ORAL HISTORY OF
JOAN Z. BERNSTEIN - FIFTH INTERVIEW
MAY 12, 1999

Professor Jackson: Today is May 12, 1999, and this is Vicki Jackson continuing the oral history interview with Jodie Bernstein. Now my handwritten notes for the last minutes, which were all I had with me for the taxi ride over, had a couple of cryptic things at the end. They said Thurgood Marshall and Pat Wald, and those genuinely were cryptic to me. I don't know if you recall – I do know that one of the things I want to ask you about in just a few minutes is what, if anything, you remember or recall about Judge Wald's nomination and confirmation, given your friendship with her and her role in the circuit. And reviewing also my notes I had intended to ask you the last time, I'm not sure that I did, if you would take a moment to review two lists of judges who served in the D.C. Circuit in 1970s and if you have any recollections of them either as a litigator as a private attorney or in the government. This is list I printed out from *Federal Second*, I think, from 1970, and let's see: Judge Bazelon as the Chief Judge, Skelly Wright, Carl McGowan, Tamm, Leventhal, Spottswood Robinson, by the way there is a memorial service for him this afternoon at the courthouse, George MacKinnon, Judge Robb.

Ms. Bernstein: The father of Catharine MacKinnon.

Professor Jackson: Yes, who was a classmate of mine at Yale.

Ms. Bernstein: Oh was she? I consider her to be a total nut case, but that's because I have met her a couple of times, and I just have this impression of her being so totally intensified person.

Professor Jackson: She is a totally intensified person. On the other hand, her work

has been enormously influential. And when she started writing this in the 1970s, she was the only one out there who was articulating this legal theory, which has just been phenomenal.

Ms. Bernstein: Oh, I'm not making fun of her. I've met her up at Yale with my dear friend Ruth Emerson, Tom Emerson's wife, who I think I mentioned to you before. And Ruth is a total radical. I mean Ruth is like 75, but she's older than that – she must be 78, and she gets more radical every year. Which I love, I just love. We are close friends, and so I can view her radicalism and make fun of her, you know, her belief that Cuba is the last civilized place in the world. But Ruth introduced me to Catharine MacKinnon when we were up there for an event. I met her twice I know, and I found it impossible to talk to her because she was like a powerhouse of intensity, and it's like you are either going to be gobbled up by her, or she shuts you out altogether. At least that is my very limited experience.

Professor Jackson: I think other people may have had similar kinds of experiences, but her work is really terrific. She gave a very nice talk about her dad at a judicial conference in the last two-three years.

Ms. Bernstein: I heard that. It think it must have been on C-Span.

Professor Jackson: Okay, the senior circuit judges. I don't know if any of those are people [you know]: Prettyman, Miller, Fahy, Washington, Danaher, Bastian; and the district court judges: Judge Curran, Sirica, Hart, Walsh, Jones, Corcoran, Gasch, Bryant, Smith, Aubrey Robinson, Joseph Waddy, Judge Gesell, John Pratt, June Green, and Barrington Parker. Let's see, senior district court judges: David Pine, Matthew McGuire, Henry Schweinhaut, Richmond Keech, Charles McLaughlin, Burnita Matthews, Luther Youngdahl, and Joseph McGarraghy were the judges in 1970. And I don't know if you ever had occasion to appear before them.

Ms. Bernstein: Oh, I can tell you a couple of things. Judge Bazelon I met

socially several times. My dear friend Selma Levine had been one of his principal clerks, and so I wouldn't say I was a close friend. I went to a party about a week or so ago, and Frank Mankowitz, whom I've known for years and years, said, "Hello Mickey," and Lionel said, "Why did he call you Mickey?" And I said, "He's thinks I'm Mrs. Bazelon or who was Mrs. Bazelon. He's got an association with older Jewish women where there is a law connection. Frank is losing it." Of course, followed all of Bazelon's decisions. Skelly Wright was extremely important to the commission. Skelly Wright wrote the majority opinion upholding the commission's rule-making authority in the D.C. Circuit, which was extremely, critically important. I think we talked about that earlier.

Professor Jackson: Yes, but I didn't know he was the judge.

Ms. Bernstein: He was. I don't even remember who argued it. I know I was there when the case was argued. I suppose it was somebody in our general counsel's office. I don't know who argued it. Leventhal I recall from when I was first going to, I was just about to be sworn in as, general counsel at EPA, and I think at the judicial conference I was talking to Leventhal, and I'll never forget this because he asked me, "Are you going to do something about developing a record in EPA cases?" I said, "What do you mean, don't they have a record? What do you mean?" He said, "That agency is impossible. They send me over cardboard boxes of material and that constitutes the record, and I'm very close to just sending them back." He further said, "I believe in the laws that the EPA administers and I try to be very supportive." He delivered this lecture to me, so that when I got to EPA I really paid attention to that.

Professor Jackson: How did you get a hold of that, because the record in those cases, I remember in the 1970s, friends of mine clerking in the D.C. Circuit talking about –

Ms. Bernstein: I don't know that I solved it all, but I did indeed make

improvements in two areas. We had a new statute, the '77 amendments to the Clean Air Act, so there was a kind of a new shot at how we were going to go about developing the regulations pursuant to that statute. And about '77 or '78 the RCRA passed (maybe in '75, '76), but the responsibility for doing the regulations was while I was there, and that was it was such a totally different statute than the previous statutes at EPA, and the staff had a terrible hard time with it. It was one of the things I think I brought to that, Vicki, because it was more similar to the FTC's laws and particularly section 5 than it was like to the Clean Water Act, which you know is a very, very detailed kind of statute.

Professor Jackson: The RCRA is a more general statute.

Ms. Bernstein: Much more general. It drove people there crazy. There was, for example, a provision in the statute that said the agency shall develop rules that will define what the new requirement that companies that generated or managed waste were required to maintain a level of financial responsibility to assure the safety of the facility over the years. There were only about two lines in the statute that said anything about financial responsibility – the staff was beside itself. First of all, they didn't know anything about economics or even accounting or how to deal with financial matters, and secondly, that was all the guidance they had from Congress. That was typical of the difference between RCRA and the Clean Air Act and the Clean Water Act particularly. There weren't any other statutes like that, and for that reason it took years to promulgate the regulation. I was not there by then, and I at least think that I could have influenced it if I had. I was not there at the end of rule-making, not on that particular one but nearly all of them. I believe the Agency did a terrible job on implementing that particular statute.

Professor Jackson: This was finalized after you left?

Ms. Bernstein: Yes.

Professor Jackson: And in terms of the problem with the record, you implemented some –

Ms. Bernstein: Yes, because there were two new statutes, so we were beginning the process of setting out the schedule for developing regulations. Nobody talked, or didn't then, about enforcing the law until the regulations are out, which could take and has taken years. That too was different than what my experience had been here. I didn't try to address that. They said this is the way it has to work. So then I started with the administrative people. Bill Drayton, who is my good friend and my colleague and ally, was the head of administration, and he and I together made some very critical decisions. For example, if one of the regional offices had lead responsibility on developing regulation X, which was often the case, any documents in connection with that would be God knows where. Presumably it would be in the regional office where the initial draft was being developed. If it was here in Washington, I would locate the unit developing, let's say the Toxic Substances Control Act, similar to RCRA. And I had a lot of input into that statute. I'm vague about this, but I believe that through the assistant administrator for administration and the general counsel we established procedures for maintaining documents in a particular area of the building that would have a clerk. Not only were dockets not maintained uniformly, they didn't even have a document room where people could file a comment or obtain a copy of a public document. Instead, they were all over the place.

Professor Jackson: Oh.

Ms. Bernstein: It was, if it was an Air Act, you would send a comment to the lead on the regulation in the air office.

Professor Jackson: There was no central, sort of a docketing system for the agency?

Ms. Bernstein: There wasn't one. So we began to set up a docket room, where the record for the regulation was maintained.

Professor Jackson: That was really early in the history of the agency.

Ms. Bernstein: Sure, the agency was only set in 1970, and you know, till you even get a building and get things started – . And they inherited immediately a whole bunch of responsibilities, some of which were transferred from other parts of the government.

Professor Jackson: That's interesting. Do you think Judge Leventhal knows how effective his comments were to you.

Ms. Bernstein: I doubt it –

Professor Jackson: Do any of the other judges remind you of any other things.

Ms. Bernstein: Let me see. I don't think they remind me, Harold Greene wasn't on this court yet, huh.

Professor Jackson: I was just looking to see. I brought another sheet with 1976 judges.

Ms. Bernstein: I remember Harold Greene when he was a Superior Court judge. When I was initially in private practice, I had some kind of case before Harold Greene and what I remembered about him was he was like light years better than any other judges in the Superior Court at the time. I mean he was a real scholar. The rest of that court was pretty bad then.

Professor Jackson: Let's see, the only judges who I think came on by '76 who weren't on the '70 list I think are the district court judges, Judge Richey and Judge Flannery, otherwise. The next time I come I'll bring a list from the ‘80s, just to see because I think it's interesting to remember who the judges are.

Ms. Bernstein: This was a court that was extremely important to us here at the

FTC, and at EPA as well.

Professor Jackson: It's very stable . . . many, many years, so it really had a character and personality. Okay, well thank you very much. You're welcome to keep these or I'm happy to bring them back, whatever you prefer. Now, at EPA I think we had talked a fair amount in our last meeting about the structure that you helped establish at EPA. I think I asked you about, but we have detoured into, issues of organizational structure. I think they are called the lead . . . and lead proceeding, and I didn't remember if you had, what I recall from my handwritten notes was your getting yourself involved in the regulatory process, and that was quite important and was that true in the lead regulations case. The other thing I could tell from my notes was we talked about your introducing concerns about cost and realistic cost considerations.

Ms. Bernstein: Economic analysis was required in some of the statutes and prohibited in others. At least one, the Clean Air Act, has some provisions which I found so difficult to understand that the Congress would prohibit the consideration of cost in a regulatory judgment, but they had. Most of them were silent on it but many in the agency argued that Congress really meant not to, that the only consideration should be environmental or health and safety considerations.

Professor Jackson: Was, in the dynamic at EPA on these regulations, was your role often one of bringing to bear the economic analysis?

Ms. Bernstein: No, I wouldn't say often because I would say that was the policy office's principal responsibility, and then we all had to deal with OMB, which was indeed the developing OIRA it is now called. As you know, in 1980 a new approach gave OMB tremendous power. It already had power, and the Carter administration was pretty much

committed to a moderate course of regulatory review and had what's his name, not Schultz, but who was the czar of – he wasn't allowed to say "depression," you know who I mean – and he was head of the CAB and then moved into a more prominent economic role at the White House. It was Alfred Kahn, and there was a very strong commitment in the Carter administration to reasonable, sensible approaches to regulation, which was very controversial because Muskie was Mr. Environment, Senator Environment, and he was very aggressive and his staff was certainly very aggressive and did not at all like the Carter administration taking a sort of middle road here. So at least for those of us who believed that the more moderate course, which I was, in the end would mean we would get more accomplished by making a better record of what analysis we had gone through, rather than going to OMB and having them send us back to do it, or have them do it and cut back, we began to really stress the need for complete analysis in the process of the development of the regulation. Also it didn't hold things up. So by the time it got to the administrator you wouldn't have that issue before you in order to make the decisions. I honestly believed that we would accomplish more by doing more. And then I'm sure I said before, Vicki, I was also very active in being Bill's principal ally on market-based alternatives to command and control. That was really a thesis that he brought from the White House because he had been very much involved in those issues in the transition. I was not because I had been doing FTC stuff, but I thought I had a relevant background to understand it, and I did, and I was very excited by it as well. Now of course, it's just everybody believes in it. We were very early and it was extremely important.

Professor Jackson: Why did you leave EPA and go to HHS? I know you told me Pat Harris wanted you over there.

Ms. Bernstein: You know, I don't know exactly. I think I told you the sort of

convoluted story, HUD and all that. I loved EPA, I really loved it, and I think I also told you by then I was also acting assistant administrator for enforcement. I was working myself to death. That wasn't the reason I left. Because I was busy running both of those organizations and by that time had a great deal of credibility in the agency and at Justice because I had worked very closely with them, and we had by that time really re-established the agency as not being just a bunch of crazy environmental people.

Professor Jackson: This was when Pat was at Justice and you and she worked out meetings with Jim Moorman and Angus MacBeth –

Ms. Bernstein: Jim Moorman and all, I had a great situation. Well I don't know, I guess part of my thinking was, and I think it was partly this fact: I was already thinking now "What would I do in a second Carter administration" because I developed a very good reputation with the White House people. I know I would be considered for, I knew I had the prospect of being considered for, other things and so I started to think about what would I do. Two things about EPA. I did not think I would be considered to be administrator at EPA, and I didn't think that would be the right role for me anyway somehow. I don't know exactly why. It may have been that I didn't view myself the way I thought the administrator of EPA should be viewed. I tell you, my ideal in a way of what an EPA administrator should be was Bill Reilly, a real statesman, an international statesperson on environmental policy throughout the world but particularly here. I thought he was fabulous, and he came with a different kind of background. Russ Train was as well, but I didn't know Russ Train as well, and I wasn't there with Reilly. Obviously he was a Republican appointee, but I thought he really established and that was my concept. As much as I like and admire Doug Costle, and I still do, I don't think he viewed himself that way as much as we would have liked him to be viewed as elevating.

Professor Jackson: To elevate the stature of the agency.

Ms. Bernstein: To be the person to go with the president when there was not only an environmental issue but an issue that would involve the economy as well because you have to integrate these things. When you're dealing with things like urban sprawl, well that isn't even in the statutes, but it's a very significant issue that ends up having a critical environmental impact. My ambition would have been to be in the cabinet. I would have liked to have done that and when Pat asked me to come over there, of all the places that I felt I was most capable of being considered, I thought I had the appropriate capability for. I knew a lot about the department. I knew a lot about the law in the department. I wasn't a real expert but I knew I could get on top of that. I thought if there is a prospect here, of even being the under-secretary, that would be in case Pat decided she wanted to move perhaps onto the judiciary. As it turned out, she would have recommended me to be under-secretary, because she said so, because we had an inadequate under-secretary and by the time she and I had worked together, she treated me like the under-secretary. I would have had a shot at being secretary of HEW, and I think for that reason I think I decided to do it.

Professor Jackson: How did you know Pat Harris to begin with?

Ms. Bernstein: I didn't know her at all before the administration. I knew who she was. Donna Shalala was an assistant secretary at HUD, and we had, in the Carter years, the appointment of several women, not just a handful. It was big news, it was big deal news, that there were this many women. Sara Wettington, who was general counsel at Agriculture, was called over in the position at the White House to be the women's coordinator, so she started having these sessions with us and promoting women's issues, and, as an aside (and I suppose I should put that on background, maybe not), I think what she ended up promoting mostly was

Sara Wettington, but the rest of us got to know each other in the course of this. One of the people I got to know the best because Carol Foreman I had known before, and she and I were good close buddies, and we worked across these organizational lines. One of the organizations that was most important to me (I'm just diverting a little bit), Doug set up and worked on the IRLG, the Interagency Regulatory and Legislation Group. It was EPA, FDA, CPSC, and OSHA, and the idea was to coordinate positions on health and safety and environmental issues. It worked because the government was always being criticized that OSHA required one standard and others a different one. So we had that little organization that I staffed for Doug. And that was how Carol Foreman –. It must have been the Department of Agriculture must have been in there, Vicki, for sure, may have been five, but it had a name and it had a little staff – I think the little staff was over at OMB. I got to know a lot of people in that context. But I particularly got to know Donna Shalala. Whenever Donna had a real serious legal problem, anywhere, she would call me up, a regulatory or a political problem, whatever. We would talk and scope out how to do things. So Ruth Prokoff was general counsel of HUD and was very close to Pat, and I had gotten to know Ruth also. The attorney general had a general counsel's group or the deputy did, and the general counsels throughout the government got together like every quarter, so I knew other people. It was interesting because there were a number of women in general counsel positions. It was always interesting to me afterwards, not at the time, to really look at which one of the women who were around. I think it is most important – this was the first time that there had been women in general counsel positions in the federal government. And you know how important that is to further careers. That was a wonderful credential if you left the government and went some place else. There never had been a woman general counsel of a federal agency in all history. Of course, there weren't all those agencies except after World War II, but

nonetheless, that was 30 years, 40 years, something like that. Anyway, I got to people that way. And the women who were successful in their jobs were women about my age who had had some experience. They put some people into jobs that did not have experience, or the relevant experience, and they failed in those jobs. They didn't get kicked out or anything, but they got sent to the side, they left them in their jobs, but I was very unhappy for them. Those things have occurred in other areas, where people were put in for reasons that are almost paths to what always bothered me because each time a woman would not be successful, it was because she was a woman and not because it was the right one. And a lot of that happened, not a lot, but there was some of it. It was very devastating to the people who were in those jobs, to fail, to not succeed.

Professor Jackson: I'm sure that's right. Okay that makes sense for why you went to HEW, and would I be right in assuming that because of the results of the 1980 election you were not there as long as you were –

Ms. Bernstein: That's correct. That is absolutely correct. We were out the first week in January, whenever, we stayed until the 20th, I believe, the 19th.

Professor Jackson: A new administration –

Ms. Bernstein: A new, very hostile administration did not want any of us.

Professor Jackson: Now during the short time that you were there, if I remember correctly from a lunch we had almost two years ago now, did you do some work on the Title IX guidelines?

Ms. Bernstein: Oh yes.

Professor Jackson: I would love to hear about that.

Ms. Bernstein: If I can remember. We did. It was, the Title IX was already

passed, but the guidelines and thus enforcement had been stalled. And the reason they were stalled, I was told, was that Joe Califano, former Secretary, considered them too damned controversial, and wasn't going to do it. And believe me, it was controversial! At EPA, we got beaten up, suing steel companies. So I came and was told, "Congress is opposed to putting out this guideline; nobody wants this guideline." People told me that, and I said, "You know the law requires us to put these guidelines out. So okay, so they are controversial. Well let them repeal the statute, if that is what they want to do; they don't want to do that." The White House was as nervous as cats about it. And we were being lobbied. There were people, I can't remember their names, but I remember a whole delegation of southern universities' presidents came in and told us it would "kill football as we know it," and you know how controversial it was because there were no women athletic programs to speak of anywhere. I mean they were minuscule. And there weren't any guidelines about what you had to do to meet the legal requirements. So I told our folks to work on them. They were already at work on them. They had been working on them, they just didn't have anybody who was willing to do anything with them. I said to the Secretary, "Am I wrong or am I right that we have to do this?" And she said, "We have to do it. You know we have to do it." Then she didn't pay attention. And we worked through. I brought in a person to pay special attention to regulations in my office, Terry Dowd, who had worked with me someplace else, I don't know where. She was terrific, she was just terrific. She is now in practice at Miller and Chevalier I think. Her husband had been with EPA, and he was a scientist. I knew Terry was looking for a job, and I brought her in, particularly to head a little unit – there was a little unit in general counsel's office when I got there, just three people who were supposed to review regulations for the kind of moderating that we had done at EPA. Same kind of thing was supposed to go on at HEW, but it really didn't until we got there. A woman,

Inez Smith Reid, had headed it. And she subsequently, you will probably remember this, subsequently she was corporation counsel in the District of Columbia, where she got into terrible trouble about a relationship she had with another woman who was on the payroll. And this was all in the papers, and who was paying the rent on the apartment and stuff like that, and she, in my judgment, was totally incompetent, totally. Now obviously, I was told, you can't do anything with her, and I thought okay, and to my amazement she became the inspector general of EPA, and she left HEW. Now my friends at EPA said to me subsequently, uh huh, you couldn't have told us. I said, "I didn't really know." The woman was a disaster. It's just amazing she just keeps getting these jobs. Oh yes, she got promoted over the years, and everybody I know who knows her, every time she would get some promotion I would get these e-mails and things from around the country saying, there are Teflon people in the world. Anyway that's just a side line, and I brought in Terry to do that job. And she hired a couple new people, and we re-shaped regulations when they would get to us. I had people digging around all over the department because there was so much to see if we could shape it. And I selected some. I didn't try to do all of them because this place was huge. Education was there, everything was there still. Social Security – and it was a huge amount of work. We would select the ones I thought were politically important and that where there might be a shot at re-shaping them into something less command and control, less detailed, and we did. We did that.

Professor Jackson: We're back on the tape, after a brief break for review of correspondence. And we will resume our discussion shortly. And we had just talked at the office that you had helped re-vitalize in the general counsel's office, looking at regulatory review, and I think we had gotten to that discussion because we had started talking about the Title IX regs, and your role in trying to break them free from the paralysis imposed by political

controversy.

Ms. Bernstein: Right. I cannot tell you any of the details but I know that as they came forward we spent a good deal of time consulting with outside groups and internally reviewing them in such a way that we thought we could answer all of the questions that would come from them, and I was finally satisfied that we had a guideline that we could propose. And we were going to propose it. It was not a regulation, but from every other point of view it was. So we were going to propose it. And I met with the Secretary and one of her closest advisors, assistant secretary for legislation, Bill Walsh. He had worked on the Hill, and he had been legislative counsel for the AFL-CIO, and had about as superb political intelligence and judgment as anyone I have ever known. I think Pat considered us about her closest advisors. There were others that did other things, but in terms of these kinds of issues and approaches, I mean what should she do? She read everything, and she had her own legal advisors on her immediate staff although she dealt directly with us. And I remember Bill Walsh and the other guy, was not nearly as close but also was involved in these discussions, was the head of the public affairs. He was not as effective as Bill was. But he had to be involved. And both of them said, but especially Walsh said, "This is a disaster, I don't know how I'm going to handle this on the Hill," and he was being very straightforward and objective and mentioned all the names of all the threats that we received from everybody about why we shouldn't do it. And she said, "You're going to have to get a game plan because we have to go forward with these." And he said, "Madam Secretary, we'll do the best we can." And the other guy felt the same way about the publicity. Could we slip them out the door somehow in the middle of the night? He asked her about how to publicize. We always had press conferences for big things like this, and he said, "Here's my recommendation: you should distance yourself from this stuff, Secretary, and have

Jodie do it and then she can answer the questions." And she looked over at me, and I said, "I'm perfectly happy to do it." And she did not ask me what I thought about her position, she just asked whether I was comfortable doing it, and I said, Yes." And then she said to them, "And what would the world say about where was Patricia Roberts Harris?" I recall her words exactly, "Hiding underneath a desk in order not to take the heat for something that is right and something that should be done?" And they just kind of looked at her, and she said, "I will do the press conference, Jodie will answer the questions. I'll come in and do the press announcement and I'll tell why." That's what we did. And I, of course, beforehand schlepped with Bill all over the Hill, telling what we were going to do. They were carrying on and complaining. Then the press came out, and the press was very positive. The press was all positive. The White House was nervous. They were nervous as hell. I can remember Sy Lazarus over there, "Jodie, are you really going to do it?" you know, blah, blah. I said, "Well you know, Sy, what's the alternative?" And we did an economic analysis. We did one that said it's not going to cost that much, it isn't going to kill football. I don't remember much more about it.

Professor Jackson: You were right. As far as I know they still play. Is a guideline subject to judicial review?

Ms. Bernstein: Well, it is if it's applied . . . like a regulation where somebody could challenge the guideline and have it reviewed. It doesn't have the force of law.

Professor Jackson: So you get some distance from the promulgation of it before it has to be reviewed. Did the statute, forgive my ignorance, did the statute call specifically for guidelines rather than regulations?

Ms. Bernstein: Oh I can't remember that. I think so. Because there never was any discussion about regulations. I can't remember this now, Vicki, but it may have been that a

regulation pursuant to the statute that was like almost identical to the statute, you know, that kind of thing, and the need for guidelines was really to provide. And I can't swear to that, but I kind of think that was what occurred.

Professor Jackson: Okay. Let me ask –

Ms. Bernstein: And that would have occurred before I got there.

Professor Jackson: Were there other – the one thing I knew to ask you about your tenure at HEW was the Title IX guidelines – were there major projects that you were involved in, in ways that you recall?

Ms. Bernstein: Let me think for a minute. I know there were. One of the biggest ones was in, gosh what year was it, '79, I guess it must have been '79. You know this issue of if the Congress doesn't act, does the government have to close down? That was raised for the first time that year. I think it was 1979 or 1980. And Ben Civiletti was the attorney general. It must have been, the election was in 1980 right, ah, that issue arose during the summer in the budget period because there were controversies about the budget, for the whole government, not just us, and the attorney general issued this opinion for the first time saying basically (I don't remember what the analysis is) but if Congress doesn't do it, you've got to close down, with certain exceptions. And that still stands, that memo. At the time I didn't know much about what was going on until after the memo came out. It had never happened before. The government had never closed down before. There was some other interpretation, about I don't know what it was, but it just wasn't an issue. So that thing comes out and of course the first issue for us is oh, great, if that's the case, and it's right before the election that was going to kick in September. I mean if they didn't get the appropriation, they were going to close in September, right before the election. What if the Social Security checks didn't go out? That was number one issue. That

was the number one issue for me. Well I cannot sit here and tell you that there was any question in my mind about what I was going to conclude. How I was going to get there I wasn't entirely sure. But we got to work on that, and we worked it through. I don't think I even let Social Security near it. I think I took it over and worked with either Terry – I had a couple of really good people in the office that I had recruited, Les Platt was one of them, and Terry Dowd was another. I'm probably leaving somebody out. Oh, then I had some people that – a woman named Helen Trilling, who has been at Hogan Hartson since, was just out of Harvard Law School, and she was excellent. [END OF SIDE ONE OF TAPE]

Professor Jackson: . . . my interview on May 12, with Jodie Bernstein. We were just talking about the decision that had to be made about the position of her agency in issuing Social Security checks in the event of a government shutdown. And we had a description of some of the people involved in working on this and Jodie was about to tell us what they concluded.

Ms. Bernstein: We concluded that, and I think generally this is probably a very loose legal interpretation, but it was about the fact that the Social Security money was in a trust fund, it was separately funded, and therefore the distribution of the money would not be contrary to the attorney general's opinion. Then the subsequent issue, which was harder – what about the salaries of the people who had to write the checks, mail, et cetera? And somehow we got some legal theory that supported that. I first took it to the Secretary and ran it through the Department of Justice and the White House and everybody was thrilled. We could have gotten a hero's button on that. And it was early that we concluded it. It was like August, that's not an issue, and I get called over at the White House for how is the government implementing whatever, and I said it's not an issue. It's been concluded – it's not an issue, and everybody said oh good, good.

Professor Jackson: Boy, crisis averted. Was the binding effect of the attorney

general's opinion taken as established?

Ms. Bernstein: It was. I don't know whether that was right or wrong or whether it could have been challenged and I don't know what's happened in the interim, but I believe that interpretation still stands.

Professor Jackson: That's fascinating.

Ms. Bernstein: I think. I have not followed it closely.

Professor Jackson: Those are two big issues, while you were at HEW. Any others?

Ms. Bernstein: Let's see. I know there were some big HCFA issues but I can't remember what they were. There were always HCFA issues.

Professor Jackson: Time out. HCFA?

Ms. Bernstein: Oh, Health Care Financing Administration.

Professor Jackson: Okay.

Ms. Bernstein: That's Medicare, Medicaid, the SSA, is in Social Security. The disability statutes.

Professor Jackson: I don't know if this is helpful, but I remember litigation in the '77-'78, period that when I was a law clerk in New York, having to do with a regulation that, if I'm remembering it right, capped reimbursements at some percentage of average costs for hospitals under Medicare which if you thought about it, they're going to some who were above the average and who aren't going to get – you could see the objection that the providers had to it. So I'm thinking the late '70s were a period, the beginning of the burgeoning of the health care costs and regulatory efforts to constrain it. Is that [a] . . . set of issues?

Ms. Bernstein: Yes. I did think of one other very big issue that we dealt with. And it was HCFA issue. All of a sudden we began to hear that people were for the first time

getting heart transplants, first time, and it was in a few medical centers around the country and of course the legal issue was had it now passed from experimental, not covered, to "reasonable and ordinary or routine"? Anyway the statute said they had to pay for procedures that were widely accepted routine medical procedures, and the cut-out was for procedures that were still experimental, they didn't pay for that. So what was this going to be? While we were fooling with the NIH and the assistant secretary for health, trying to figure this out, we got, I'll never forget this, we got a cable from some heart transplant surgeon in Texas saying, "I have scheduled Mr. X , who is at death's door for a heart transplant operation on Friday [or something like that], and I must know and he must know whether the government is going to pay for it." Doesn't leave you a lot of time for further analysis. I mean it was like 2-3 days ahead. I said, So where are we on the deliberations and what this will mean if we pay for this one, we'll have to pay for all of them." Nobody was ready for that kind of discussion, and in the end Secretary asked me what I thought. I said, "We don't have any alternative. We have to pay for this one. The guy is going to die. If the guy dies, it will be your fault. And then we'll have to figure out the rest of it afterwards. Because we can't figure it all out now. And we can't wait. So we'll just issue something that says government will pay for this one and further information will be developed subsequently."

Professor Jackson: That's very interesting. In a sense your hand was forced by the doctor's letter. That's pretty interesting.

Ms. Bernstein: It was absolutely forced. I wasn't ready to conclude it. And I'll tell you why. It turned out that they did it this way, but the original proposal from the docs as to how to go about this issue was, their view was, that there was a protocol for heart transplants. In other words, you know what a protocol is, for this kind of patient under these circumstances with

the likelihood of success rather than failure, plus experience of the facility, the doc, would be the way you would decide the funding. That is, then you could send out the word to the docs "If your patient doesn't meet these protocols ,and you haven't already done 50 heart transplants, you won't get funded." Well I took a look at the protocol and the protocol said "whites, age in the forties."

Professor Jackson: It did?

Ms. Bernstein: Yes. Because that was what the data was.

Professor Jackson: Was it all men?

Ms. Bernstein: I believe it was probably all men at that time because they didn't have any experience with women. So I think it was probably all men, but it was all white and that meant it was only going to be funded at three institutions in the country, medical centers at three institutions: California, Texas, and somewhere else. I had never ever thought the government could make a decision like that in a regulation. It didn't have to be in a regulation. We had other ways of doing the funding, but it seemed to me it was totally contrary to these kind of generalized applications to all Americans that you ordinarily do. It was something I had never, never dealt with, and I said to the Secretary, "We can't put out that protocol, we can't say it's based on that protocol. It would exclude all African Americans and Hispanics." "You are absolutely right." And we worked it through so that it in fact did result in the funding of only those with some indicia of success. I can't tell you exactly, but we knocked out some of those things. And we didn't make it so absolute. Oh, it also said you needed to be married and you needed to have somebody to take care of you when you got home, a little wife waiting at home. Now those docs are like that, Vicki, or they were then. I told this to my husband, the Dr., and he said, "That's right." I mean the chances of these guys surviving if they don't have all that, you

can do a regression analysis and show that they are going to die, so what's the sense in wasting the heart and wasting the government's money or anybody else's money. I'm glad we talked about this because that was really one of the hardest things that I ever had to try to work through.

Professor Jackson: Forgive my comments, but the notion that you would have a large enough sample to have really reliable data on some of this seems doubtful. These were very, at that time, very big deal complex procedures.

Ms. Bernstein: Oh, 8-10 hours in surgery. You know all that.

Professor Jackson: That's really quite fascinating. Both in terms of the protocol it developed and in terms of this one doctor kind of forcing the agency's hand, a very interesting dynamic.

Ms. Bernstein: The way they made decisions in that department was very different than in a regulatory agency really because I think if it hadn't gotten to be such a big deal thing, the docs would have just decided which ones they were going to fund and which ones they weren't going to fund. And they wouldn't have done it by general guidance. They could have done it with big grants, I don't know. Couldn't do it through HCFA because HCFA was organized actually by Califano. There had been separate organizations. He put them together from Medicare, Medicaid and created a separate agency really that would deal with it. So that injected a kind of different approach than I think the docs had previously taken. You know, if the lawyers had very much to say about it, it would have been unusual.

Professor Jackson: The next question I was going to ask you was, you served in three major agencies or executive departments in the 1970s, and how did they compare? This is in a sense what you are talking about. Is it that it's an executive agency, I mean I'm asking you a sort

of con law I question, is it the independence of the regulatory agencies, or –

Ms. Bernstein: I think from at least from my – it's interesting, we were talking about this today with the commission in a sense because the issue we were dealing with this morning was the interpretation of a statute as to whether the commission could use section 5 to basically fill in the gap where the other statute is silent. The reason I mentioned that is because it raised a question of statutory construction. To me and to Theresa Schwartz, who have been involved in various agencies, she as a professor and I at other agencies knew the basic rules of construction. In this instance it wasn't even close as far as we were concerned. The commissioners, including the chairman, come from a very different background. They haven't dealt with the kind of statutory construction that I dealt with every day at both EPA and HHS but especially at EPA. And at HHS, the Congress micro manages that entire department. It was just fascinating to the two of us that they come to it in a much different way than we do because it was sort of new to them and therefore we had a level of comfort in interpreting the statute so that it fit the section 5. As far as we were concerned, there was no question about the authority. The question was whether they wanted to exercise the authority. They were stuck on whether they had the authority, and the reason was because of the different background and experience.

Professor Jackson: Very interesting, very interesting. From your perspective you know that when Congress wants to micro manage something, they can do it down to the last dotted “I” and crossed “t.”

Ms. Bernstein: Oh you said it. And if they don't, you figure it out, and, in fact, I reminded Bob, which I don't think he was impressed, of that and I may have told you this, Vicki, because it was very interesting. When I was at EPA with the '77 Clean Air Act, there were two provisions of that statute, and I cannot tell you what they were anymore, that were totally

inconsistent, totally. We had people come in and one said it means this and other one said no it can't mean this because this would mean that– just polar extremes. What are we going to do? Are we going to go back to Congress, et cetera, et cetera? It's not feasible to go back to Congress on that. They had basically told us, don't be coming back here. We're done with you. So with the help of some very capable people in the general counsel's office, here's what we decided to do and I did this. I issued an opinion of the general counsel which said what the general counsel believed the Congress intended to do here and rationalized it too and said this is what it means.

Professor Jackson: Was this an innovation?

Ms. Bernstein: Yes. It was an innovation and I don't believe it had ever been done that way. One of the things which I did do at EPA, which was also controversial, there were many opinions of the general counsel that were issued internally to the agency, to the regulatory people, you know. There would be some can we do it this way, and there would be an opinion of the general counsel, which would always prevail in terms of interpretation, and they were never made public. In fact the OGC staff just didn't want anybody to know about these, and I thought they should be published, and I worked out with a publisher to publish them. And there are about three volumes of the Opinions of the General Counsel and that's all, I believe. I think they quit doing it after I left.

Professor Jackson: When you were general counsel –

Ms. Bernstein: That position was upheld by an opinion, I believe, of Leventhal.

Professor Jackson: Speaking of judges again, you had mentioned how important Skelly Wright was to the FTC's jurisdiction, and I was just reminding myself that in the lead case it was Skelly Wright who wrote for the court on that.

Ms. Bernstein: Oh was it? Gee, I had forgotten that.

Professor Jackson: And you were one of the counsel on the brief.

Ms. Bernstein: Oh yes, I was. That was a very good brief. Isn't that fun. Department of Justice. Angus MacBeth, Joan Z. Bernstein, Gerry Gleason, I think he's still there, Jim Moorman, et cetera. Isn't that good? That is good.

Professor Jackson: It will help me get oriented to the world that you were in. When you were general counsel at the agency, let's see you were general counsel at EPA and HHS, did the question come up of whether your discussions were privileged?

Ms. Bernstein: Discussions with whom?

Professor Jackson: With people in your agency, whether government lawyers in representing their agencies have attorney/client privilege.

Ms. Bernstein: I think we assumed we did. I don't remember it being an issue. I know it has subsequently become an issue.

Professor Jackson: I'm interested in, as a matter of history, in what people assume when they were doing the job.

Ms. Bernstein: I believe we assumed that it was privileged.

Professor Jackson: Okay. I had asked you a question, and I may have interrupted you, and that was generally how the experience at the three agencies compared. There are not many, I think, who would have had that combination of experiences at agencies that were as active in that time period as these three were.

Ms. Bernstein: All three of them were active in that period. I guess there were obviously major differences in, I guess, the ability to carry out the agency's mission. The most difficult I suppose, no I wouldn't say difficult – I would say that the structure of the EPA, of the

FTC, that is of five commissioners, makes the role here of the staff much more political than at others. I don't mean Democrat, Republican, but there is a totally different process in terms of how things can get finalized here because of structure of the agency. Now the agency has, since the '70s I think, viewed itself, and I think it was partly because the agency got in trouble as being excessively regulatory in the '70s. It now views itself, and we constantly say we're a law enforcement agency, we're not a regulatory agency. That changes the dynamics quite a lot. And the other thing here, Vicki, is what's happened after I was here was the extensive use of the federal courts rather than the administrative process. So there is much less, in a way, micro managing by the commission in terms of the staff's operations in the courts than there is in the administrative process for some reason or other. So in some ways that makes our jobs easier.

Professor Jackson: Is it a commission-level decision to go more with litigation than with administrative –

Ms. Bernstein: Both, they have to find a reason to believe the law has been violated, whether we are proceeding in court or proceeding administratively. But there are those centuries, it seems like, of history with the administrative process, which is not so when we're proceeding in court. We've used it in the fraud cases to obtain injunctive relief in the federal courts for section 13b proceedings. And our bureau staff particularly has become crack litigators. That also made a real difference. And the commission is not in the role of being an appellate court where we are proceeding judicially, that somebody else is the appellate court. Somehow I think makes them more comfortable in a way. And that mixture of being both a prosecutor and an appellate court in the same case in the administrative proceeding is an ambiguity that results in them getting more involved in every pleading and every detail.

Professor Jackson: EPA has an administrative process?

Ms. Bernstein: Yes, but they don't use it very much. Because it's only one administrator, and it was always very awkward. And then they set up a little office that was supposed to be on the same side as the administrator, and he was supposed to conduct the appeals process and it became a black hole, nothing ever came out of it, it was just dreadful. And most of it really regulatory. And the enforcement of it could be in the court and it was in the courts. The regions did an awful lot of the enforcement. But the difference was, at least from the staff of my office, there was still a lot of political manipulating by the administrator but, from my point of view, since I was viewed as sort of a neutral because I didn't have a program to run, I gave the administrator my best judgment. It meant that I had a huge amount of influence, a huge amount, and the administrator was one person not five commissioners. Once you develop a relationship like that, I would just go up the one-two flights of stairs, I would go in and say, "I talked to you about this before; you need to sign this order. Here it is, and it's okay." And he would sign it. So there was an efficiency there that you can't do when you've got five people, you just have to go through a different kind of process. As close as I am to Bob, and I am much closer to Bob personally and professionally than I was with either Doug. I wasn't when I worked for Bob directly; I didn't know him that well, but now I do, and I certainly have the same amount of access.

Professor Jackson: But he's one.

Ms. Bernstein: He's one and he'll say, "Well, who is going to run around and see the rest of them, you or me?" So it's just a different process.

Professor Jackson: One of the questions I was going to ask you might bear on this and that was at which of those three sets of positions and agencies did you experience as giving you the most power?

Ms. Bernstein: I think probably EPA.

Professor Jackson: That's what it sounded like to me from your description.

Ms. Bernstein: Not that I was not powerful at HHS, as you can tell from heart transplant stuff, but I wasn't the only person. On the Title IX stuff I was the principal architect. I mean my office was. We didn't bother with the rest of it.

Professor Jackson: Do you have any impressions of, this question is because of the D.C. Circuit historical side, I was thinking about linking, linkages to courts so you may not have anything to say about it, but I was wondering whether in your experiences in those three agencies whether their relationship to the courts here was significantly different in any way that you can put your finger on. I recall in one of our early talks the effort that was made here to avoid having a judicial challenge to the care labeling regulations. One example of the work of the agency in a sense being influenced by what's out there. In EPA you said this afternoon that you were attentive to the effort of having the kind of record that would not only go to OMB and get through but that could get upheld as thorough and taking the middle of the road. So maybe it's those kinds of things, I'm not really sure.

Ms. Bernstein: Well one of the things that is different but I think it is important, Vicki, in EPA law, almost all the regulations, I believe they still are, are only reviewed in the D.C. Circuit. So you wouldn't have the same kind of issue. In the care labeling we were trying to avoid a split in the circuit's in rule-making. We wanted to keep it in the D.C. Circuit, we had it in the D.C. Circuit. But the care labeling could have landed to a different circuit. EPA we didn't have to worry about that too much. There were other minor things that would get in a circuit court from a district court, but not the major regulations. They all are reviewed only in the D.C. Circuit. At HHS, we had one, we had a case in the Supreme Court while I was at HHS, because

I remember going there, but I can't remember what it was.

Professor Jackson: I printed out a list of every place your name showed up, and I don't know if I brought it with me today. I know I showed it to you other times, but I tried to lighten my brief case, and it may not be here. Let me just, okay, well, if I can find it I'll pull it out, and if not I'll bring it the next time. Okay, no, it doesn't seem to be here.

Ms. Bernstein: I don't think, at least, it wasn't one of the things that was nearly as significant in terms of court review at HHS, at least not as I recall it now. We had much more concern about that with Congress; they are really micro managed by the Congress. I told Bob the other day there is a tunnel underneath the HHS building up to the House Office Building.

Professor Jackson: You're kidding.

Ms. Bernstein: No, there is.

Professor Jackson: I didn't know that.

Ms. Bernstein: At least there used to be, unless they bottled it up.

Professor Jackson: So the orientation there was more on the Hill.

Ms. Bernstein: Much more so. Not to say that we weren't in court all the time, because of course we were. It was to defend. There was all this administrative litigation that was review of disability payments, that whole thing I put out of my mind because I thought it was the most horrendous system that I had ever encountered. I don't know if it's any better now. It was just horrible. And there were hundreds of those awful ALJs who wouldn't do any work, and oh, it was just awful. I had that on my agenda that if we got re-elected I was going to take that on, but I never really could.

Professor Jackson: I don't know what the system is right now. I certainly know that the difficulties you describe were perceived to exist long after you left.

Ms. Bernstein: Oh yes, they got worse because it got terrible in the ‘80s, got really terrible.

Professor Jackson: All right. I have a new subject, which is judicial nominations in the Carter administration. I assume you know about Judge Wald's. Do you still have time?

Ms. Bernstein: What were we scheduled for?

Professor Jackson: Scheduled until 3:30.

Ms. Bernstein: Fine, perfect. Okay let's do Judge Wald's nomination. I can do that.

Professor Jackson: Good.

Ms. Bernstein: And here's what I remember. I told you we worked together when I was at EPA and she was at Justice, very closely. I drove her to work, and we really accomplished a lot that way, and I'm confident in saying I think that she was probably the best assistant attorney general for legislation that they have ever had. And she worked herself to death, to death, in that job. And while she is one of the best lawyers with the deepest experience in litigation, I don't think she had had a lot of experience with dealing with the Congress before that. She had dealt with the Congress brilliantly. Of course, she always knew more than anybody else, so you know everybody respected her up there. So she got nominated with everybody's support. Bob Wald had called me. My first recollection of anything, I said, “Whatever I can do?” I was still at EPA I believe, wasn't I still at EPA? I'm pretty sure.

Professor Jackson: I think so, because you were at EPA into '79.

Ms. Bernstein: Yeah, I didn't go to HHS until– no, I'm pretty sure. Yeah, because I remember by the time I got to HHS, she was already on the court and was already saying to me “Now we can't discuss some of these things because some of your stuff will come

to the court." So I'm pretty sure I was still at EPA. Because she went right to the court from the DOJ. So Bob called and said, "You know we're getting all the support and everything ready."

Professor Jackson: This is Bob Wald.

Ms. Bernstein: Yes, and you know I'm as close to him as I am to Pat in many ways. He and I were in the same section at law school. I knew him before Pat did. And he said, "I think you know Bob Dole." Bob Dole was on the committee. I said, "Yes I do." I don't know Bob Dole as well as I know Libby Dole, Elizabeth Dole because, of course, she had been here with me, and I'm sure I told you I had been at the shower for her and the wedding, and she was wonderful to me. She was wonderful to me, always. And considered me a friend or I wouldn't have been invited and all that. So I said, "Well, I tell you what, I don't know if I can call up Senator Dole or not directly, but I can call Elizabeth." And he said, "Do what you can do." So I said okay. And I called Elizabeth and told her why I was calling and that I would like to send a resume. And I didn't know if she knew Pat or not and that anything she could do in terms of supporting Pat's candidacy with Senator Dole would be very much appreciated, and if I could do anything more, I would do it. She said, "Fine, Jodie, I know of Pat's work and thank you." Okay, so that was as much as you could do, as much as I could do, or they could do, because I didn't know much about Bob Dole except that he had been viewed as pretty much of a conservative, hawkish, I mean I already liked him, but I only knew him socially. I did know him socially. I thought he was wonderful because he has a marvelous sense of humor, and he was charming to me always. But he was not viewed as anywhere near a liberal or even a moderate. Remember what Bob Dole was then? So we were worried about him. Then the next thing I remember distinctly was the hearing. And I went to the hearing, and I do recall Pat and I kidding about first of all she had written some article, which I'm sure is in some law journal, which had

something to do with whether or not minors in various custody disputes, whether they should be separately represented. And she probably concluded under some circumstances they should. I believe she did. Well nobody thought it was the least bit controversial until this stupid hearing. When an asshole senator from New Hampshire, I believe (I think the one who was formerly a pilot and he served one term, I don't remember his name), he came from another committee to testify against her nomination. They may have known, I didn't. I was stunned when he came to give his testimony stating she was anti-family. This was close to the beginning of the Reagan revolution, it was close to the beginning, the tides were turning.

Professor Jackson: The logic is what is escaping me, that it's anti-family to argue when the family has fallen apart and the child is the subject of battle, there isn't a family to protect a child.

Ms. Bernstein: Obviously, this is not exactly a legal analysis. This was a position from a sitting senator to a committee. I don't remember who introduced her now because they lived in Maryland. I suppose it was Sarbanes, I don't know who it was. You know how they always introduce everybody. I don't remember who the senators were. I was sitting there. Then there came a little break after he testified, and Pat was sitting there with Bob and her five children and all dressed up and looking wonderful. That's how anti-family she was, five children, beautiful children. I remember Johanna Wald saying to me, "Oh Mrs. B," (they always called me Mrs. B) "do I have to wear a bra today?" I said, "Johanna, yes, today you have to wear a bra. I don't care if you never wear one again." She laughed and we all laughed. Her kids are wonderful kids. And they were then and they are now. And so they're all lined up, and there comes a little break, and there's Pat being accused of this terrible thing. Senator Dole, who I think was probably chairing the hearing, although I can't remember, certainly was there, and I

don't remember who else was there, but I remember vividly that he came down to greet Pat, Bob and be introduced to her family. Puts his arm around Pat and is talking to Bob and the children and stuff, and the woman sitting next to me, by chance says to me, "Is that Senator Dole that's up there visiting with them?" I said, "Yes it is," and she said, "I can't believe that he seems to be willing to support her." I said, "Well it certainly appears that way, doesn't it? And of course she's fully qualified." It turns out that was the wife of this dopey senator from New Hampshire, which I didn't know. Isn't that hilarious?

Professor Jackson: That's wonderful.

Ms. Bernstein: Oh it was just wonderful. He was perfect. Dole was perfect. I mean a bunch of other people spoke in her defense, but that was just my little part. And he was wonderful as he always has been to me. Always. In fact, when I first came back here, I was here already, but I had just gotten back and one of my old pals from the garbage company said –

Professor Jackson: This is now in '95?

Ms. Bernstein: Yes, this is my current one. One of the pals called up and said, "There's a big environmental dinner, we've got a table. Will you come? We'll get catch-up time and you'll see some other old buddies." I said I'd love to come. It was some big environmental thing. And John Chaffee was getting an award from this environmental group for his contribution, you know that kind of thing, so a big dinner. Okay, so I go over with Chuck McDermott and these other guys and I was smoozing around with these old pals from EPA and people from the states and all, having a good time, and just as we're told we're supposed to go to our tables from the cocktail area, we're walking across the room, Chuck and me, and in comes John Chaffee escorted by Bob Dole. He was majority leader, wasn't he in '95? He wasn't out yet, he was still in office, and he was coming in because he was going to introduce Chaffee and

give the award, and the two of them were there. And of course people as they see them come in are beginning to move up, you know how people do toward the important people. We just happened to be right smack in front of them, and he said, this is just perfect, "Jodie, Jodie, how are you? You know, what, John, last night I had the TV on and I saw Jodie doing this piece on TV. I said, 'Elizabeth, come in here, Jodie is just doing this great job'," and all these people are saying, "My gosh, who is she?" It was just perfect. And, of course, all my buddies from the old garbage company said, "Jodie, you set that up, just to show off." And I wrote him a note afterwards and said only you could have delivered this perfect line in a perfect setting, and thank you very much.

Professor Jackson: That's a wonderful story.

Ms. Bernstein: It was just perfect. And that's how he is. As a person that's how he is. He never forgets anybody. Now mind you, the ten years I was in Chicago I saw him several times because he was always out fundraising. Our Republicans in the company loved him. And so there were a number of times in which the company had a fundraiser for him, and we would always go, even though we didn't give the money, the company gave the money. I gave money one time I remember. But he never missed an opportunity to indicate to them out there that he knew me and so forth.

Professor Jackson: That's really a lovely thing.

Ms. Bernstein: Right.

Professor Jackson: Someone of his generation who can marry someone who is a very bright, very professionally oriented, successful person it takes – we had talked about that before.

Ms. Bernstein: Yes, and the other connection we had with Bob Dole was that a cousin of my husband who was an orthopedic surgeon in Chicago had been a partner of the

doctor in Chicago who ended up with the final repair of his war wounds. And Bob Dole had kept up with Dr. Kelikian, I think his name was, a hand surgeon. He had kept up with Dr. Kelikian and his family after he died, so that at fundraisers, for example, the widow and his daughter would be invited and would have dinner with Bob or be invited to various things. He keeps up with people.

Professor Jackson: Very nice. Interesting.

Ms. Bernstein: A very interesting person of another generation.

Professor Jackson: We're getting close to the 3:30 mark. Did you have any involvement in the Carter administration's judicial appointments other than Pat?

Ms. Bernstein: Not that I can remember.

Professor Jackson: Okay, we could –

Ms. Bernstein: I was never interested. And I don't think they ever got serious about me. Oh I've never viewed myself – I'm very much an advocate, I like advocacy. I'm very comfortable. I think there was some prospect of going to Justice. I really decided that wasn't for me. There are so much more policy decisions shaping of things like that in a substantive agency than there is in the Department of Justice. And I remember discussing it with Sy Lazarus. He said, "What do you want to do there? The civil division, all they do is defend the government, the positions have already been, that's what you like to do, you like to be involved in the –" I said, "Yeah, you're right," so –

Professor Jackson: So far we have another 15 or 16 years to think about, the number of important, publicly important initiatives that you were involved, that have your handprints are really, I would think you feel very good about it.

Ms. Bernstein: Oh I do, I mean I feel very good especially about having had the

opportunity. I think I feel like I was grounded somehow in ways where I was capable of making decisions in a way that contributes so much to government service. I'm convinced, Vicki, that if I've been successful that part of the reason is I have an ability to get myself sufficiently informed so that I can make decisions. The rest of the organization works very well if there is a decision-making process in place that they can trust, rely on. It's just very important to the functioning of an institution. And I don't say that I'm better than anybody else, but the other thing is to make a reasoned decision and to back up the staff when things get controversial which is what I did today. But the entire process must be open and debated within the organization to preserve the integrity of the place.

Professor Jackson: That's a nice note on which to end. It gives us – I'm not sure we could really do justice – I don't have yes/no questions. I have let's talk about questions.

Ms. Bernstein: You're a great interviewer, Vicki, you are.

Professor Jackson: This is so interesting to talk about.

Ms. Bernstein: You've read all that [referring to book, *Report of the Commission on Wartime Relocation and Internment of Civilians: Personal Justice Denied*]?

Professor Jackson: Yes, I have. It's really interesting. I actually cited it in my comparative con law book that Foundation Press is putting out this summer.