

Oral History of Robert Pitofsky
Second Interview
December 2,2003

Ms. Born: This is the second interview of Robert Pitofsky for the Oral History Project of the Historical Society of the District of Columbia Circuit. It is being held on December 2,2003, in a conference room at Arnold & Porter, 555 12th Street, NW, Washington, DC 20004. The interviewer is Brooksley Born.

Ms. Born: Bob, one last question about your time at Dewey, Ballantine. When you started there, it was an era when many New York firms were not hiring Jewish associates. What was your experience at Dewey, Ballantine in that respect?

Mr. Pitofsky: The timing is important. In 1957, there were relatively few firms that had an absolute or quasi-absolute rule against hiring Jews and Catholics. It was very much a period of transition. For example, at Dewey, Ballantine, there was only one Jewish partner, prior to 1957, a young man with spectacular credentials, and I don't think there were too many Jewish senior associates when I arrived. But by '57, the firms were hiring, regardless of religious preferences, and I was one of the people, along with many others, who was swept into these large Wall Street law firms even though we were not white Protestants.

Ms. Born: Let's skip forward to 1963 when I think you became a full-time teacher at NYU.

Mr. Pitofsky: I think I started full-time in '64. There was a commitment to hire in '63, and I had already been an adjunct professor for a year or two before that. But actually moving over to NYU Law School, that happened in September '64.

Ms. Born: What caused you to decide to teach full-time?

Mr. Pitofsky: It was a decision that was long in the making. As I mentioned, I was already an adjunct, teaching antitrust, usually on Monday and perhaps Wednesday night and preparing those classes on the weekend. I knew a lot about antitrust relating to the cases I had worked on, but I didn't know the broad range of issues in antitrust. And I soon found, in fact almost immediately, that I enjoyed the teaching immensely. I was not a bitterly unhappy person practicing law, but it was clear to me that teaching was a better fit for me than full-time practice and part-time teaching, and, therefore, I turned it around to full-time teaching and part-time practice. And from the day I arrived at NYU, I've never looked back on that decision with any thought other than what took me so long to cross that barrier.

Ms. Born: So you continued to work part-time at Dewey, Ballantine even though you were teaching full-time?

Mr. Pitofsky: I did. Less and less as the years went on, but certainly in the first few years. In those days a teacher's salary was very small. The fact that the law firm continued to employ me on some major cases was a very important economic transition factor. I continued on a regular basis to do much of the same kind of work I had done while I was an associate.

Mr. Born: A lot of antitrust work?

Mr. Pitofsky: All antitrust. And almost all merger work, because that's what I had moved into toward the end of my stay at Dewey, Ballantine.

Mr. Born: I understand the financial motive for doing it. Did you find that working part-time at the law firm offered any other benefits?

Mr. Pitofsky: Yes, although the main reason was financial. I couldn't live on my teacher's salary. My wife and I had our first child just as I moved into teaching. My wife, therefore, retired. So not only was my salary cut by 30 or 40 percent by going from Dewey,

Ballantine to NYU, but we only had one income. In addition, there were people at that law firm I liked very much. And those were the people who would tend to call me and ask me to continue working on a project or two. So, I found it attractive. I would sometimes work in the evenings, and I often would work on a Saturday at the law firm.

Mr. Born: Tell me about the courses that you taught when you first went to NYU full-time.

Mr. Pitofsky: There's an interesting little spin to this. Originally, I was hired to teach antitrust, consumer protection, and civil procedure, and in the summer months, just before the fall semester started, the then-dean of the law school said, look, we can fill civil procedure with many people, but we don't have anyone to teach federal courts. I have always said, taking federal courts in law school, and learning to teach federal courts, was the most challenging, intellectual experience I've ever had. But that's what I did. Those were the three classes I taught. Sometimes I would convert consumer protection course into a seminar and for the first three, four, maybe five years there, that was the combination of courses. Eventually, I found someone else to cover federal courts and I moved over to constitutional law which was a little less of a challenge.

Ms. Born: Did you enjoy the teaching aspects of the job?

Mr. Pitofsky: I loved it then.

Ms. Born: The interaction with the students?

Mr. Pitofsky: I loved it then and I love it now. That's the one thing that hasn't grown old on me. Close that classroom door and it's just you and a group of students and if it's a subject that's interesting, you can have an extraordinary hour, hour-and-a-half.

Ms. Born: Is it the opening up of young minds to these ideas or what is it about

teaching that is so appealing?

Mr. Pitofsky: It is a matter of drawing students out, gaining their confidence, convincing them that they will never be the subject of ridicule in a class of mine. Almost always, especially in a large class, there'll be two or three or four people who will challenge first principles. They will ask about the derivation of a rule that experienced lawyers won't ask about. Senior lawyers just figure, it's there, and it's been there since the Old Testament. You can use and convert that student challenge into a fascinating exchange with the class. Also, as time has gone on, there are more, what I would describe as constructive conservatives in the class who raise serious questions about why do we bother with antitrust. Is it really a contribution to the welfare of the country? Wouldn't we be better off, as Robert Bork and Judge Posner have argued that we mainly challenge hard-core cartels and large mergers, and leave the market to take care of most of the rest of transactions among businesses. I don't agree with that but I love to be challenged.

Ms. Born: You love to work it through with the class?

Mr. Pitofsky: Yes. To try to explain why I think merger enforcement or vertical distribution enforcement really is a complement to what we all agree is essential and that is enforcement against hard-core cartels, price-fixing, market division, and so forth. We have cut back over the years greatly in non-cartel enforcement, especially during the Reagan years, but we seem to have moved up again to a more activist antitrust posture in this country during the Clinton and now the Bush years.

Ms. Born: Tell me about the research and writing you did during the years you were at NYU.

Mr. Pitofsky: One of the great attractions of academic work is you choose the

topic that you're going to become involved with, that you're going to research and that you're going to write. I wrote one very quick article with a partner at Dewey, Ballantine that was published in the *NYU Law Review*, which was essentially converting a memorandum to a client into a broader piece, dealing with intra corporate conspiracies. I don't think I've seen it cited in the last 40 years. Then I started on two projects that made a big difference. I wrote a fairly ambitious article on antitrust and joint ventures, which was published in the *Haward Law Review*, and that got me started on merger/joint venture analysis. I had done cases in that area but not much else. And second, I was invited by someone I didn't know at the time, Harlan Blake, a professor at Columbia Law School, to join him in the first edition of a new antitrust casebook. In those days, the Handler book and the Areeda book dominated the field, and it was a little difficult for a new entrant to break in, but we had a selling proposition, which was to include far more economics in the book than other existing casebooks. The book was not a raging success, but did reasonably well. One ironic note is that among the professors in the United States who used our casebook was an adjunct professor at the University of Arkansas, by the name of Bill Clinton. I didn't know that, but he remembered it and called it to my attention many years later.

Ms. Born: Haven't you continued on with that book or some derivation of it?

Mr. Pitofsky: Yes. Blake and I only did one edition, and then we merged with the Handler book because Milton Handler wanted to retire. So he turned the book over to Harvey Goldschmid, and Blake and I joined Goldschmid to put out a revised edition. Just three months ago we put out the fifth edition of that book. So I've been doing casebooks every seven years or so for about 30 or 35 years.

Ms. Born: You've had a lot of different co-authors over the years, haven't you?

Mr. Pitofsky: Not a lot. Tom Jordy joined us for a while. He was then teaching at Berkeley, but he stopped teaching and went over to more of a law practice career. Now we're lucky to have Diane Wood, a judge on the Seventh Circuit and a senior lecturer at the University of Chicago. So she's a judge and she teaches. She's a specialist on international antitrust and that has allowed us to put more comparative law and international law into the book. Those are the only authors, along with Goldschmid, Blake and myself.

Ms. Born: How did you first meet Harvey Goldschmid?

Mr. Pitofsky: He had just begun teaching at Columbia. There was a lunch in which Handler invited Blake and myself to join forces with Goldschmid and merge the two books together. I met Harvey at that time, although I knew him slightly as a result of bar activities.

Ms. Born: What about the tenure decision at NYU? When were you up for tenure? When did you get it?

Mr. Pitofsky: I came up for tenure fairly quickly, five or six years. Not only had I written the articles for NYU and for Harvard and begun the casebook, I'd written some book reviews and occasional short pieces so I had a substantial body of scholarship. The problem was would they consider the casebook as scholarship since it had not yet been published. But the tenure committee was very generous about that. They read the manuscript. It was about to be published. And tenure was a relatively easy matter for me.

Ms. Born: During these years, going back to family developments, your first child was born. Sally stopped working and stayed at home. How many children did you have?

Mr. Pitofsky: We had three children, born in '63, '65 and '69 and so that, essentially, the second and third child were born while I was at NYU.

Ms. Born: And how did that affect your career? Did you spend a lot of time with the family? Could you spend time with the family?

Mr. Pitofsky: That's another extraordinary virtue of the academic life. While at Dewey, Ballantine, I was traveling a great deal and found it very difficult as a newly married husband and new father. But we lived in Greenwich Village. I lived about three blocks from the law school. I never came home for lunch, I didn't impose myself in that way, but I was home for dinner almost every night of the year and could easily work part of the day at the school, part of the day at home. It couldn't have been more convenient in terms of having an opportunity to see young children grow.

Ms. Born: Were there any special family activities that you liked to engage in? Travel or go to museums?

Mr. Pitofsky: When we traveled, we took the children with us. I think Sally and I have taken, all together, one trip in our entire life, where the children didn't come along. Sally loves to tell this story. It came up because I was teaching in the summer in Naples, and we were scheduled to be away a month without the children. Then after about three weeks or so, I said, this doesn't feel right, let's go home. I taught at Salzburg, and the children were with us. We've taken houses in Europe, and the children would always join us. Every summer, they've joined us on the Cape where we usually put in two or three weeks.

Ms. Born: Do you have a house on the Cape or do you rent there?

Mr. Pitofsky: We rent. We've been doing this for 30 years and we're on our third house. We just rent the same house over and over and over again. We are a very sports-oriented family. I loved to play ball with the kids. When we came to Washington, one of the first things we did was organize a father-son-daughter softball game. That's still going on **30** years later. I

don't know what else we did, as a family. Side-trips around New York. Visiting my parents in New Jersey. But I think it's fair to say that it's a very close-knit family. The children are close to each other, and they're close to us.

Ms. Born: Tell me about the ABA Commission to study the Federal Trade Commission.

Mr. Pitofsky: That was odd. I had been granted tenure. I had finished seven years at NYU and I was ready to take a sabbatical abroad. And out of the blue, I received a phone call from Ira Millstein, a prominent lawyer in New York, and another very prominent lawyer, Allan Holmes, was on the call, and they wanted to explore whether I would serve as Executive Director of this new project involving the Federal Trade Commission. The background was that Ralph Nader, when he started his Nader's Raiders Project, singled out the Federal Trade Commission as his first target, no doubt because he thought it was the sleepest, most ineffective agency in Washington. He wrote a scathing, very harsh and fairly personal attack on the agency and its people. Someone, I think it was Allan Holmes, persuaded the then-President Nixon to ask for a follow-up report.

Ms. Born: Who was Allan Holmes?

Mr. Pitofsky: Allan Holmes was managing partner at Jones, Day. One of the best lawyers I've ever met. And a very prominent figure in Republican circles.

Ms. Born: And who was Ira Millstein?

Mr. Pitofsky: Ira Millstein was senior partner at Weil, Gotshal and a powerful figure in the Antitrust Section of the American Bar Association. The trick was to have President Nixon ask for a commission to study the Federal Trade Commission in what was thought to be a more moderate style than the Nader people had done. Or at least to publish their report in

language that was a little less incendiary. And with the help of Holmes and Millstein and Mike Pertschuk, who was part of the selection process although he was not on the commission (he was then working for Senator Magnuson in the Senate), they put together one of the most interesting groups that I've ever had anything to do with. Miles Kirkpatrick, head of the Antitrust Section of the ABA, was chair. Richard Posner was on the commission; John French, who was editor-in-chief of the *Haward Law Review* and a very prominent lawyer in Milwaukee; two first-line economists, Jesse Markham and Betty Bok; Harlan Blake from Columbia; Ellen Peters, who was teaching at Yale, and several others. Millstein and Holmes were joined by other prominent lawyers like Fred Rowe and Jack Greenberg of the NAACP Inc. Fund. It was an extraordinary group of people. And I took some persuading to undertake this project because I thought I was going on sabbatical. I wasn't going to work hard for another year.

Ms. Born: Where had you been planning to go?

Mr. Pitofsky: We hadn't really nailed it down. Travel or the possibility of teaching in a European country. That was sort of the general idea. But this seemed like such a promising project. Also I was intrigued by the fact that it let me get into consumer protection and economic analysis, more than just antitrust. I agreed to do it. My deputy on the project was Mark Yudof, now the President of Texas University, formerly President of Minnesota University. And three or four young people from NYU and Harvard—Robert Skitol and Michelle Corash among others—possibly the best staff I think I've ever had the pleasure of working with.

Ms. Born: Were you an ABA employee or were you a volunteer in this project?

Mr. Pitofsky: That's an interesting question. I was not paid for this project. I'm sure expenses were provided. We spent a good deal of time in Washington, interviewing people

and having meetings, but this was not a paid proposition.

Ms. Born: How was it that it ended up an ABA project as opposed to an independent commission set up by the President?

Mr. Pitofsky: I don't know what the strategy was. I think people in the White House wanted to distance themselves a little bit from the conclusions the group would reach and, therefore, asked the ABA to organize the commission and select the members. Although I know that the White House had a hand in that selection process.

Ms. Born: Was the commission a child of the Antitrust Section of the ABA or was it totally independent within the ABA?

Mr. Pitofsky: I sometimes think it was a child of Ira Millstein and Allan Holmes. I think they decided, as we came to conclude, that this was an agency with immense, unused substantive and remedial power. And that power was going to waste. It was in a sense, a sleeping giant. And the epithet that people used about the Federal Trade Commission—the little old lady of Pennsylvania Avenue—tells you a lot about what people thought. And that was quite unfair because in the previous 10 or 15 years, the agency had on a few occasions behaved very courageously and quite boldly. But if you look across the entire range of what they were doing, it was really a sad commentary on what they could be doing with proper leadership.

Ms. Born: So, as Executive Director of this group, what kind of program did you follow? What was your process?

Mr. Pitofsky: We held an organizational meeting at NYU Law School. It seemed clear to me at the end of that meeting that we were never going to come out with a unanimous report. The fact that eventually we came out with a report that was 15 to 1, I still haven't gotten over that, because people had such strong views about abolishing the FTC, retaining the FTC,

breaking it up into different parts, and other reforms. There were all sorts of reformist notions. As I mentioned, the chair of this commission was Miles Kirkpatrick, the then head of the Antitrust Section of the ABA. And he and I put our heads together and prepared an outline of the subjects that we would try to cover in the report. We circulated that and asked for comments, and people added and subtracted from our outline, and we were ready to go. We did a great deal of interviewing, not just of members of the FTC, but other people in government and lawyers who practiced before the FTC. And we reached out. We invited written comments or solicited meetings. I know we worked straight through the summer. We probably started around April or so, and I think we published perhaps in November of 1969. I have to go back and check the dates. But it was about a six-month project. It ended with an extraordinary meeting of the entire commission, myself and the senior staff at Weil Gotshal, that went on for at least two days, in which we hammered out the conclusions. Some things the staff was proposing the group wasn't interested in; other things they were. And then, a most astonishing feature was that 15 of the 16 said the agency could be reformed. The 16th was Richard Posner, who incidentally wrote his dissent before we circulated our report. And it was a brilliant analysis by Posner. Someone referred to it as a biopsy of what the commission had been like in the previous ten years, and it tore the agency to shreds.

Ms. Born: So he was in favor of abolition?

Mr. Pitofsky: Abolishing, yes. As were many others around the country, and as I thought three or four others on the commission would conclude that way until the very end.

Ms. Born: And had you led the staff in drafting a proposed report and proposed conclusions?

Mr. Pitofsky: Yes. The report consisted of two parts. One is an analysis of the

authority of the commission and what it had been doing, and then a blueprint as to what it could do if it were properly led and properly staffed and if it had the support of Congress and the White House.

(End of Tape 1, Side A)

Ms. Born: What were the main conclusions of the report?

Mr. Pitofsky: As to the first half of the report that dealt with what the commission had been doing in the previous 10 or 15 years, the main conclusion was that it had not realized upon the enormous authority it had in both the antitrust and the consumer protection area. In antitrust, it was bringing a hundred cases a year under the Robinson-Patman Act. By comparison, there's been one Robinson-Patman case in the last eight or nine years. On the consumer protection side, it was bringing trivial cases involving mislabeling of furs and flammable fabrics, tiny advertising cases. I often mention the case that the commission won in the court of appeals, saying it was a fraud not to disclose that navy bean soup was not manufactured by the Navy. (laughter) You would think that's extreme but that's a fairly typical case during that period of time. The proposals included the following. Practically, the principal proposal had to do with remedy, because the agency in most cases, not all, but in the overwhelming majority of cases, would find a practice it disapproved of and either settle the case or win it in litigation and then the remedy would be, don't do that again. "Go and sin no more."

Ms. Born: Cease and desist.

Mr. Pitofsky: Cease and desist only. And it stands to reason that business people would decide, if that's all that's going to happen to me, why don't I do it until they tell me to stop. It is profitable for me to engage in this deceptive, anticompetitive behavior. And then, on top of that, often, the agency wouldn't even require that the wrongdoer sign an order. They

would sign an assurance of voluntary discontinuance, which isn't worth the paper it's written on. So the report urged a review of remedial provisions and the adoption of remedies that would take the fruits of illegal behavior away from the wrongdoer. Second was the problem of trivia. I mentioned earlier some foolish cases, and it urged the creation of an office of policy planning, which would adopt some guides or rules, principles about which areas of the law to aggressively enforce and which areas of the law to back off. Third, in the fashionable language of the time, the report urged a ghetto fraud project; that is to say, a very aggressive review of marketing practices in one or two inner cities, not to stamp out those practices by case-by-case enforcement, but rather to see what the problems are, what the trends are, and consider rulemaking. And I think some excellent rules emerged from that project and I think it was useful. Finally, there's a section of the report having to do with staff. There were always at the agency some outstanding people — idealistic, interested in public service, interested in a career in government service — but there were also many people who were not highly qualified to work for a federal agency. And one of the most provocative things that we heard came from the man who was in charge of hiring people in the regional offices. There were ten regional offices. They might have accounted for a third of the staff of the agency. And he said to us, with no thought that he was saying something that would come back to haunt him, when I hire for the Federal Trade Commission, I like to seek out people who have been out of law school for awhile and not made much of a mark in the world because those are the people who remain loyal to the agency. That statement was extreme but there was a sense in the agency of not going for the best and the brightest, and we urged the new chair, whoever that might be, to revise completely the recruiting program and try to bring in able, young lawyers, even if you knew they would only stay at the agency for three or four or five years. And it turned out, when they tried to do that, the number

of people—just graduating law school or perhaps out a year or two—who were willing to commit to the Federal Trade Commission, was astonishing. So that those hiring years—'71, '72—brought in some of the best lawyers the agency ever hired, and those lawyers are now senior partners or managing partners in some of the great law firms in this country. There was no problem getting first-rate people to commit to the Federal Trade Commission, but you had to be out there recruiting them. I don't think the agency was interviewing at law schools prior to 1970, but I'm not sure of that.

Ms. Born: Don't you think it may have appealed to very bright recent law graduates because of the reforms that were being adopted in the early '70s? If the agency had broadened its recruiting in the '60s, before your report, it might not have brought in the same kind of lawyers.

Mr. Pitofsky: You're absolutely right. And of course the fact that the first Chairman after the report was Casper Weinberger, and then the second Chairman was Miles Kirkpatrick—two highly respected attorneys. And also, the fact that under the leadership of Basil Mezines, many people nearing retirement age were induced to move their retirement up. So that I think in two or three years, the agency replaced almost half the lawyers working there. The faculty studied this project at the Harvard Business School and at the Harvard Law School. It's a chapter in one of the casebooks on administrative law. And the credit goes to an unsung hero, Basil Mezines.

Ms. Born: What role did he have at the agency?

Mr. Pitofsky: He was an interesting, young, promising lawyer in the late 1950s and a Republican, one of the relatively few Republicans at the agency, and when the Democrats took control in the 10 or 15 years before 1970, he was relegated to being a field lawyer, a trooper,

bringing cases. When the report came out, Cap Weinberger met with Allan Holmes, Ira Millstein, Fred Rowe and myself, and we all agreed that he needed somebody who knew the commission inside and out and the unanimous proposal was that Basil Mezines become his executive director. He was put in charge of recruiting, and persuading people that there was a new wind blowing in this agency and you might be better off and happier if you took an early retirement. And he did it in such a skillful way that almost no one ever sued the agency. There was one reduction-in-force and we were sued once, and we prevailed.

Ms. Born: I think that you are describing some of the impact that the report had on the agency, on its stature in the legal community. Can you elaborate on that some more?

Mr. Pitofsky: It didn't happen overnight. Weinberger only stayed a year, but he performed an absolutely essential function and that is—I hope I'm not hurting the feelings of some people—clear out the dead wood. There were many people at that agency who would leave for lunch at 12:00 and come back at 3:30 or 4:00. Many. Many people who came late and left early. Many people who hadn't done a lick of work in many years. You had to clear that crowd out to allow yourself the luxury of hiring these bright young people. Weinberger did it with Mezines as his implementor. Weinberger was a man of steely intentions. Even though some of those people who hadn't done a lick of work had patrons on the Hill, the House and the Senate, and he received a fair number of communications saying, do whatever you want, but make sure to take care of this person, that cut not a bit with Cap Weinberger. So when Kirkpatrick came in, you had a different look to the agency entirely. He brought in the first, strong, young class, and there were vacancies all over the place. Kirkpatrick hired on an apolitical basis. Remember now, these are Republican years, these are two Republican chairs. But I don't think Miles even knew whether some of his senior staff were Republicans or

Democrats. He didn't care about that. He was a man of principle; he had been the chair of the Antitrust Section and led the way on the ABA Commission Report, and he was there to implement what he thought were the correct recommendations.

Ms. Born: And he brought you in?

Mr. Pitofsky: And he brought me in. I thought he was inviting me to run the Bureau of Competition. I was shocked when he said I want you to do the Bureau of Consumer Protection. There hadn't been a Bureau of Consumer Protection before the ABA Study. And at first I was reluctant. The more I thought about it, the more I thought that this is better than running the antitrust side of things. I'd been doing antitrust for too long and the opportunity to try out essentially a new field, although I had taught a little bit in that field, was enticing.

Ms. Born: Who did he choose to be head of the Bureau of Competition?

Mr. Pitofsky: Alan Ward, who was a successful, mid-range partner in one of the big law firms. Basil stayed on as Executive Director and into his own office he brought in Cas Hobbs, who's now managing partner of Morgan, Lewis. And two or three other people who went on to great law careers.

Ms. Born: Tell me about starting the Bureau of Consumer Protection.

Mr. Pitofsky: Looking back on it, I wonder that I wasn't more intimidated by the prospect. I came to Washington about a month before I was installed, and I just sat with the Acting Director of this new bureau, like a fly on the wall, listening to what he did and what he said and who said things to him and so forth. And I knew what the opportunities were. I knew that there were some assistant bureau directors who were first-rate. There was a young man running the advertising section named Gerald Thain, who later became a law professor at Wisconsin. The senior administrative aide in the bureau director's office was Mort Needleman,

a really superb lawyer. The credit practices section which had been doing all these trivial little truth-in-lending cases—you know, the comma's in the wrong place, the word's in the wrong place—was ready to go. There was no consumer education function at all and a young woman named Nancy Buc was put in charge of that and did a terrific job.

Ms. Born: Did you hire Jodie Bernstein, too?

Mr. Pitofsky: I did. She was my first hire. I remember resisting it because I knew there was a tendency to hire people who “hadn't made much of a mark in the world,” and the week before I came down to Washington, I received a call, urging that I authorize the hiring of this woman, who had been out of law school for 20 years but really was, they thought, quite a good lawyer. And I hemmed and hawed and I said, why can't it wait a week. I'll get down there and I'll interview this person and finally I was told, well look, she did go to Yale Law School and she was one of the only two women on the *Yale Law Review* that year, so I bravely said, okay, hire her. (laugh)

Ms. Born: (laugh) So a leap of faith on your part. And what role did Jodie have?

Mr. Pitofsky: It's interesting. I'm going to talk about this tomorrow, when Jodie is presented with the Miles Kirkpatrick Lifetime Achievement Award, but I'll give you a preview of coming attractions. She started as a foot soldier. At 20 years out of law school, she, like so many other women of her generation, Pat Wald is an example, cut short their career, took off a decade or a decade-and-a-half to start and raise a family, and then they had these entry problems, and the best job Jodie could find was being a trial lawyer at the Federal Trade Commission. She went over to ad practices and almost immediately people would say to me, (I don't think I'd even met her) this Bernstein girl—people talked that way in those days—this Bernstein is

special. And we gave her some very challenging assignments, and she did them brilliantly, so once again I boldly made a move and moved her up into my office, and her career since then reads like a Who's Who of government service.

Ms. Born: It's certainly true. So what did you all do in the bureau? How did you change it? Did you follow the recommendations in the report or try to?

Mr. Pitofsky: We followed many of the recommendations in the report. It so happened that in my view, national advertising was out of control in the early '70s. There was no self-regulation as there is now. It was a free-fire zone. Companies, when their product was maligned in advertising by their competitor, thought the only answer was for them to deceive in advertising about the rival product. It was just open warfare. We had a better than average staff doing advertising work, and therefore I would say something approaching 50 percent of our notable cases were against national advertisers. It was shooting fish in a barrel; it was hard to lose these cases. The claims were so outlandish and the substantiation was so flimsy. We brought cases against Sunoco, against Warner-Lambert, the company that made Listerine, the cigarette companies, requiring the Surgeon General's warning in advertising and then eventually on the pack, the analgesic manufacturers and oh yes, we lost one case. We lost one case, in which the lawyers representing the defendant were from Arnold & Porter. (laugh) And, following up now on my thought about remedy, we introduced the concept of corrective advertising, and we had what I thought may well be the perfect case. It was the claim on behalf of Listerine that it didn't just freshen your breath, but it prevented colds and flu. The problem for the company with that was the study it relied on was probably 40 years old and a subsequent study that the company did itself concluded that the first study was faulty. In those days Listerine had almost monopoly power. They had something like 70 percent of the market,

largely because mothers felt that they would do better to use Listerine because it had this added virtue that no other mouthwash claimed, which is it prevents colds and flu. We brought the case—they litigated. We won, and the remedy was to go back in the same media that you used to advance the claim and tell the truth about your product. With respect to Listerine, it is that Listerine has no superior ability to prevent colds and flu. You don't use corrective advertising all that often. Advertising is ephemeral, and we do know that people forget the fraud shortly. But when you run a campaign for 20 or 30 years and you identify your entire product with that claim, corrective advertising is appropriate. The commission is still bringing corrective advertising cases here and there.

Ms. Born: Bob, just to clarify, when you were bringing these cases, were these cases being presented administratively to the commission or where they being filed in federal court?

Mr. Pitofsky: That's a very interesting question and now that you call my attention to it, we went to court very rarely in those days, unlike now. So they were tried before administrative law judges, passed on by the commission, and appealed to a circuit court of the defendant's choosing. It was a slow process. Some of the most famous examples of dilatory litigation in the administrative law books involve FTC cases: 16 years to persuade the Carter Company that Carter's Little Liver pills were deceptive because they had nothing to do with your liver. (laugh) Sixteen years and no corrective advertising. So all that happened was the word "liver" disappeared from the ads and no one probably knew why.

Ms. Born: And they'd been advertising it for those 16 years during the proceedings.

Mr. Pitofsky: Yes. It was a famous trade name. We experimented a little with

rulemaking but not nearly to the extent that the commission moved to rulemaking a decade later.

Ms. Born: So the tool that you were using was primarily the administrative litigation tool?

Mr. Pitofsky: Yes.

Ms. Born: How many ALJs did the FTC have then?

Mr. Pitofsky: I'm not sure. I'd have to look it up. They now have two. I think they must have had 10 or 12 in those days.

Ms. Born: I suppose that the D.C. Circuit did not have a disproportionate number of these cases for review since the defendant could choose the circuit.

Mr. Pitofsky: Yes, I think that's right. One or two famous cases—the case that effectively expanded the commission's authority to use unfairness as a weapon, not just deceptive, not just misleading—unfair, was a case against Sperry & Hutchinson and that was reviewed by the D.C. Circuit. But I think most of these cases ended up in the Fifth Circuit, Seventh Circuit and so forth.

Ms. Born: Did you do any studies in the Bureau of Consumer Protection during your tenure?

Mr. Pitofsky: We did only one study. I became a great enthusiast about studies later on. First of all, I should introduce it by saying that, when you look carefully you see that the Federal Trade Commission probably has broader fact-finding authority than any other agency in Washington. It just emerged out of legislation in 1914, but fell into disuse. The agency had become almost entirely case-by-case oriented, even though that was not what President Wilson and his colleagues had in mind. We did a study and report on the advertising industry. Very extensive. I think one of our recommendations—I haven't looked at that report

in many years—was that the industry could do a better job of self-regulation, and then they proceeded to adopt the best self-regulatory program of any industry of which I'm aware. They went from paying no attention to excesses by their members to cracking down on their members in a way that even the Federal Trade Commission may not have done. They were very severe and very successful.

Ms. Born: What was the organization that they created to do this with?

Mr. Pitofsky: It's called the NARB—National Advertising Review Board—made up of experienced people from Madison Avenue and I think some academics. And all anyone need do is complain to the NARB that an ad was deceptive and the NARB would investigate. The end game was, if the NARB found an ad that they disapproved of, they would direct the company to withdraw the ad and if the company didn't withdraw the ad, they would tell the company that the NARB would file a complaint with the Federal Trade Commission. The Federal Trade Commission will give priority to any complaint of the NARB. So rather than risk Federal Trade Commission review and corrective advertising, or redress or restitution, the NARB almost never failed to persuade its member to withdraw the ad.

Ms. Born: The industry broadly joined the NARB?

Mr. Pitofsky: Yes, absolutely. It was in their interest. People had reached the point where spending money on advertising was not a useful thing to do because people were dismissing virtually all advertising claims. There was no sense of consumers relying on information that they picked up from advertising so that it was in the interest of the industry to do so. You can't completely eliminate fraud but you can certainly cut it back and that's what they did.

Ms. Born: What was done in the area of consumer education during your

tenure?

Mr. Pitofsky: Let's see if I can recall. Nancy Buc was an aggressive administrator. One thing I know we did is we made some spot announcements and made them available to radio stations around the country and they were all too happy to play them. Mild announcements, calling people's attention to a certain kind of fraud that seemed to be on the upswing. I think we had a spot announcement about pyramid fraud because that was the fraud du jour during the early '70s. We put out brochures, fact memos, made them available to schools and post offices, things like that. It was a very modest program. I don't know that Nancy had more than two or three people working for her but she certainly got a bang out of the buck in that area.

Ms. Born: In the remedies area, were there new remedies tried in addition to corrective advertising?

Mr. Pitofsky: Later on when I came back to the commission as chair, we put a great deal of effort into disgorgement and I still think that should be the primary regulatory remedy on the consumer side. We did experiment with redress and restitution but we didn't have very good precedent in that area at the time and I don't think we were all that successful. You have to show a causal connection between the fraud and the loss of the funds, to establish who's entitled to it, who bought a particular product on the basis of an advertising claim.

(End Tape 1, Side B)

Mr. Pitofsky: The bureau did attempt some initiatives in the direction of restitution, reformation of contracts, disgorgement, but at least at that time, there was not good precedent supporting commission action. Sometimes we were able to achieve restitution in a settlement but in court, my recollection is we were not very successful. Certainly not as

successful as the commission became in the 1990s when disgorgement became a very prominent weapon in its arsenal of remedies.

Ms. Born: What do you consider the accomplishments of your period as Director of the Bureau of Consumer Protection?

Mr. Pitofsky: I go back to the recommendations in the Kirkpatrick report. There was much more careful selection of cases, including challenges against some of the most prominent corporations in America. We were suing oil companies for fraud in advertising gasoline and not furriers for mislabeling fur by putting abbreviations in where they didn't belong. We emphasized remedy. We tried to come up with a set of remedies that people would pay attention to. We followed up on the ghetto fraud proposal by launching an investigation of marketing tactics in the District of Columbia, and needless to say, we found an enormous amount of fraud, taking advantage of a vulnerable group of customers and initiated a few rulemakings as a result of that project. I remember the rule about holder in due course came out of that project. The rule at the time was if you discounted some monies without knowledge that the monies that had been achieved by fraud, the plaintiff had no right to go after you—you are a holder in due course. And it was so easy to evade responsibility by processing the money up the line to somebody else. The commission essentially abolished that rule. Truly, the major accomplishment was to put staff in place many of whom stayed for considerably more than three or four or five years and were able to carry on in the direction of a more effective enforcement program.

Ms. Born: What was the relationship between the agency and the White House during this period or the agency and the administration in general?

Mr. Pitofsky: I think before Weinberger and Kirkpatrick, there was a fairly regular

exchange of views between the Johnson White House and then the Nixon White House with the leadership at the Federal Trade Commission. Once Miles Kirkpatrick became Chairman, it should have been obvious to everybody that he was the last man in the world who would cave in to any kind of political pressure. And that's exactly what happened. President Nixon once said publicly, in response to complaints from the business community that the Federal Trade Commission was out of control, it was too active, you know, I can appoint these people but I can't do anything about them once they're in office, which I thought said worlds about the relationship of the White House to that Federal Trade Commission. Now there may have been things going on between the White House and some senior members of the staff but I would have no way of knowing about it.

Ms. Born: Not with you.

Mr. Pitofsky: Not with me, no one would try anything with me, and Kirkpatrick protected me, a Democrat, from Hill or White House pressure. I never had to answer for the cases that we recommended.

Ms. Born: Maybe just for the record you should describe Miles Kirkpatrick's background.

Mr. Pitofsky: Good. Fascinating man. His father had been a judge, senior judge, in a federal district court in Pennsylvania. He attended school at Princeton and Penn, or maybe it was Penn and Penn, was a very successful lawyer with the Morgan, Lewis firm in Philadelphia, the largest firm, was head of the Antitrust Section of the ABA when he was selected Chairman of the Federal Trade Commission, and was a gentleman, through and through. But he could persuade you so effectively without ever raising his voice or appearing to be angry. He was apolitical and he cared only about the welfare of the commission and implementing the study's

views. I told a story about him a few years ago which I think really summarizes his character. We were appearing before a House oversight committee on a budget matter. I think it was the House. And we spent a lot of time trying to figure out what we should propose. In those days, the budget for the whole agency was about \$18 million; it's ten times that amount now or close to it. And Miles, on behalf of the agency, made the presentation, and the chair, a rural Southern Democrat, who you wouldn't think paid any attention to antitrust or consumer protection, heard him out and then said, I really admire what you're doing at the agency and I'm not only going to grant you every penny that you requested but I'm going to add on my own behalf a million dollars. I hope you're pleased. Miles said, "Well, I don't know. We've made these plans very carefully and with an extra million dollars, of course we would use it to hire additional young lawyers, but there's a limit to how many good people you can hire in a given year." The Congressman said something like: "You'll figure out a way to spend the money I'm sure." Miles said, "Well, I really didn't come here to ask for that." This went on and on. Finally, the Congressman slammed his fist on his desk and said, "I'm giving you an extra million dollars and I want to be clear about something. Don't you come back here next year and tell me you haven't spent it." (laugh) And Miles caved in such a gentlemanly way. He knew where this conversation was going. He was going to end up with his million dollars. But he just wanted it to be clear that he wasn't there aggrandizing his agency through the budget process. It says volumes about his style, his principles and also about his shrewdness in dealing with the Hill.

Ms. Born: Well, it says a lot about the relationship of the agency with Congress, too, doesn't it?

Mr. Pitofsky: Well, that's true. It certainly stunned us that anyone would give us extra money. That was a period in which budgets were being cut left and right.

Ms. Born: How did you decide to leave? It sounds as though this was a wonderfully creative period for you.

Mr. Pitofsky: I had the problem that many people in academia had in those days. Your school would give you a two-year leave without batting an eye. They might give you an extra semester or an extra year. But you risked your tenure if you stayed longer than that. I remember a little later on, Steve Breyer had to leave the Senate working for Senator Kennedy because Harvard wouldn't give him an extension. I might have pushed harder for an extension, but I'd been there for something like two-and-a-half years. I'd worked on the Kirkpatrick report for six months before that, and I thought it was time to get back to teaching.

Ms. Born: But you just did not go back to NYU did you?

Mr. Pitofsky: I commuted to New York for a semester.

Ms. Born: I didn't realize that.

Mr. Pitofsky: It was a family decision. Did we want to go back to Greenwich Village and NYU? I leaned in that direction. Did we want to stay in Washington, which certainly for a family with young children, is a little easier place to deal with? The fact that I commuted for a semester is an indication that it was not clear which way we were going to go. But eventually I got in touch with Georgetown and found they were receptive to hiring me as a professor. I had been doing less and less work for Dewey, Ballantine. In fact, I was working more for Weil, Gotshal and Ira Millstein than I was for Dewey, Ballantine. But then I switched to Georgetown and Arnold & Porter and I don't think I have regretted that ever since.