**ORAL HISTORY OF**
**JOAN Z. BERNSTEIN - SEVENTH INTERVIEW**
**May 1, 2000**

Professor Jackson: This is May 1, 2000, and this is Vicki Jackson, completing, we think, Jodie Bernstein's oral history. This is our last session of the year 2000. I am going to hand to Jodie, again without a cover letter, the rough transcript of our last meeting on July 8, of 1999 for her review at her convenience. And I think that we can get started. Maybe it would help if I identified the four subjects I hope to cover with you today and this may be a very brief meeting, I don't know. One that we mentioned at the end of our last talk together were any impressions albeit if from afar, of the D.C. Circuit and what was going on in the D.C. Circuit in the years from, I was thinking when you were out of town, from '85 really up until the present, but since this is an oral history of the circuit I thought even though your professional life was not centered in this circuit you might still have had impressions. Second, I don't know how you would choose among, I think of them as one's darlings, one's work, but the last five years at the FTC you've done an amazing amount of work in a large number of areas, and I thought it might be helpful for posterity for you to reflect a little bit on what you think are the most important of those efforts. I have some specifics I've written down that we might talk about. Third, it occurred to me I would love to ask you a few questions. This is really if in the future people concerned with lawyers lives look at these transcripts, since you have had such a range of experience in both private practice and government work, what your thoughts are on the balance of those two and where people can find and make fulfilling and good professional lives as lawyers, and last, I want to talk to you about forms and schedules, some administrative stuff just to get us on track to finish up. So, and anything you want to talk about that we may not have covered in our prior meetings. So I guess

of these as I mentioned, if you had any impression from away of the D.C. Circuit during that time period when, after you left practice here.

Ms. Bernstein: And I think I have very little recollection, Vicki, of that. I was functioning as a general counsel as you know, for the first five years and therefore as the company's lawyer I was functioning in courts all over the country, not by myself, but in terms of litigation in various courts. And I don't think we had any D.C. Circuit matters, so my overall recollections were just kind of general. I followed what the D.C. Circuit was doing, of course, in the environmental area closely. From a personal point of view, of course, I always read Judge Wald's decisions, whatever they were. And if I press myself, I must have had more a sense of things. The court was beginning to change, but what I can't remember, Vicki, is when the newer judges began to get appointed to that court.

Professor Jackson: Well, I know because I think I had an oral argument in 1983 with a panel that included then Judge Scalia, so I believe he was appointed probably in the early '80s, by President Reagan.

Ms. Bernstein: Yes, I think he was appointed very early, and I knew him from the administrative law section of the ABA. So despite the sort of reputation of Judge Scalia, we all know what his reputation is, and indeed that's what it is, I mean what his philosophy is, I sort of knew him. I had really a strong sense, which may have been either right or wrong, but there was a shot of his being a more sort of reasonable judge than he's turned out to be on the Supreme Court. And maybe that was naïve, but Pat and I both liked Nino. You know, I served with him on the council of the ABA, and he was always very nice to me. I had very warm personal feelings about him. And of course he's very, very smart. I don't think that's either here nor there.

Professor Jackson: I don't remember when the other appointees came on, but I think

in the early and mid-'80s Judge Douglas Ginsburg would have been on for a while because he was when Judge Bork would have been on for some period of time because when Judge Bork's nomination was defeated, the initial next nominee was Judge Douglas Ginsburg before Justice Kennedy was nominated. This was in the '86ish or '87ish period, so they would have been on the court of appeals for some time before that, for how long I don't know.

Ms. Bernstein: Well, we won't belabor this point, but on the issues I was dealing with, the company was opposing the government, not on all but several, and the principal constitutional issue that the company was dealing with, which came out successfully after much litigation, was whether waste movement was to be fully protected by the commerce clause. For ten years, the controversy continued. I didn't handle all of that, but there were side issues in litigation (state limits), and they were not much in the D.C. Circuit but in other circuits and then eventually went to the Supreme Court. I think I had one, I think we had one case in the D.C. Circuit that I think went against us, but it wasn't along ideological lines at all. It was long-shot litigation anyway. We were trying to reverse a decision of EPA's that we didn't get overturned. But I think that was the only one.

Professor Jackson: Have you followed at all, I know I'm jumping ahead and it's outside of my field, but the D.C. Circuit's decisions in environmental law? I think there was a recent decision on the Clean Water Act raising questions under the delegation doctrine. I don't know if you followed that at all.

Ms. Bernstein: Not very closely. I read them when I can. I, of course, read them in the paper. I will tend to follow much more issues like the long-standing issue between the EPA and General Electric and the state to some extent on whether the PCBs in the Hudson River should be removed. That's been going on for years and years, and I will follow that because

maybe because I'm more interested. And I try to follow the Clean Air Act litigation because I was pretty much involved in that, both when I was at EPA and afterwards. But I don't follow it very closely any more, it's just impossible, and the decisions are too long to read. They are just too long to read. We have a case pending there now that is very important to me. It was on Doan's back pills that we litigated before an administrative law judge who found for us on liability, and we had asked for corrective advertising. It's the first case since Listerine for corrective advertising because the campaign ran for eight years making a claim for unique back relief, which they couldn't substantiate. The ALJ turned us down on that, went to the commission, the commission upheld the corrective advertising order. The commission structured a corrective advertising remedy that went to the court of appeals. On noting the panelists, we thought we ought to settle case, it looked so bad, but the oral argument was such that we were much more optimistic.

Professor Jackson: So you're waiting on this.

Ms. Bernstein: We're waiting; it's been months already.

Professor Jackson: Have they asked for further briefings?

Ms. Bernstein: No.

Professor Jackson: So, it's going to be piling up on that little report that they get. So who is the panel, do you remember?

Ms. Bernstein: I do. Wait a minute. The woman who never talks, Judge Henderson, is that her name? Karen Henderson.

Professor Jackson: She's quiet.

Ms. Bernstein: So it was impossible to tell. The other two, Judge – I'm going to forget their names. I can't think of their names at the moment, but one of them was an antitrust

lawyer who knew the commission's process, understood the case extremely well, even though he's conservative, as was the other one, but who also seemed to understand the case and understood what the issues were. I must say and this is just sort of an impression, I think, the commission did a better job in presenting our case to the panel than we did in the oral argument before the commission. It was just an interesting observation.

Professor Jackson: What made it better?

Ms. Bernstein: Well, I suppose there are some differences. Before the commission we did not have, we were not defending, an existing corrective advertising order. We were asking the commission to impose it. But I tell you, there was an issue that I thought was absurd in the case: the company was arguing "materially" that the claim they made was not material. I hadn't heard anybody argue that for years. I mean you run a campaign for eight years, and then assert the claim you're making is not material to the advertising on which you spent thousands of dollars. It was a stupid argument. I thought it was a stupid argument. The court of appeals panel didn't spend any time on it all. On argument before the commission, we got tangled up in it, anticipating what the other side was going to say about it, and I think, diminished the effectiveness of our argument.

Professor Jackson: Before the commission?

Ms. Bernstein: Yes. We didn't do that at the appellate level. We didn't do that, and therefore we felt it was a much more focused presentation. The answers to the questions were crisp and direct. It was just very much better.

Professor Jackson: When you do litigation like this, do you play any role in working with the litigating attorneys?

Ms. Bernstein: I do. Or I try to. I mean we moot the lawyers and so forth. Here

the lawyer who had tried the case argued the case before the commission. The lawyer who argued in the court of appeals is in the general counsel's office and is an appellate lawyer, came to us from civil appeals at DOJ, where he had been arguing for years. So there are some differences between them.

Professor Jackson: And in terms of the brief-writing process, in representing your regulatory action, does your office play a role in that?

Ms. Bernstein: We generally have an outline of the brief, we go through it with the staff. In fact we had a big major dispute about it because I told them when the first piece came up for the commission that is was too long. I went through it and said it's too long. We had a big, big argument about it.

Professor Jackson: Did you win?

Ms. Bernstein: Yes, because I told Theresa Schwartz (who is my principal person on matters like this) tell them that in the courts there are page limits and if lawyers can meet those page limits in the federal courts, which we do all the time, don't tell me they can't do it here. This really means there is stuff in there that doesn't have to be in there. So we do get involved. I did not go to the mooting because I just ran out of time. We put together a diverse group and we mooted once or twice. John Daley, who did the argument for the court of appeals, was mooted a couple of time. He is a much more experienced appellate lawyer.

Professor Jackson: That can make all the difference, the experience. All right. But I think we've already moved into the second area that I wanted to ask you about, unless there was anything else about the D.C. Circuit that you – you've been here now for five years.

Ms. Bernstein: Five years, I just passed my five-year anniversary. I can remember Bob saying to me and Bill, "You may be here only 18 months. If we lose the election,

we'll be out the door," and I said, "Well you know, I don't care, 18 months is 18 months." So here it is five years.

Professor Jackson: All right, so five years. Looking back and around what have been, do you think, the most important matters that you have taken up and worked on? And I want to remind you that we did talk about and there is a record of it, I've lost the words, the procedural changes, the de-encrustation of the process that you did talk about, so I understand that was important.

Ms. Bernstein: It was very important, it was Improving the Work Place and the Strategic Planning Process, so there were two major initiatives that I took at the very beginning to both stimulate the bureau and change the way work was being done.

Professor Jackson: Okay, the planning process, I should have reviewed all of these transcripts, and I'm sorry I did not, but there was a particular internal procedure for changing the rules, and it is my recollection that you were able to simplify.

Ms. Bernstein: Oh yes, that was one thing. Toward the end of the Bush administration and then the Clinton administration there was this, you know, improving government initiatives, which was to review old rules and guides and eliminate those that are no longer necessary or obsolete or whatever. So when we got here, the bureau was on what looked to be a glacial pace in doing that, and they had adopted a ten-year program to complete it. I talked to Bob, and he and I both agreed we wanted to do it, and to do it more effectively and much more quickly. The general counsel's office had imposed EPA adoption requirements and other requirements to repeal one. (If you had due process A to adopt the rule, you must follow process A to undo it.) In addition to the generalized process, the agency had encrusted upon itself many additional procedural hoops to do it. So part of the problem was staff did not want to do it

because it really was an extraordinary commitment of resources. Nobody smart and active wants to commit that time – you know it's not very sexy. We tried to make it more appealing, but under my direction it was my staff that wrote a memo that I sent to the commission saying we're getting rid of some of this encrustation that is not required by statute, nor even by any rules of practice of the FTC.

Professor Jackson: That piece I know, but there are these two other points that you've made in terms of improving the workplace and re-stimulating the planning process.

Ms. Bernstein: Right. Developing the strategic planning process.

Professor Jackson: All right. Can you talk a little bit about each of those?

Ms. Bernstein: Improving the work place was my initiative to try to see basically why everything took long. Everything took forever. The simplest investigation, until it started at the staff level and got up to the bureau, just seemed to take forever. Part of the reason for that was in the Reagan years, especially in order to begin to make the corrections, they felt they needed to take from the Perchuk years. They imposed various internal procedural requirements on the bureau. There were things like initial phase and final phase and all sorts of internal requirements forcing bureau review for permission to go forward to the next phase of the investigation. And memos had to be written at each of those phases. Did I tell you about the session I had at advertising practices – because this is a good illustration. The first thing, of course, I did was go around and talk to each of the divisions to try to figure out what it was they did and why they did it. What were the pluses and minuses of the things they were doing, because we had pretty darn good people. That was one thing I found, Vicki, that the quality of staff was very good, I thought, in terms of just plain competence. Not everybody, but on the whole it was very good. But it was half the size it was in the '70s. It was cut in half sometimes in the '80s. There were under 1,000

people in the whole agency.

Professor Jackson: That is really dramatic. That is really a striking kind of a number.

Ms. Bernstein: So I went over to ad practices, which actually was a division I was in before I came up to work for Bob in the '70s, so it's probably my favorite place. I love the advertising issues. I loved advertising law. I like what you had to deal with. So I went over there, very good folks. Joel Winston, who has been there for a long time, knows every single advertising case that ever came down in any court anywhere. And there was very good leadership in Lee Peeler in terms of just plain legal competence. So I said to them, take me through one of these cases, and they began to describe these cases. Open the investigation, and after we've investigated and have permission from the bureau to engage in consent negotiations, at that stage, once it's approved by the bureau, staff sends a proposed complaint, an order and – "What's involved in obtaining bureau approval?" I asked. They said, "We write a memo to the bureau director and say why we need to do it, and that takes several months to do." I asked, "What's in the memos that takes several months to do?" Answer: A lot of our cases have scientific issues. How many tests did they have? Are they adequate? Is there a possible scientific dispute? We will have to write up all of the positives and negatives that we have and then we have to tell how we would counter the negative and it goes 60 pages long. I said that what I need to know is the fact that there is a controversy, and your judgment is that there is much more negative than there is positive. Is this a minority view or a majority view? If you tell me the identity of the researcher, it would give me an idea. Is it the Mayo Clinic or is it a lesser institution? I don't think I need to have a description of every paper that's been published, et cetera. I don't think I need that. They then argued with me for 20 minutes about why I needed more. It was just really a funny exchange. I was dealing with massive resistance to change. I knew I was. So I kept

working with them, and I finally said, "Well okay, the first time there's a case let's do it my way and see what happens, and if it's the disaster you predict, the commission will kill us." I said, "The commission won't know anything about this; the commission doesn't even get involved at this level." Now mind you, these are people who had been badly burned, very badly burned and there was never anything in it for them to take any initiatives. The less they did, the better the commission seemed to like them. They didn't risk anything. So it was really a big, big change and in some ways it's still evolving in that division. That was just one illustration. So that they don't do those things; we now have consent authority, a process. I developed a form, and they tell me what the case is, and they tell me the essentials of it, and then I have a record that I've approved it. They do write up two or three pages, mostly with bullets that don't require full prose, because I meet with these people constantly. I know what they're doing. So out of that experience came a much more formal Improving the Work Place plan, which was basically focus groups-type review at each division. We had hired a facilitator to do that – to really identify what were all the impediments within the organization that really became true impediments to an individual lawyer getting his job done and getting it to the bureau and to the commission. I said, "I want the views of the individual lawyers. I don't want it filtered by management. I want to really hear that." And coming out of that, though I consider that a continuing process, it's not quite as elaborate as it was, it's ongoing. First we listen then respond with ways to answer their concerns. This last time, things were good basically. We now have the resources managed so we know what we've got. They know what they're supposed to do. They crack along and if they need more, I usually manage to give the help; for example, they ask for another expert or something like that. One of the main things that I did was restructure the way resources were managed. Previously, there was one woman who was the financial officer for the whole bureau. No one had

any idea how much money there was. When they needed money to travel on a case, they had to call Sylvia and Sylvia would say yes or no. I asked whether they had any idea that the person who hands out the money is actually the policy person. That is not going to happen any more because we're going to have a budgetary process that I'll control but do it through the strategic planning process with them and decide jointly what the initiatives are going to be for the coming year as best we can; i.e., who will handle telemarketing or will do the fraud cases, and so forth, and then allocate resources. And they are given to them. My whole management thesis was to achieve greater accountability through the planning process and control of the resources.

Professor Jackson: Did you use these techniques – I'm trying to remember when we talked about your time with EPA – and I don't remember this particular management approach. Your task there was different.

Ms. Bernstein: It was. Even though I did do some of this at EPA's general counsel's office, which was pretty small compared to other places, but also needed to be coordinated, needed to have the assistant general counsels who were running the air program and the water program come together and talk. EPA's whole problem was, and still is, this vertical line where the fact that air and water are in the same place and the total effect on the environment isn't considered within the organization. I did do some of that. I worked a lot with Bill Drayton who made some significant management changes. He came from McKinsey, among other things. And I learned a lot from Bill. I'm sure I mentioned that to you that I worked a lot with him. And so I really got much more involved in how change could be effected through management initiatives than I ever had been before. I did the same with the company as to the extent I could.

Professor Jackson: Now you were both general counsel and a vice president.

Ms. Bernstein: I was vice president and general counsel of Chemical Waste

Management, which when I came was a solely owned subsidiary of Waste Management, Inc. It was actually one organization. We had different facilities that we managed, and we had a president and financial officer et cetera, but all significant decisions were at the Waste Management corporate level. The CEO and the president of Waste Management, Inc. attended our management meetings. I was the only woman in the hierarchy for a long, long time. And then we took that company public while I was general counsel, which was very interesting to me because I had never been through anything like that before. It was a very successful launch, and I was involved in really quite a lot of that, given the number of questions about superfund liability. It was very interesting stuff, and it was a very successful launch. And then after I had been general counsel for five years, the chairman, the CEO of the parent company, asked me to come over and work directly for him, so I became a corporate vice president basically for environmental compliance and ethics.

Professor Jackson: In that capacity did you need to do things to restructure training?

Ms. Bernstein: I couldn't.

Professor Jackson: There are some institutions that are too big or too set?

Ms. Bernstein: There was no invitation to – there were lots of things I would have done – it was too big. It was too macho. They thought they knew how to do everything. I did my job. I did get to set up an environmental compliance program that was very good. We had a very effective compliance program, and I started an excellent ethics program. But what I didn't have any control over and what I wouldn't have advocated at the time, because I don't think I understood it well enough, was the financial audit issues that should have been surrounded in compliance program. I don't know that I was competent to do it. I don't know that I was at the time. Probably I could have been if I had the right people working with me. When I was at Chem

Waste, the financial officer and I worked closely together, and I had a lot to say about these issues. That was not true in the parent company. The company has had a lot of negative regulatory problems since then and, thank God, they weren't on my watch. My watch was well over. The problems were all financial, not environmental.

Professor Jackson: One of my kids became an enthusiastic investor in microstrategy and has been learning about the need to pay attention to financials, if you're going to engage in that, it's a good lesson to learn.

Ms. Bernstein: My son who is a lot older than that and works for BMW – in that hierarchy, one of the things he said when BMW bought his company, a design company, and he said, "Mother, what should I do? I need some more training and what should I do it in?" I said, "Finance."

Professor Jackson: Let me ask in terms of your offices, call them initiatives or regulatory work in the last five years, there are more subjects based on looking in the newspapers than I could reasonably figure out how to ask you –

Ms. Bernstein: All those things we were just talking about I would consider to be management initiatives toward finding a way to produce substantive work which has been extraordinary.

Professor Jackson: It has just been incredible, and from leaving now the management initiatives, I think the FTC has done too much for me to even try and ask you about, but I wonder whether in terms of particular projects – there is the web site and Sears and Roebuck, funeral parlors, and high octane gas, and pediatricians – but the range of areas is unbelievable. Now, of this incredible array of regulatory consumer protection activity, are there any of these that are your particular favorites, or you are particularly pleased with or that you think are going to be

particularly important in the future?

Ms. Bernstein: I think we started almost as soon as I was here, and I don't know how I quite recognized this, but as early as 1995 we began to focus on the Internet.

Professor Jackson: That's –

Ms. Bernstein: Yes it was. And we brought the first series of a group cases against really tiny operators. I'll never forget this because the director of the Chicago regional office said, "Jodie, I've got sort of five little cases of people in traditional areas of FTC law, credit repair, work-at-home scams, all those kind of traditional scams we categorize as fraud, but the difference is they are operating on the Internet. What should I do because the companies and we don't usually go after tiny little companies, it's not worth it, et cetera." I said, "How about bundling them up? Get five consent agreements, and we'll make the point that FTC law applies on the Internet, the same way it applies on television or in newspapers or any other place." That was the beginning of what has been an extraordinary development. And right after that, – so our main, main focus in any number of ways, fraud, the initiative to create a database, complaints largely for fraud, consumer education in all these areas, big priority, and of course privacy. I can't tell you how important both the creation of the consumer response center that resulted in the database have been to a sophisticated, modern program for the agency.

Professor Jackson: Is it on-line?

Ms. Bernstein: Oh yes, out of that grew "Consumer Sentinel," which is a database operation for law enforcement people around the country dealing with fraud on the Internet or otherwise, only law enforcement. We now have close to 50 partners of states. That has been so well received on Capitol Hill that they've done a couple of things. First of all they gave us a new program that focused on identity theft which is criminal, but we're the center repository of

information about what's happening out there. Other agencies that have criminal jurisdiction send us their complaints, and we can serve as a central point in terms of who is doing what, how many cases are there, et cetera.

Professor Jackson: That's fascinating. I would have thought that would have been at Justice.

Ms. Bernstein: Well Justice is eating its heart out at the moment because they are so far behind they can't stand it. But we got started earlier. An interesting contrast, Vicki. I didn't go through any big deal process in terms of saying, "Yes we're policing the Internet." The one place where there were some very vigorous issues of jurisdiction was in the privacy area. It didn't quite fit into "deception or unfairness" for us to say, "Everybody out there ought to be required to protect people's privacy." Didn't quite fit the jurisdictional model. If you said you were doing something and you didn't do it, we could assert our authority, and we did, using traditional law enforcement. But we couldn't get to the other place. There were internal discussions about how to handle it and from that came our concept of convening forums on privacy issues on the Internet very early and to articulate our program. Then we did the first survey of what was happening to the personal privacy on the web sites, encouraging self-regulation, the privacy issues are real hot right now.

Professor Jackson: Okay, so privacy and the Internet basically are among your favorites, that's fantastic. Dot.com disclosures, information about on-line advertising with the toll free number and the web site for the FTC on the front – it looks very, very substantial.

Ms. Bernstein: It is. It tells you how to make disclosures that are required by law or regulation or guidelines, adapting to the fact that it is on-line.

Professor Jackson: So it's designed really for businesses to be in compliance.

Ms. Bernstein: Yes, conspicuous disclosures, the requirement, proximity and placement value, et cetera. We did that through one of our workshop processes which bring people together. We've used that as a technique which interestingly enough emerged from efforts to do alternative dispute resolution earlier on. That never really worked here except that it evolved in a fantastic process for us of holding workshops with everybody in the world who is involved. People have come to trust us. They understand they can't come and make speeches. And then we produce a report often with recommendations at the end of that process.

Professor Jackson: Okay, getting people in can go a long way to building a trust.

Ms. Bernstein: Absolutely. We're also very transparent – which is a real trick – sometimes it is so difficult if you're in the private sector to find out what the government thinks, to find out what the problem is so I can solve your problem. To be open, to be transparent as much as possible, is a real trick in government.

Professor Jackson: Let me try and sharpen the question I have for you. Many young lawyers I know feel caught between a desire to do public service and the attractions of the money that private firms seem to offer and want to figure out if they can lead a good and honorable life in the private world as well as in the public world. Do you have thoughts on that?

Ms. Bernstein: Yes, I do. I think both are possible. I think the combination is the most valuable thing that one can do in order to maximize your performance in either place. I think it's one of the most valuable things I ever did was to be in both public sector and private sector. I think I'm much more effective now than I ever could have been at any earlier time.

Professor Jackson: You've been on both sides of understanding transparency. [Jodie needs to go to a meeting].

Professor Jackson: That's it. Wait, forms, schedules, I know you have to go, could I

ask you to take a look at that transcript. I will try to get you a transcript of this meeting I was going to say by next week, but –

Ms. Bernstein: I'm gone from Wednesday to the next Wednesday.

Professor Jackson: I go over to Justice on May 10. I'm going to try to get it to you by the 10th, the last transcript and then after you get that if you could look over the forms which you have in there and I will try to send you a list of everything we've done. I believe we've done six interviews and I'll get you that so that over late May or early June we could agree on the form you want to use to donate these to the D.C. Circuit Historical Society. Would you mind affirming your continued intent to give this to them.

Ms. Bernstein: No, I not at all mind. I affirm my consent to donate these materials to the D.C. Circuit Historical Society for their oral history project. Happy to do that.

Professor Jackson: Terrific. Thanks Jodie, and thanks for your time.