turned out, that the agency had been over-rigorous in imposing on the real process requirements that (a) didn't need to be there in the first place for Magnuson-Moss and (b) didn't make a cut at trying to look at what had the agency imposed that could be eliminated in the repeal process. So Bob, the chairman, and I had a long session with the people who were in charge, in fact the acting director of the bureau and the chief person in charge of it. When we asked why can't it go faster, why can't you do more, why can't we really accelerate this review process, they said, the answer was no, no, it just can't be done because of all these other things and because of— it just can't be done! And for me it was not unusual. I have encountered resistance to change in many, many places, so I was not at all surprised. But the chairman said to me with some frustration, “This is, what are we going to do

about this?” And I said, “Just remain calm because I've led efforts like this in the past and I can do it again.” And then I got a group together, a different group, and asked them to review requirements and tell me which ones were imposed by the agency and which ones could be eliminated. And also, one of the so-called onerous requirements of Magnuson-Moss is the right to cross examination where there are disputed issues of material fact, and in my judgment, the agency got so scared that they literally never engaged in Magnuson-Moss rulemaking. I noted maybe there weren't any disputed issues of material fact, maybe there was only one, and so you cross examine for two days.

Professor Jackson: Is there a procedure in these kinds of proceedings for something analogous to summary judgment, so that you take care of sorting out?

Ms. Bernstein: Yes, certainly. We make up the procedures, so I won't go into all the details, but I think it did send a very strong signal to the bureau that this was going to be an era of change, and if they welcomed it, it was really going to streamline the way they did their work and increase the level of productivity of the whole Bureau.

Professor Jackson: Has this effort at reforming the rules to facilitate the agency's active enforcement of its various jurisdictions, has that been reflected in any kind of re-organization of the divisions or structure of how the agency does its work?

Ms. Bernstein: No, not that part. But accelerating the review process has produced a statistic that has been extremely valuable, publicly and on the Hill and indeed with the administration, because Vice President Gore has had a reform program as well. We eliminated half the rules and guides already.

Professor Jackson: Half?

Ms. Bernstein: Yes. Some of them were just absurd and had been there since the

'40s. Those were easy ones.

Professor Jackson: Do you have any pictorial ways of expressing that in terms of number of inches of regulations?

Ms. Bernstein: I think we do, I don't know where, but I'm pretty sure we do. And the other thing that goes along in tandem with this, there had been discussion within the agency of criticisms of the fact that FTC orders were in perpetuity. That always had been the case, and there had been criticisms of that and also complaints that it imposed burdens on companies that they shouldn't have to follow any more: the older provisions were anachronisms; they were different companies; they were out of the same business; and so forth and so on. And the only way you could get rid of an old order was to petition the commission and assert either a change in law or a change in fact of sufficient importance to get the commission to repeal the order, or terminate the order, or modify it. It was a very onerous process. The staff would almost always conclude they don't meet the test, leave it in place, because they didn't want to deal with it. It isn't anything you want to encourage because it's so boring to have to go through old orders.

Professor Jackson: Has that aspect of the agency rules been changed or is that still in effect? The rule that orders once issued last in perpetuity.

Ms. Bernstein: No, here's what we did. The chairman asked me to address it. And I found that it had already been sort of staffed in a way because there had been a commissioner or two who had asked about whether or not we shouldn't adopt a sunset policy, and the Bureau of Competition was looking at it, too. There was more and more pressure on the Bureau of Competition for its orders than here. I found that there was, even in the face of a commission saying it wanted a recommendation which it had on this subject, enough resistance so that no recommendation had come forward. Hence the commission couldn't act. There was

great ambivalence in the staff about this issue, and so it really did require my making it a priority. We recommended to the commission a sunset policy which has resulted in commission orders terminating after 20 years unless there has been an enforcement proceeding on the order which then extends it. And all the old orders that were older than 20 years got abolished. So we abolished about 10,000 old orders.

Professor Jackson: This is really quite considerable. So you must be really a model agency for government reform.

Ms. Bernstein: I've had people when I'm speaking— lawyers and particularly of ad agencies – who stood up and thanked me from the bottom of their heart because they used to have to keep an inventory of huge numbers of old orders, for various products and so forth, that really were meaningless, but it meant that you always had to be checking to see that there was no problem with a particular order with a particular product. He said it was just busy work and paperwork and costly staff time and so forth. I was very impressed with that. That had really lifted a burden.

Professor Jackson: And without doing any apparent harm to consumer interest since these were old and not being enforced and not really that relevant.

Ms. Bernstein: And it was a burden on staff as well in a way because you always had to, even if an order was 30-40 years old, if somebody complained about it, you had to schlepp it out and see and so forth.

Professor Jackson: One of the things this is making me think about is the debate I've heard, I don't have a focused question for you on this but debate about the degree to which in the U.S. compared with countries like the U.K. when the administration changes, when there is a new president, how deeply into the agency the change in personnel goes. And I've heard some

people say it goes too deep, that it would be better to have the civil service staffing go higher up into the agency, in the U.S., and I think what you've just described the staff resistance to salutory change suggests that that may not be right. I wonder if you had any thoughts on that.

Ms. Bernstein: Oh, I do, I do. I was thinking about that just the other day. A group asked me to talk about my early career, and the women always want to know what was it like. It's impossible to tell them because it's really impossible to convey that it was such a totally different environment that your reaction to responses are totally different. Anyhow, I was thinking about one of the things I said to them was that I had always been interested in public service, and I probably told you too, in state government. And I may have already told you this, but this was the reason I was thinking about the issue of career v. political appointment. I had an offer from the Illinois Commerce Commission which I really wanted to take when I was there, you know after I had gotten married and was in Chicago looking for work, and I had an offer and it was staff lawyer, but it was a good commission. It did basically SEC-type and so forth and other kinds of business opportunities and things, and it was a well staffed organization. As I went down there to sort of finalize that, the person who offered me the job who was pretty high up, like division enforcement or the GC, I don't know which, said to me, "You know there's going to be an election in six months and if the election goes to the other party everybody will be fired here." I said, "In the whole place?" And he said, "Yes, the whole state government turns over. It turns over, the entire state." And I said, "Well it doesn't make a lot of sense," and he said, "No, it really doesn't because you'll be on the street." And I just accepted that because that's pretty much the way the world was. It was not in the federal government, but I didn't know a lot about the federal government then. And there weren't a lot of agencies. There was the SEC and the ICC and the CAB and FDA, but there were not the kind of things that there are now.

FTC was there but it was kind of moribund I think. And over the years, I think even since I was here in the '70s, there are fewer and fewer political positions throughout the federal government. That's my impression. This job has always been a political appointment. I think with the SES coming in about 1980, it really got, no in 1978 it was implemented, that really had a significant effect. Jobs that had previously been political now became career SES positions, and the theory of that was that the SES was supposed to make it easier to hire and fire and move people around in those managerial positions so that it didn't need to be a political position, so you could move people and get other people into them. That's not the case, of course.

Professor Jackson: So your perception of the effect of the SES change is that it has diminished the capacity of new administrations to appoint politically without providing the flexibility to change people at those levels. So do you think on balance it's not been a good thing?

Ms. Bernstein: Do you mean SES or the civil service reform, the whole thing? Well, I won't speak to the whole thing because I think there have been good things. I think it's like the law of unintended consequences. I don't think it achieved what it was supposed to achieve, and just recently there have been critiques of it. And even Janice Lachance at OPM said that one of the things that was very critically important was to have professional managers who could move from agency to agency and take on these tasks. That simply hasn't happened at all. And in fact it's difficult even to get into the SES if you haven't been in an agency, or at least that's been my impression. It's hard. It's very hard.

Professor Jackson: That's interesting.

Ms. Bernstein: Now mind you, at the FTC it's so small that it's not nearly as much of a problem as I encountered in larger agencies or departments. Because you can't have

hidden pockets here of people who are doing their own thing.

Professor Jackson: You find out about it.

Ms. Bernstein: You find out about it fast.

Professor Jackson: Well speaking of other agencies, maybe what we should do now is to say we're going to return obviously in the course of our interviews to this more current period, but maybe we should go back now to the '70s and talk about your move from this agency to, if I have your career correctly in mind, would it be EPA.

Ms. Bernstein: Yeah, but not directly. Not directly.

Professor Jackson: Okay, maybe you can help me out, I probably have missed some pieces.

Ms. Bernstein: Well, I'm mixed up about the '50s I know, but I'm not mixed up about the '70s. I left here; it was after Bob Pitofsky left. I was acting director of this bureau for several months. This was in the Nixon years that we had a new chairman, Lou Engman, and he appointed me acting director, and it took him 10 months to bring in a director. I fully expected him to do that— I was not a political person; I was a career person. But it took a long time, and I had to struggle here being acting. And then when Tom Rush was appointed, Lou appointed me deputy director of this bureau, and I did that for a year or so. I guess for two years because I did it the whole time Tom Rush was here, and when Tom Rush left, I was again acting director. And at that point I was thinking to myself, there's really no place else as much as I love as here. And I did, I just loved it. Where am I going to go here? This is really the end of the line here. There's no place else to go, and I can't stay as a director because there's going to be a new chairman, and I could go back to being the deputy, which people have done subsequently. I didn't think that was quite fair to people if there were going to be new people coming that they should have these

two positions themselves, and I thought well (and I think this is really interesting), I guess I better think about going to the outside at some point. Alan Ward, who had been the director of the Bureau of Competition, then on his own, talked to me about joining him at Baker, Hostetler, a Cleveland firm with an office here, and I thought, well, I'll give it a try. And I have this vivid recollection, Vicki, of going down to talk to Elizabeth Dole, who was still on the commission then and telling her where I was going, and she said, "Why are you going? You love government service— you're terrific at it," blah, blah, blah. I said, "You know, —" I went through this litany of well where am I going to go and so forth. And she said, "Did you ever think about going to another agency?" And I said, "No, I never thought about it." And for a person who prides herself on being in the know, subsequently I thought what a dumb thing, I never even explored it. I never even did. It turned out fine.

Professor Jackson: You went to Baker, Hostetler, was this in like '75?

Ms. Bernstein: '75. There was going to be an election in '76, so I had an additional reason, maybe give me some different options. So I was working away at Baker, Hostetler. This is the kind of interesting part here, and I couldn't do any FTC stuff because, of course, I had worked on everything and I knew everything that was going on, and I was being extremely careful, and of course the law firm was being extremely careful. They had a lot of FTC business. I couldn't do anything on it. Alan kept saying to me, stay calm, there will be other things you can do, and I'm frantically thinking "Well what am I going to do here?" One of Alan's clients indicated there was a possibility of legislation that they really wanted a little help on. They had been working on it. It was what became the Toxic Substance Control Act, and so I welcomed the opportunity. I sat down and read up on everything, and the client was Proctor and Gamble, and they didn't have a big interest in it, but they had some interest in it. And

Proctor and Gamble is a good client. They want you to get really steeped in it and give them sensible advice and so forth. And then some other client of Alan's also wanted to know, so pretty soon I was holding myself out as an expert on this new law, which by that time had passed. And I thought well why not? Nobody else knows anything about this either and the traditional environmental people, which I didn't know anything about at the time, didn't understand this law. This was a very different kind of law than all the others – I mean I didn't know that at the time, but that happened to be the case. And I did understand it. It was much more like the kind of issues that we had dealt with at the FTC, not like the Clean Air Act, which is a very different kind of statute as you undoubtedly know. I got very comfortable with TSCA. I was busy telling them well, how will it be implemented? They'll be making things up. And then in the meantime I began to acquaint myself with EPA and how it was structured and where this might be. And indeed the statute established a position, assistant administrator for toxic substances, that was a presidential level appointment at EPA. So I got plenty busy there at Baker, Hostetler, and in the meantime I could do some advertising counseling that didn't involve being in here and doing that, and I did some of that. And I love and adore Alan Ward to this day. I do. We had some excellent anti-trust people– Phil Progar and Louie Sernoff had been at the FTC. We had a very congenial group. It was the worst managed firm at the time that I had ever seen, but since then I've concluded that they are all badly managed. Now that's on the basis of two. I suppose that Skadden, Arps and Cravath and those places are well-managed, I don't know, but I don't think you can really manage an organization like that with individual partners who have fiefdoms, so that's just my own bias about the structure of those organizations. But the bad management didn't really bother us because we pretty much did our own thing here in Washington, and we would have to schlepp to Cleveland only once in a while.

Professor Jackson: How big was the Washington office the time?

Ms. Bernstein: About 40 I think. It's much bigger now.

Professor Jackson: Were there other women in the office at the time?

Ms. Bernstein: I don't remember whether Betty Murphy came at the same time that I was there or not, but there were like two associates who were women. Betty Murphy had been on the National Labor Relations Board, and I can't remember when she came exactly. There were none in Cleveland at the time. And there had been some big scandal between a principal partner and an associate that I'm sure resulted in the associate leaving, and you know the typical kind of stuff going on. It had been a bad experience for the firm. Being a woman was not much of a problem. It was Washington, and I was already fairly well known. And the clients didn't seem to have a big problem, at least in regard to the stuff I was doing. I don't know why, but it just didn't seem to be much of a problem.

Professor Jackson: Your gender.

Ms. Bernstein: Right.

Professor Jackson: So you're at Baker, Hostetler for not very long, if my research is right. A year or so.

Ms. Bernstein: That's correct. Came the '76 election and here is what occurred. I already was thinking how can I get involved in this and thinking about Carter, especially after he was nominated, and I made some efforts with people I know that weren't very high level or anything, but contributed some money. And the whole law firm, by the way, was very heavily Republican, or was at the time. Anyhow, this is quite vivid in my mind. In about August before the election (I recall this vividly), I was sitting outside (I had a swimming pool out there in Chevy Chase), and it was on a Saturday and I was sitting outside, and my husband said, "There's

a telephone call for you.” And he said, “It's somebody from the transition group.” I said, “What transition group?” and he said, “I don't know – they're calling from Atlanta.” So I said, “Oh, okay.” It was one of those principal guys of Carter's, Jack something, Jack Watson, who Carter had put in charge. That was one of the first times that they started working before the election, and it's now standard, but it wasn't then. It was Jack Watson, and he had said they had been talking to people, and you are one of the people who said you wanted to be involved, and we know your background. I believe that was before the Carter people also set up a data base of possible women to serve in the government. I forgot what they called that. They had a whole list of women, it was supposed to be a data base, and I don't know exactly when they got operational, but I sent them a resume and then I sent them another one and another one because, if you know anything about the Carter administration, it was already totally disorganized. I said to Pat Wald, “How many have you sent?” and she said, “I quit sending after they called about five times.” I don't know when that occurred, but my name was in the data base. Jack Watson said, “How about your working on a transition paper for the FTC, what should be done with it, you know the usual kind of thing, and, we haven't called him yet, with this fellow Bob Pitofsky— he's interested too.” I said that would be great because we worked together and so we did. We wrote up this, he did most of the anti-trust, and I did the consumer side. And one other assignment we were supposed to have, Vicki, was who would we recommend for the chairmanship. So I asked, “What should we say?” He said, “I'll nominate you and you nominate me and then one of us can be the chairman and one can be the other commissioner.” I said, “Oh that's great, I'll be happy to be the other commissioner. I don't care. You can be the chairman.” My husband was quite aggravated with me. I remember he said, “Why should you give up the chairmanship like that?” I said, “Look this is my life, my career, this is the way I would like to

do it. Okay?” So that's what we did. And it's funny what things stand out so vividly. He probably doesn't remember a bit of this. The paper was due on Yom Kippur, and I had said to Pitofsky, “We need to get together and merge these two papers” and stuff. He said, “Yes,” and I said, “Well it's due on Yom Kippur so probably nobody will get their paper in.” He said, “I think you and I ought to, we always get our papers in.” I said, “It's okay with me. We'll have our paper in. I'll go down to the office.” He said, “On Yom Kippur?” And I said, “Well, let's do it the day before— we don't want to be punished by God for working on Yom Kippur.” He said, “That's right.” So we turned in our paper. And that was it. Then I did some other stuff as best I could and generally talked with people. And then came the election, and of course it was a success. So then I'm finally believing that when this all comes about, this is how naive I was, Bob will be nominated to be chairman and I'll be nominated for the other spot. And that would be great. I would love to come back here. Did that happen? No. It did not happen. Because – I knew Mike Perchuk because he was on the Hill working for Magnuson, he was Magnuson. He was a very, very powerful person. Bob had told him what we were going to put in the transition paper, and Mike said fine, fine, that's great, implying his support. I've never quite forgiven him for this. But I should because it was my naivete and not his duplicitousness that resulted and besides which I ended up in the better place because Mike became the chairman and Bob was the other commissioner. Hence here I was, see, thinking well what should I do now? And then the data base people kicked in, and I began to get calls about what else would you like to do. I don't know – what have you got in mind? And the first thing they suggested – it was a couple of women doing it, “How about general counsel for the Department of Defense?” I said, “You've got to be kidding – I don't even know the way over there.” “You're qualified, you're an experienced lawyer. It's Harold Brown and the President.” Now this is something that I have

always felt strongly about President Carter. While he let his individual cabinet members and agency heads pretty much have their pick at who they wanted to put in place, which not every President does, in fact it was a mistake to do it that way, probably, I think he'd say so, but "one of the people you appoint must be a woman." And I think he said the same for minority, but I can't swear to that, I don't know that for a fact, but I know that he said, "One has to be a woman. I'm not telling you which one, but go find a qualified woman for one of these jobs." Not all of them took it seriously at first, but Harold Brown did, so this was a great episode in my life, Vicki. So they said go over there and be interviewed anyway. I said okay. I called my husband. I said, "Listen, this is what's happening – [he's out at the NIH] would you go home and get my black suit? I'm not even dressed to go for an interview, and come down [I was going in the evening for the interview]. Come down and you'll run me over there and wait for me. I don't even know how to get there. And promise you won't tell anybody." He said, "Oh, okay." And so he went home and got the black suit and in the meantime he tells his friend, his best friend who was working with him out there, and the friend calls to say, "Wow this is terrific, I understand you're being interviewed to be general counsel of the Department of the Army." I said, "Who told you that?" He said, "Lionel told me that." I said, "No, the whole Defense Department." "Oh, I guess Lionel doesn't think you can do that big job." I said, "Let's just say he must have gotten confused." Well the whole thing was just hysterical because I had said to Lionel "now stay in the car, I don't want anybody to know I couldn't get here by myself." He said, "I don't want to sit in the car. Can't I sit in the lobby or something?" "Come in with me." So we came in, and he was just going to sit down and read a book. And some full colonel comes down to get me, of course, because it's for the Secretary of Defense. It turns out I was interviewed by the deputy Secretary of Defense. The Colonel said, "Ms. Bernstein, yes, I'm

Colonel _____,” and I said, “This is my husband, Dr. Bernstein, and he's just waiting here for me.” “Oh, no, Dr. Bernstein will want to come up, too.” At which point we're going up there as a couple. I was so aggravated. It was just awful. The interview was terrible. And I knew he was not offering me the job although I guess I was down to the last three or something like that. I knew that was just not going to happen. And it would have been the wrong thing. Just would have been the wrong thing for me. I do have sort of a self-preservation instinct, Vicki, I think. Sometimes it serves me very well, not taking on things that I really don't feel that I have the qualifications to do. Or the experience – I think experience counts a lot. Okay so I start over again. And I go back to my now new found expertise in environmental, and I say, “Listen girls,” because they said to me, “What else?” And they were great. I said, “There's this assistant administrator for toxic substances at EPA. I have been working on that; I'm fully qualified.” They said, “Oh great, because Costle hasn't appointed a single woman.” He's got all his old buddies in these jobs, the air and the water, and policy, and they are all guys either been in the environmental movement or been on the Hill or they worked with him in Connecticut, and he's got to have a woman. They called back. No, Costle wants, he does want a woman, he wants a Ph.D. in toxicology who preferably is a minority. I said, “With one ear, perhaps?” They laughed. “He won't do that. But listen,” they said. “He doesn't have a general counsel yet.” I said, “Ah, that's a job I know I can do. I know how to do that.” So they lined me up to go up there, and in the meantime, which I found out subsequently, Costle's people did a whole review of me and who knew me and so forth. And he had a couple of candidates, one of whom I got to know, subsequently, who Costle had virtually promised him the job of general counsel, and he had to call him up and say, “I'm down to the point where the President won't approve this and so I have to look for a woman,” because the guy told me afterwards that I took away his job. He

was very nice about it. I had one interview with Costle, and I liked him enormously. He offered me the job on the spot and I accepted it. And it was really terrific, it was just the right one for me. The deputy administrator was a woman named Barbara Blum, who came from Atlanta, had been an active environmentalist and a big supporter of Jimmy Carter for many years. She was really the political person, and I liked both of them enormously, and not everybody was able to work with both of them because they were really not so simpatico. He had to take Barbara. Barbara would not have been his choice. Barbara, on the other hand, felt as if she should have been the administrator, and she certainly was qualified. So between them it was not the happiest in the world, but I somehow got along with both of them, and I think served both of them well.

Professor Jackson: Are there particular problems or initiatives that stand out in your mind?

Ms. Bernstein: At EPA?

Professor Jackson: Yes.

Ms. Bernstein: Yes, there are a couple. When I arrived there, which was sometime in '77, I can't remember exactly when, Vicki, the whole top of the agency was focused on the amendments to the Clean Air Act. The first Clean Air Act had passed in 1970, I believe, and here were a set of very, very controversial, very contentious amendments.

Professor Jackson: Were these the amendments that included the lead levels or no?

Ms. Bernstein: No, that was later. I can't tell you what all was in it. It was a huge step, to me it was like a huge – it was almost 70 pages, 80 pages long. I remember thinking this is ridiculous to have a statute like this, it's ridiculous. Dave Hawkins, who had headed whatever the principal air environmental group – and he still does, is a brilliant wonderful advocate for the air. Dave was already assistant administrator for air. Bill Drayton, who was

also a superb environmental figure, got to be a very close friend of mine. Very close, still is. I love Bill. He's impossible to work for. But if you don't have to work for him he's a – . I mean these people were of incredible ability really, others as well, but because of the focus on air, there were people who stand out early. And so the act was adopted, and we began to try to figure out how to implement it, and my contribution in terms of management was, I thought to myself, –. There were all kinds of funny stories about the fact that there was already a general counsel there, and nobody had bothered to tell him he wasn't general counsel anymore. So I had the pleasure of telling him. I mean talk about resistance. It was really just a mess.

Professor Jackson: Did he stay in the agency?

Ms. Bernstein: He did for a little while. So I had all that to deal with.

Professor Jackson: In terms of the management of the Clean Air Act –

Ms. Bernstein: Here's what I did first. I decided that I needed to figure out how I was going to spend my time because there was so much stuff there, so much litigation and so much everything that I better figure out where I was going to be, and of course I knew. And other people said your main job is to see to it that the administrator asks for your advice on really important matters other than legal matters, judgment, political advice, just plain policy judgments. And so I began to figure that out. Now I remember going out to lunch with Peter Hutt, Peter Barton Hutt, who had been a very successful general counsel at Food and Drug previously. He was there for quite a long time. He really became Food and Drug. He was so powerful. The commissioner was hardly visible. And he was a friend, a colleague, he was back at Covington, and I had known Peter, and so as I usually do, I had lunch with previous general counsel who had been at the agency. [End of side one tape.] And here's what he said: “You can't do both litigation and regulation and the most important policy judgments. Most important

ones, not that they are not made in litigation, are in regulation. You've got to inject yourself and your people into the regulatory process at EPA. That's where the big judgments are made, and you need to pay attention to what the process is because many, many decisions can get made at the bottom of the agency so that the top of the agency really doesn't have any choice by the time the thing gets up there.” And the agency is heavily a regulatory agency, which I had not really encountered before. I had rule-making experience but not like that. And so I said, “Okay, I'm going to recruit a principal deputy, who is going to be responsible for litigation except where he thinks I need to be involved – somebody I know and trust and so forth – and I'll principally work on high-level regulatory policy issues. That's where I'll do my stuff.” I was fortunate enough that Dave Bickart, who had worked here at the FTC for several years –

Professor Jackson: Is that Toni Bickart's husband?

Ms. Bernstein: Yes it is. Who had come here, he had been a student of Bob's at NYU, then he had been a Supreme Court clerk. He's absolutely brilliant, and wonderful, and he had been a Kramer fellow and was out at the University of Chicago and was just coming back to Washington, and I knew both him and Toni, and they were already friends. And I like to tell people that Al Kramer, who was then in this job and was Mike Perchuk's bureau director, was so stupid that he couldn't figure out what to do with David and was sort of saying well maybe we'll do this, maybe we'll do that. I suppose Al Kramer would deny it, but I won't. I said to David, “Don't fool with Al Kramer, come over here, be the deputy general counsel.” And by the way, I had already in my interview with Doug said, “I would like you to give me the authority, before I even take the job, to bring in one person, my person.” And he said, “Done.” So I had the authority to do that. And I talked Dave into – I didn't talk him into it, Dave considered it, came over and it was fabulous. Mind you, all the people who had been there since 1970 in the general

counsel's office – bright young able lawyers came in '70. They were all environmentalists; they were all. They couldn't possibly imagine – they thought they could tolerate me because they considered me sort of political, and they knew they were going to have to have somebody sort of political, but to have a deputy who was not an environmental lawyer, did not come out of the agency – Jimmy Rogers came to me, “This is just not going to work.” Jimmy Rogers is now at Wilmer Cutler and is a distinguished environmental lawyer, but then he was in the water program. He said, “Jodie, you can't imagine – this will be a terrible blow to morale.” I said, “Well they'll just have to get over it because they are going to find out that David Bickart will contribute so much to the legal analysis, rigorous legal analysis, that these guys won't know what hit them. He's a lawyer's lawyer, and you guys are going to be lucky to get David Bickart here.” And of course it turned out like that because he did a fabulous job. In the meantime that meant that I could be involved in the very highest level of consideration. Bill Drayton, who was then Assistant Administrator for Policy and Administration, had a huge responsibility at the agency and is one of the most innovative intellects known to man. He was supposed to be doing management reform at the agency and whipping it around, the kind of thing that I have done here. The first thing he did was set up this senior management group. That was all of the assistant administrators but not me because I wasn't an assistant administrator. And they had a Tuesday morning breakfast, just them, no staff, principals only, to really work together, which was a very powerful group. And then afterwards he or somebody else would call up and say to me, “If we were going to do this or this, what would you think of it?” I would respond. Soon it appeared to Bill particularly, and others as well, that the Administrator was looking to me to second guess these guys on their views because I was still independent of them, and I could stop them because I could say, “You can't do that, the statute won't permit it.” And they would be

stuck. Not that I would do that on purpose, but one day the phone rang, and Bill said, “We would like to invite you to come to the Tuesday morning breakfast all the time as a regular member.” So I said, “What? You're letting the ladder down from the tree house, boys?” He still remembers that. And he said, “Yes.” I became a member of this very powerful group which was extremely powerful, and in fact we got an awful lot done. We revised the process, the regulatory process, so that every part of the agency had a role to play. Now it ended up being a pretty cumbersome one. It was called the Red Border Process. The regulatory development papers had a red border around them, hence the name. The concept was terrific. When the water division was going to propose a regulation under the Clean Water Act, they couldn't do it all themselves and go straight to the administrator. They had to go through a process where working groups met across these lines. We were recognizing that actions under the one act may have implications for other media. When I first got over there and they talked about the media, over here the media was ABC, NBC, and newspapers. Over there it's air, water, and so forth.

Professor Jackson: So the idea of this internal management change was to make sure that proposals, say on water, didn't get developed to the top without consulting with people in air or toxic.

Ms. Bernstein: The idea was, before a proposal really got negotiated out totally, that there would be an ability to raise big issues with the Administrator, say “does this sound right?” It really was an effort to make sure that all these issues got raised because it's complex, and some, as you know, the regulations imposing incredible costs on the economy and others. And also it was to make sure these policy debates were very fully aired within the agency.

Professor Jackson: How do you measure the success of something like that?

Ms. Bernstein: I don't know. I imagine now that they have some way of trying to

measure. I think they do, but I don't know what it is. It became very cumbersome. It became extremely cumbersome and almost impossible. But then when we first started it, it was very good because people across the agency got to know each other. There were ways of working out things instead of having them arise at the end. The lawyers, for example, never were involved in the regulatory process previously. They would only look at it at the end of the tunnel. So that they would be in the no-no position: "Can't do it that way, no, I don't think so." Then big arguments at the end that were difficult to resolve. Lawyers got injected into the regulatory process, so there would be a lawyer assigned to, let's say, the Toxic Substances Act if you are regulating to establish the basic inventory, which was a very big issue about which chemicals would be on the inventory and basically grandfathered. I had a lawyer on that work group that was developing that regulation from the beginning. That made a big change. I suspect they still do that. Those are some of my early ways of beginning to work at the agency. I think I became a very major player at the agency. I know I did. The administrator depended on me and my judgment in part because I played an honest broker role between people. There were huge, huge controversies between Drayton and both Tom Jorling, who ran the water program, and Dave Hawkins. Bill was early on developing what is now standard lore and that is market-based regulation is preferable to command and control regulation.

Professor Jackson: Market-based, that means incentives rather than, okay –

Ms. Bernstein: One of the first ones was an Air Act regulation, called “the Bubble” concept.

Professor Jackson: Was that Bill's idea?

Ms. Bernstein: Yes.

Professor Jackson: A long time ago I did a little research for Bill when I was in law

school. He was in New York; he was at McKinsey. It was before Ashoka, and it was a very interesting idea that he had that was something about cooperative land use – it was about cities and what you did with properties and how they were built and the development of common areas, and he seemed like an enormously smart guy.

Ms. Bernstein: He's just brilliant. He's just absolutely brilliant. And my working with him on things like the bubble and others, I understood very quickly what he was trying to do once he told me about it, and partly because of my background here, you know, my economic background. And I had an undergraduate degree in economics, though not that I tell anybody that now because it's all so changed, but I understood very quickly what he was trying to do. He also developed the concept of penalties under the various statutes should be based on profits that were made because you didn't make the investment on whatever controls you had to put in. It was very complicated, very complicated and not in the statute. Not prohibited by the statute but not in the statute. He couldn't figure out how that was going to get done because basically we had to find a way to try to persuade district court judges that they ought to measure it our way. He couldn't do that, but I could. I mean I at least knew how to go about doing – in other words, I became an advocate for some of the things Bill developed because I was a better advocate than Bill. And he knew that.

Professor Jackson: Sounds like a great team.

Ms. Bernstein: It was a fabulous team. He will tell you that today. Because when the Clinton people were elected, Bill called me – he was one of the two candidates to be head of USAID. He would have been brilliant in that job. He didn't get it. It was Brian Atwood and Bill. And I said, “Bill, that's fabulous! I know you'll be great at it.” Although his people skills are still somewhat not great. Although he can, he understands it. He said, “I want you to

come back with me, and you'll be my principal person to really change the place.” And I said, “Maybe we should wait till you get the job.” “I want your commitment.” I said, “I’ll go any place with you, but we better wait.” He didn't get the job. So I have the most enormous regard for him. I also really protected him from a lot of things because I'm a much better bureaucrat than he is. Not that he doesn't understand it, he understands every bit of it. But he also was not always practical in the way he would go about announcing changes. So it was a wonderful relationship. I had a great relationship with Dave Hawkins as well, even though Dave opposed the bubble every step of the way. And any change from command and control. He did not believe in it. He doesn't believe in it today I don't think but of course it's moved so far now that I'm sure he isn't fighting it any more. He is a formidable adversary because he's civil, he's polite, he's smart as hell. Unlike Tom Jorling, who would lose his temper, and you could always take advantage of that, because Tom had been on the Hill – he worked for the senator from Maine, Muskie. And so he had all the political connections with Leon Billings and Muskie and, in fact, had been a candidate to be administrator if Leon didn't get the job – there was a lot of tension about that. I didn't know anything about that when I started because luckily I hadn't been involved, and therefore I could be much more of an honest broker, and I liked Tom. And got along fine with him. Now who do you think got to be the toxic substances person – was it a black woman Ph.D. toxicologist? It was a guy named Steve Jellinik who didn't have any training. I asked him what qualified him for this job. He said, “I'm a smart guy, I'm a bureaucrat.” He had been in CEQ. He since then built a whole business consulting group on toxic substances that he sold recently, and I'm sure he's retired by now. I like Steve, too.

Professor Jackson: Now my notes may be wrong, but I thought that you were not only general counsel but at some point an acting assistant administrator.

Ms. Bernstein: What happened was at an early time at EPA the assistant administrator for enforcement was also general counsel, it was like one position, right before we came. There had been some internal quarrel between the enforcement part of that and the lawyer's part of it, and they had split them up, and they just took the general counsel and dumped it downstairs. I don't know why, so that is what I found when I came. The presidential appointment came to the assistant administrator for enforcement. That was a guy that came after I had started – Marvin Durning, a distinguished environmental lawyer from the west coast who would also run for Congress and lost. Gone to Yale, lovely guy, wonderful guy, a disaster as an administrator, a total disaster. Very interesting experience I think, Vicki. Marv was an excellent lawyer, excellent, but like a lot of lawyers, Marvin could basically only do one thing at a time, and you can't run a large organization vertically. You've got to run it horizontally. Marvin would get involved in say a big case and work on it for 6-7 days at a time. He'd have them in the office basically developing the case himself. In the meantime, the whole program was going berserk; the Justice Department was complaining. It did get up to the Attorney General.

Professor Jackson: Now tell me about, because one of the general questions I had – wanted to ask you about – was the relationship between the agencies. You had been in other agencies. So how did EPA work with DOJ?

Ms. Bernstein: Oh, that's interesting, we shouldn't skip over that. When I first got this job, of course Pat Wald was already over at Justice. Pat Wald was assistant attorney general for legislation, already knew the people at Justice, and she said to me, “One of the things that has got to be attended to is that the part of Justice, the assistant AG for Lands and Natural Resources [now Environment and Natural Resources] is a guy named Jim Moorman. They are so fed up with EPA because EPA is such a disaster; EPA has been running around on the Hill

advocating getting their own law enforcement authority,” which of course Mother Justice would not permit them to do. It was a disastrous relationship, and people were fighting with each other and not talking. And Justice never knew what we were doing; we didn't know what Justice was doing, in other words, it was a disaster. And so Pat said, “I want to introduce you to Jim and his guys,” and I said, “I'm going to have to attend to this quickly because my view when I'm in a job like this is that I'm not fighting on the inside. We have enough fights on the outside, so that I'm going to resolve this.” She said, “It's not going to be easy because this is a long-standing difficulty.” “Well,” I said, “we'll give it a try.” So I said to the administrator, “Listen, this is a terrible problem, and I'm going to go about doing this.” So I went over there and talked to Jim and talked to his section chief, Angus MacBeth, who was a wonderful lawyer. You know Angus, don't you?

Professor Jackson: He was at DOJ then?

Ms. Bernstein: Yeah.

Professor Jackson: In Jim Moorman's division?

Ms. Bernstein: Yeah. And we talked, and I said, “Let me go back and talk to my guys and see what are the problems and then we're going to have a series of meetings, back and forth – you come over and talk to my guys, I'll come over and talk to your guys, and then we'll go to the next level and we'll begin to send a signal to both groups that we're working together, not working apart, and it's not going to be tolerated.” And that is what we did. Angus came over every week. I had asked Angus to come over every week for lunch, and we'll have different guys, and he did, so that if we were trying to get Justice's attention on something that we thought we weren't, there was Angus taking his notes on Monday. I would go over there all the time, and we basically worked it out. And of course David was in charge of writing the briefs and at the

court of appeals level, and he quickly established himself as a person of respect at DOJ.

Professor Jackson: Did you not have independent litigating authority?

Ms. Bernstein: Not much. We didn't have much.

Professor Jackson: Could you initiate actions in the district court on your own?

Ms. Bernstein: No, I don't believe so. I can't remember that. I don't think so.

Professor Jackson: You had to work with the DOJ lawyers?

Ms. Bernstein: They were our lawyers. And court of appeals particularly would get aggravating to our guys, as you can imagine. Our regulation was being challenged. And what DOJ schlepper were they going to put on the case and would they let us participate at all? And we worked through that, too, so we became co-counsel. We really were co-counsel. I'm shortening that up – obviously it was a bigger job than I described. But because of that, when Marvin was such a disaster and his conclusions were also, now did the enforcement lawyers have, enforcement lawyers had the ability to bring some kind of actions, but I can't remember what. I can't remember because my attention was on the court of appeals pretty much.

Professor Jackson: And David Bickart worried about the enforcement actions, the regulatory –

Ms. Bernstein: No, he worried about the court of appeals stuff too, but also to the extent that we had any say over the enforcement actions, we didn't have a lot of say because we were a separate office. They were all lawyers in the enforcement division, and in fact, most of the enforcement was done in the field anyway in those big regional offices. It was just an odd kind of situation, and that was why they had been combined in the first place.

Professor Jackson: In other words, the general counsel's office did not closely coordinate the enforcement activity in the field offices.

Ms. Bernstein: Did not. We had a regional counsel's office in every region and an enforcement division in every region.

Professor Jackson: They were more autonomous then?

Ms. Bernstein: The regional counsel reported to me. The director of enforcement in the regions reported to the regional administrator, not to Washington. I insisted on maintaining my role with the regional counsel because I argued to the administrator, "If you want to have any sense that there are consistent legal positions being taken across the country, this is the only way I can assure you that." And it was a very serious problem. It still is. They never deal with it. I think when I was there was about the only shot that anybody had because I made it a priority to know what legal position they were taking. You ask around in industry, and they will tell you the first problem with dealing with EPA is region 7 will say "this is okay to do," and region 5 will say "oh no, you can't." It drives people nuts, and there isn't any resolution to it. You have to get it to Washington. It can take a year if it's a major dispute. I tell you, when I was at Waste, Chem Waste at the time, we had gone through a process at a facility in Ohio where there had been PCB violations, and part of the resolution of the violations was to basically clean up the lagoons where the material had been deposited. In other words dig it out, clean it up down to standard, build a state of the art trench for redeposit with the liners, et cetera, all under an order where EPA observed every step of the way. We completed that and were prepared to put the material that was then in a huge mound in the trench, at which time EPA decided, or didn't decide, said they were concerned a new regulation, which hadn't really gone into effect but was going to, that might prelude putting that material into the trench. It took one year before EPA made a decision. In the meantime, that stuff which was contaminated with PCPs sat in the mound at that facility. It was only when Dave Ulrich, who was the general

counsel of region 5, called me up and said, “Jodie, we just drove by your facility in Vickery, Ohio, and that dirt is still there, that mountain of dirt.” I said, “Yes, I know this, Dave. I have been to Washington 15 times; I’ve been to Chicago more than that, trying to get somebody to make a decision about it. I can’t tell my people what to do with it because the agency won’t make a decision.” It took him three months of going once a week to Washington to figure it out. Now that’s an extreme example of what was happening in those years. It was terrible. Whether it’s any better or not, I don’t know because I’m not involved in it. The agency is big, it’s diverse. There are clear lines. It’s too big, it’s way too big for anybody to manage it in terms of people trying to comply.

Professor Jackson: So when we have Marvin, who was a good lawyer but not a great administrator, and I take it he leaves and you assume basically.

Ms. Bernstein: Yes, the administrator had to ask him to go finally. And then of course Doug said, “You’ve got to take it over,” and I said, “Okay.” So I did and I was never – I didn’t get nominated; I would have been. Obviously he wanted me to be; there wouldn’t have been any difficulty with it. But Pat Harris was calling and wanted me to come over to HHS, and I decided that was something I wanted to do. She had asked me to come to HUD, and I didn’t want to go to HUD because I didn’t know anything about HUD, and it was too big a learning curve. But when she went to HHS, which was still HEW, it was something I cared about a lot.

Professor Jackson: I know you’re looking at the watch.

Ms. Bernstein: Yes, I am because I have to get ready for something.

Professor Jackson: Let me just briefly tell you what I’m hoping we can talk about next time. I would like next time to talk about anything you know about the process by which Pat Wald got nominated and confirmed to the court of appeals, which I assume must have been

happening at the same time.

Ms. Bernstein: Same time period. In fact I was driving her to work. I would pick her up every morning, and she was at Justice and I was at EPA.

Professor Jackson: She didn't drive.

Ms. Bernstein: She didn't drive. She still doesn't. And previously Bob had driven us both to work. So this was my turn to and I was very happy because that was partly how we exchanged a lot of information, so that everybody said afterwards that's probably why things got straightened out between EPA and Justice – you two rode to work together. And I said, "There is more than one way to do things."

Professor Jackson: Probably was very helpful. I would like to talk about that. I have a list in my files, I may have given you a copy of some time ago, of the judges who were then in the federal court to see if there were any of them that you had interactions with in your professional capacities that would be of interest to historians of the future. And then I –

Ms. Bernstein: Remind me then to tell you the Thurgood Marshall one because there was an episode with Thurgood Marshall that would be interesting in the future.

Professor Jackson: As a former clerk for Justice Marshall I would love to hear about it as well.

Ms. Bernstein: Oh I didn't know if I even knew that Vicki, how wonderful.

Professor Jackson: I guess I have the advantage. I've sat down and researched your life.

Ms. Bernstein: Yes, and I haven't researched yours.

Professor Jackson: Yes, I clerked for him. And then I would like to learn more about what you did at HHS and then follow your career through the '80s where you did a number of

interesting things in government and at Waste Management. And my guess, given the pace at which we move, that will be the next session and then we'll probably need one more to talk about your time here at the FTC in a more systematic way. Does that make sense to you?

Ms. Bernstein: That sounds fine.

Professor Jackson: Thank you very much. I'm going to stop the tape now.