Oral History of Robert Pitofsky
Third Interview
December 19,2003

Ms. Born: This is the third 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 19,2003, in a conference room at Arnold & Porter, *555* 12th Street, NW, Washington, DC 20004. The interviewer is Brooksley Born.

Ms. Born: Bob, we're going to start this interview with a discussion of your decision to teach at Georgetown Law Center and to discontinue teaching at NYU.

Mr. Pitofsky: That happened finally in 1974. I stepped down at the FTC in '73. I still more or less intended to go back to New York and teach at NYU and perhaps have a connection with a New York law firm. And I commuted back to New York – lived in Washington and commuted to New York—for six months. But the final decision to live in Washington, teach at Georgetown, practice in Washington was really a family decision. It was much more comfortable for all of us to live here, to use the schools in this area, to teach at Georgetown. So after a half-year of commuting we made a decision, bought a house in Chevy Chase and never looked back.

Ms. Born: Tell me about your discussions with Georgetown and how you decided on Georgetown as opposed to the other law schools in Washington?

Mr. Pitofsky: I already had tenure at NYU. Hiring someone with tenure at Georgetown, especially someone with an antitrust background (they didn't particularly need an antitrust teacher), was a little tricky. But my friend, Joe Califano, put in a good word for me, and that helped a lot. And the dean at the time was Adrian Fisher and he was committed to my

joining the faculty at Georgetown. So it wasn't the easiest appointment in the world but eventually the school granted me an appointment with tenure.

Ms. Born: And what courses did you teach early on?

Mr. Pitofsky: I taught a lot in the first and second year. I taught antitrust possibly twice, once in the spring, once in the fall. I taught federal courts, a leftover from my days at NYU. I taught a course in consumer protection. I now teach nine credit hours a year. I think I taught 14 or 15 in those days.

Ms. Born: What kind of research were you doing?

Mr. Pitofsky: I always had believed that an academic who spends time in government has almost an obligation to write an article about what you were doing and why you were doing it. So I began an article that I eventually finished in my visiting year at Harvard on consumer protection and the regulation of advertising. Also, as I recall, I turned immediately to one of the editions of our casebook. We're now doing a fifth edition. That was probably the second or third edition back then.

Ms. Born: Whom were you editing it with?

Mr. Pitofsky: In those days Handler's name was first on the cover but he had retired and he was very generous about leaving the book to us. My co-editors were Harlan Blake, a professor at Columbia, and Harvey Goldschmid, also a professor at Columbia.

Ms. Born: How did you find the experience at Georgetown different from NYU?

Mr. Pitofsky: To be candid about it, Georgetown is a better school now than it was then. The student body was certainly not as good as the student body at NYU. The interesting thing about Georgetown was that it was a school that was moving in the right direction and I

liked that very much. The young people we were hiring were very good. They're either still there or they've gone on to Chicago, Yale, Columbia to become faculty members there. So you were surrounded by a very lively group of young faculty members. And the student body was getting better although not nearly as strong as it is today.

Ms. Born: How do you think your experience in government affected your teaching? Obviously your writing was affected in that you felt that you should write the theoretical underpinnings of what you were actually doing in government.

Mr. Pitofsky: I would not limit the experience in government as an influence on teaching. I've been an academic for about 35 years, I've been in government four times and I've practiced law throughout. And therefore, as my critics would say, I'm not very ideological, I don't write theoretical pieces. I try to understand enough economics and other interdisciplinary material to be familiar with it. But I try to write in a way that would be an asset for judges and lawyers and not just for other academics. As you might detect in the way I put it, I think American legal scholarship has gone overboard on highly theoretical analysis, and I wish more people would write as if the "significant other'' were judges and lawyers and not just other theoretical people.

Ms. Born: What do you think could be done to bring academia back to the profession in that way?

Mr. Pitofsky: I think it is turning a little bit. There are many things that can be done. Harry Edwards, a judge on the D.C. Circuit Court of Appeals, and others have written very strong pieces on this subject. The hiring committees at the better law schools should now think about a more balanced approach to hiring.

Ms. Born: Balanced in what sense?

Mr. Pitofsky: In the sense that everyone wants people on their faculty who know economics, who know a little philosophy if they're going to teach jurisprudence, who know a little history. If you're going to teach federal courts, it really makes a difference to know American history. I've seen teachers who know a lot of history make federal courts stand up and dance in a way that other people cannot. Paul Bator is the perfect example of that. It wasn't just a Supreme Court opinion. It was a Supreme Court opinion written in 1830. So you want to know what the country was like at that time. On the other hand there are people who teach legal subjects as if they are nothing but economics, history or philosophy. I think they're taking advantage of the students. The students didn't pay for a totally theoretical approach to an issue.

Ms. Born: Tell me about the Institute for Public Interest Representation and your role.

Mr. Pitofsky: There's a wonderful clinic started by Victor Kramer, who was a partner at Arnold & Porter and then switched over to teaching at Georgetown. I should say that Georgetown offers probably the leading clinical program in the United States—more slots, more opportunities, more faculty members. The clinical professors are treated as full professors at Georgetown, which is true at some other places but not all. Victor Kramer was one of the best lawyers I've ever had anything to do with. And he moved to Georgetown and began to intervene in government rulemaking of various kinds. There are many clinics in which the young people will represent indigent single women in real estate cases; they'll represent people in the criminal system, they'll visit prisons and give lessons to the prisoners about what their obligations and rights are. But very few clinics at that time looked at government process. Vic did. He brought in extraordinarily able assistants and he asked me to be chairman of his board, which I did with great pleasure. It was one of the best clinics the school has ever had. It's still active right now.

Today, the clinic is successfully holding up the FCC's implementation of its rulemakings which would allow greater levels of media concentration. That's a direct descendent of the kind of work that Vic was doing.

Ms. Born: As chair of the board what kind of involvement did you have with the institute?

Mr. Pitofsky: I had some modest role in choosing targets and I did that by attending the various meetings and by talking to Victor Kramer about what I knew about various rulemaking and which projects would lend themselves to the influence of an outside group.

Ms. Born: What other things were you doing during those early years at Georgetown?

Mr. Pitofsky: I almost immediately established a relationship with Arnold & Porter. I did that within months of my coming to Georgetown.

Ms. Born: What was the connection with Arnold & Porter? How did you choose that firm?

Mr. Pitofsky: I only spoke to two firms. The fact of the matter was I knew more people at Arnold & Porter. Dan Rezneck and Abe Krash were friends before I came to the firm. Also I had a sense that Arnold & Porter of all the firms I was likely to deal with had a greater sensitivity to the idea that I am primarily an academic and secondarily a lawyer. Therefore one of my test questions when I would talk to people about whether I would do law work with them is—is it expected that I will cancel a class because a client has called for a meeting in Peoria? Because I tell you right now, with respect to any project I get into, I want to have another partner of equivalent seniority who is available. Now if I'm free I'll go to a client meeting anywhere and I've done many of those things. But I don't believe I've ever canceled a class. Maybe

there's an exception somewhere. But I try never to cancel a class for law business. The interesting thing about Arnold & Porter is that no one at the firm has ever leaned on me to change my view on that subject. An academic can't have a better relationship with a law firm.

Ms. Born: So your relationship with the firm was of counsel right from the beginning? Was that your title?

Mr. Pitofsky: It was. And the understanding has always been that I would try to give about 20 percent of my active time to law practice, and 80 percent to teaching and scholarship. It's worked out very well. There are a few years when I was substantially over or substantially under but not many.

Ms. Born: In those early years what sorts of cases did you have with the firm?

Mr. Pitofsky: I remember when I first came to the firm Abe Krash had just picked up an assignment from Sperry Rand to give them antitrust advice in the way they dealt with IBM. I spent a lot of time working on various aspects of the IBM monopoly case. I promptly converted it into a seminar that I taught at both Georgetown and Harvard. I'll bet half the time I spent at Arnold & Porter for the first two or three years was on various aspects of that particular matter. I remember Xerox was a Section 2 monopoly case. I did Section 2 work. It was not for my own clients at that time. I didn't begin to pick up clients for the first few years. Later on I found myself doing work only for my own clients. But that wasn't true for two or three or four years.

Ms. Born: Just to clarify the record, Sherman Act Section 2 monopoly cases.

Mr. Pitofsky: Yes.

Ms. Born: What was your role with the Society of American Law Teachers?

Mr. Pitofsky: I was a founding member. It's a group that still exists today. It is to

the left of center among American law teachers and was reactive to the fact at the time that the AALS, the Association of American Law Schools, seemed to many academics too conservative about issues relating to law professors. It was a good group of people. Norman Dorsen was the first president. The second was Tom Emerson of Yale. I didn't stay with the group all that long, but I was glad that it was founded. I was glad we got it off the ground. And then I became emeritus fairly early.

Ms. Born: What about the Columbia Center for Law and Economic Studies?

Mr. Pitofsky: That was a very interesting project. That was a well-funded research project to do law and economics relating to government regulation. The moving force there was Ira Millstein, a lawyer in New York. He managed to induce five or ten major American corporations to provide an annual stipend to this group. Now you would think therefore that the group would be controlled by its benefactors. But the understanding was that each of these companies—GE, IBM, U.S. Steel—would give the money: they could discontinue their support at some point but they could not influence the projects. I've often referred to this as an excellent way in which scholars and the private sector can work together to produce good work. I never did a project for the Society myself but I was very much involved in selecting projects, which were then made available to other scholars. I was on the board for perhaps ten years. And the work that that group turned out has been very influential in a constructive way on regulatory issues.

Ms. Born: You had a visiting professorship at Harvard.

Mr. Pitofsky: 1975-76 was my away period. First I spent the summer in Salzburg, Austria at their summer training institute. When I came back, I didn't come back to Washington. I moved to Cambridge and taught for a year at Harvard.

Ms. Born: Why did you have this year off so soon after you started at Georgetown?

Mr. Pitofsky: It was a little awkward. But the two offers came along in '75-'76, and those offers don't come up at your convenience. Teaching antitrust at Salzburg was a wonderful experience. The antitrust component now is much curtailed, but in those days it was four weeks of living in a castle in Salzburg (the castle where the Sound of Music was made) with students of the most extraordinary quality. The students at that program were associates in law firms and corporations in Europe that the law firm or the corporation felt had a future. So you would have 30, 40, 50 students all of whom were just outstanding. The faculty consisted of Judge Shirley Hufstetler of the Ninth Circuit as the chair, Paul Bator, Joe Califano, myself. A very interesting faculty. I tell you candidly, it's the only time I've taught in the summer when, at some point along the way, I didn't regret it. Good students, good subjects, good colleagues. I guess I could say the same thing about my year at Harvard. It was a very useful year for me.

Ms. Born: Tell me about the year at Harvard. What did you teach? Why did you get the invitation to go there?

Mr. Pitofsky: I can answer the first easily. Harvard had at that time three antitrust professors. But one, Phil Areeda, was on assignment in Washington in the White House, and a second, Steven Breyer, was on assignment with Senator Kennedy in Washington. So the law school needed an antitrust professor. Don Turner was there. I was there. Oddly enough, both Breyer and Areeda came back during the year I was there. I taught primarily antitrust both in the spring and the fall. I taught an advanced seminar on antitrust and a seminar for first-year students on consumer protection. It was a light teaching load. I had plenty of time to engage in scholarship and get to know the faculty at the Harvard Law School. From my point of view it

was a wonderful year. From my family's point of view—my wife, who had a career in Washington by then, didn't have much to do in Cambridge, and our three children were taken out of school when they were young and put into new schools. It's the typical problem for a visiting professor.

Ms. Born: What was Sally doing in Washington then?

Mr. Pitofsky: She later became personnel director at the Urban Institute. She later became Assistant to the President, but she was doing personnel work at that time—a very full career. And my children were 7, 10, and 13, not the time when young people are mobile.

Ms. Born: They're pretty conservative and resistant to change at that age.

Mr. Pitofsky: But they were wonderful. They supported my year there. But as we were driving out of the driveway and heading back to Washington, my oldest son said, "That was fun but let's not do that again." (laughter)

Ms. Born: Who was dean at Harvard?

Mr. Pitofsky: Al Sachs was the dean. He had replaced Griswold. He was a wonderful dean. He had a headache because those were the years in which the quarrels between the Critical Legal Studies crowd and the rest of the faculty were at their maximum. But he kept the place from exploding.

Ms. Born: Tell me about your view of what was going on with the Harvard faculty then in that dispute and what role you played as a visiting professor.

Mr. Pitofsky: I certainly didn't play a role in the internal dispute, although I was a very active visiting professor. My view of it is you do a little of everything. I sat in on classes of all sorts of colleagues and was invited into luncheon groups and work-in-progress groups. Some people have said that Harvard is inhospitable to visitors. I would testify to the opposite

extreme. Faculty members couldn't have been more welcoming to me. But I was fortunate. I already knew half a dozen people rather well on that faculty. I thought the Critical Legal Studies movement was a little out of hand. Part of their agenda made sense to me; I resonated to some of their criticisms of the stodgy quality of legal education. But they had no affirmative program, or an affirmative program that I found totally unacceptable. I thought somehow something would have to be done to bring a halt to this runaway movement. The Crits advocated that nothing was true and everything was political and that the politics were all designed to advance the powerful and disadvantage the weak. There's something to that in the United States but its not a perfect characterization of our legal system. And it caused a great deal of harm at Harvard. Paul Bator eventually resigned from Harvard and moved to Chicago. Other people were denied tenure because they fell on the wrong side of the ideological line. The Crits opposed them because they were too conservative or the conservatives opposed them because they were too liberal. It was a very difficult period in the life of that school.

Ms. Born: Who were the leaders of the Critical Legal Studies Movement there at that time?

Mr. Pitofsky: Duncan Kennedy was a major figure. The great event of the year I was there was that Roberto Unger came up for tenure, and it certainly sparked quite a debate. Toward the end of my stay he was granted tenure. I sat in his class for two weeks so I could get a general idea of what people were talking about. It was a very unusual class. It was very European. He lectured. He took virtually no questions. He strode up and down on the podium and simply spoke as a German or a French professor would do. On the other hand, what he said was extraordinarily perceptive and analytical. He was brilliant. And he was very far to the left in any evaluation of American political life. But he was granted tenure. I have no idea how

close the vote was. Obviously I wouldn't attend a faculty meeting like that. I guess Duncan Kennedy on the left and probably Paul Bator on the right, led the fight, with the dean trying to keep the place from exploding.

Ms. Born: An interesting time to be there.

Mr. Pitofsky: It was.

Ms. Born: Who were the faculty members that you were closest to during the year?

Mr. Pitofsky: Don Turner and Paul Bator by far. They took me and my family under their wing and made sure that we had a sense of being welcomed into that community. Phil Areeda was someone I knew and got to know much better the year I was there. Steve Breyer I already knew. Arthur Miller became quite a good friend during that period. I'm not talking about just passing and knowing each other in the hall. These were people we went to the movies with or went to dinner at their homes and they came to dinner at our home. It was a very gratifying year for me.

Ms. Born: What kind of research were you doing during the year?

Mr. Pitofsky: I was finishing the article I'd been fooling around with for several years on regulation of advertising. Susan Eskridge was the first woman president of the law review, and she took an interest in that particular article and gave me many suggestions, all of which were good. I must have done two or three drafts of that article. Finally it was published in Harvard. Of all the things I've written, it probably was cited more than my antitrust work. (laughter)

Ms. Born: Was this the "Beyond Nader" article?

Mr. Pitofsky: Yes.

Ms. Born: What was your thesis there?

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Mr. Pitofsky: There was a twin thesis to the article. One idea was that advertising should be taken more seriously as a part of the competitive process. And that was backed up by the fact that the courts at about that time had given First Amendment protection to commercial advertising—so that wasn't really all that debatable. The second idea was that advertising regulation should be interpreted with the welfare of consumers in mind. Not competitors, not manufacturers, but consumers. And if you take those twin premises and start applying them to what is unfair, what is deceptive, what difference does it make whether First Amendment protection applies or not, all sorts of rules that previously had applied have to be adjusted to take those changes into account. That's what the article was about. I later became Chairman of the FTC and tried to implement that article. Just about the same time as I was writing the Nader piece, Tim Muris who is now the Chairman of the FTC wrote a piece that essentially reached the same conclusions. It wasn't that he was adopting my views; he came to those views on his own, just as I had, that advertising is not just an irrelevant minor aspect of the competitive process. On the contrary. With respect to some products, by making the product known and available to consumers, that is the essence of lowering barriers to entry. On the other hand picky little challenges to false advertising do more harm than good. There were deceptive pricing rules that said, if you were to make a claim that a product was ten percent off, that was a violation of the law because you didn't say ten percent off what. But the main point is that the discount claim pursued a procompetitive aggressive discounter strategy. And you don't want to devise a system that makes it almost impossible for the aggressive sellers to make people aware of the quality and price of their product.

Ms. Born: So that article was published by *Harvard Law Review* in 1978?

Mr. Pitofsky: Right.

Ms. Born: What kind of an influence did the article have?

Mr. Pitofsky: It had a great influence on me, (laughter) and since I became an FTC Commissioner and later the Chair, I was in the position to implement these ideas.

Ms. Born: You convinced yourself.

Mr. Pitofsky: It had another virtue. I'm obviously left of center on all regulatory issues. But someone like Jim Miller who's right of center on all regulatory issues agreed with what I was saying in that article. Tim Muris agreed with what I was saying. My hope is on the advertising front it created a place for people to stand comfortably whether you were left, right or center. I'm not sure it will continue to work out that way. It's complicated now because of the Internet and privacy and all these new high-tech issues. But certainly the idea is that you treat the consumer with respect but don't go crazy with enforcement. Suppose a claim deceives five percent of the consumers but the other 95 percent realize that its just an exaggeration. My view is the government has no business intervening into a quarrel like that. Frankly the five percent who were misled have only themselves to blame. That's not the way the law was prior to 1970, but it is the way the law is now and almost everybody agrees it is an improvement.

Ms. Born: After your year at Harvard you came back to Georgetown and Arnold & Porter, and then within a year or so you went onto the FTC as a Commissioner. Tell me about that time and how that happened.

Mr. Pitofsky: That was one of the rare occasions in my life where I managed to be selected for a position that I really didn't campaign for. I let people know that I was interested in being on the commission since I'd been a bureau director. But I didn't do anything more than

that. I had friends in the White House who thought that I would be a good addition. By then the commission had already achieved a reputation under Mike Pertschuk's leadership as being a little out of control, as being a "national nanny." Odd for the agency that only 20 years earlier was called the little old lady of Pennsylvania Avenue. I thought that was unfair. I came to the view that was unfair to Pertschuk and his people. But certainly the agency was very aggressive in those days. This was the Carter administration. The idea was to put a Democrat on the commission who supported an activist agenda but on the other hand would see that certain projects were out of control. And I fit that bill.

Ms. Born: Who was it that you knew in the White House?

Mr. Pitofsky: I remember that Si Lazarus was a person who tried to organize people in the White House to support my candidacy.

Ms. Born: What was his role in that?

Mr. Pitofsky: I think he was on the National Security Council if there was such a thing in those days. I'm not sure exactly what his role was. But he was there.

Ms. Born: Were there issues about the confirmation process in that day and age? How was your confirmation?

Mr. Pitofsky: Sailed through, unlike my later confirmation as Chairman, which took a long time. I don't remember any difficulties at all.

Ms. Born: Was it an era in which confirmations tended to be pretty easy?

Mr. Pitofsky: Yes. Remember, it was a Democratic Senate and a Democratic President, and I was not a controversial appointment.

Ms. Born: You had the necessary credentials after all?

Mr. Pitofsky: Yes, especially since I'd just finished writing an article about how middle of the road advertising regulation ought to be. The Madison Avenue people thought I was just right for the agency.

Ms. Born: Did you know the President?

Mr. Pitofsky: Carter? No, I did not.

Ms. Born: Did you get to know him after you went on to the commission?

Mr. Pitofsky: Yes. Once or twice we met. I have a nice picture of the two of us. But the commissioners don't really deal with the White House and certainly not with the President the way the Chairman does. So I knew a few people but I had very little connection with the White House. I did later become the designated testifier on the Hill. So I was much more active on the legislative side than I was on the executive side.

Ms. Born: What were the issues that the commission was being criticized about as being too activist at the time?

Mr. Pitofsky: I've already said I thought that the criticism was excessive.

Ms. Born: Who was the criticism coming from?

Mr. Pitofsky: From everyone. From the Hill. From the press. From academia. Especially from Congress, from committee chairs of various sorts. The commission made two super mistakes on the antitrust side. Let's break it down. On the antitrust side it initiated an investigation of the American automobile industry. Looking back on it, I'm not even sure Mike Pertschuk and his appointees were responsible for that. I think they inherited it the way Kennedy inherited the Bay of Pigs. It was already underway. It's the perfect example of a project in which the commission didn't have a theory. It felt that something was wrong and that the three American automobile companies were not acting at maximum efficiency and were not

serving the consumer welfare to the extent they should have. But it had no theory. When you have no theory, every piece of evidence is relevant. Therefore, they issued what might be the broadest request for information in the history of the agency. The automobile companies promptly took the commission into court with a motion to quash and they spent years litigating the scope of discovery. By the time I got to the commission they'd already been quarreling for two or three years about the subpoena. I was given the assignment of cutting the subpoena by almost two-thirds, and it was still a broad subpoena. But the industry understandably, I now think, felt that it was government run wild. The other decision had to do with collective action in the cereal industry, oligopoly pricing in the cereal industry.

Ms. Born: Cereal industry being cold cereal?

Mr. Pitofsky: Breakfast cereal. There were only five companies. They tended to proliferate brand names but the pricing tended to be high and the profits were very high. And the question is whether that in itself ought to make out a violation. I can't second-guess now. I thought that was a respectable though questionable initiative. But the commission time and again got its head handed to it in court. Once again the problem was that the theory of the case was so amorphous that it was hard to know what information was relevant and what was not relevant. In any event that case started before I got there and ended after I left. I never could get my hands on it because in the commission, once the agency votes a case out, it goes to the staff and the commissioners are very limited in the extent to which they can get their hands on it. But I knew that case had serious problems too.

Ms. Born: So this case was pending before an administrative law judge?

Mr. Pitofsky: Right. Very long trial. I moved at one point to have the record transferred to the commission so we could see what was going on and I did not succeed.

(laughter) Those two cases gave the commission generally a bad reputation for abusing its jurisdiction in the antitrust field. Even though it did many things that were right down the middle of the fairway and hardly could generate objection. One illustration is—again before I got there, although it continued while I was there—the Pertschuk staff brought a resale price maintenance case against the Levi jeans people and they proved that Levi jeans had a system that controlled the retail price of jeans. I've forgotten now how much of a fine the Levi Company paid but it was very substantial. And that's not making new law, that's not stretching precedent. That's what the agency had been doing and continues to do. There were some merger cases of modest proportion that the commission brought and won. But its reputation was established by the first two matters. The consumer side is really where the commission got into trouble. Again, Mike Pertschuk did not think of but inherited the idea that rulemaking was a better idea than case-by-case enforcement because that way you can wrap up the whole industry in one proceeding. The problem is you also at the same time organize the whole industry to oppose you even though you wouldn't have sued many of the individual companies. The commission must have initiated eight, ten and twelve rulemakings. That meant delay because there weren't enough people to handle so many projects. The very first rulemaking had to do with elimination of advertising on programs in which the audience was made up of a high percentage of children twelve and under—the so-called "Kid Vid Rule." And that immediately earned the commission the title of national nanny. Since I had been chairman of Vic Kramer's group at Georgetown and it had intervened, I never had a role in Kid Vid. I recused myself because I'd been the chair of that organization. But then the commission followed-up with a very unwise rule having to do with mandating the way in which used cars were examined and advertised. You had to tell the buyer the state of affairs of the carburetor, the transmission, the brakes. It was vastly more than

the typical used car shop was capable of doing. That rule never did become finalized. The best rule—but it still got the commission in a lot of hot water—had to do with funeral directors. Now that's a rule I fought for—because what you're doing is you're dealing with a vulnerable group of people, the bereaved. And the style of the funeral directors was that they would usually not tell the buyer the price of anything. They'd rarely give you a price list. They would order flowers for you whether you'd want them or not. If you're asking for cremation, they would sell you a casket in which the cremation took place. There were many excesses, and Jessica Mitford's book had led us to many of these deceptions and frauds. So we issued a rule, I thought a balanced rule. And the funeral directors and their allies in Congress just came after us with hatchets. They asked for hearings, They held up enforcement of the rule—I'd say for almost 15 or 20 years. Thereafter, for 15 years, the commission must have sued funeral directors perhaps 10 to 20 times every year. The staff would bring cases. They'd never lose. How could you? (laughter) In the middle of my term as Chairman the heads of the funeral directors trade associations came in and said "we're tired of fighting about this. Why don't you let us do this as a matter of self-regulation? We will enforce every period and comma of your rule." And as far as I know they've done it. But the 15 years of bloodletting were not a useful enterprise for them or for the commission. I've forgotten some of the other rules, but of those rules many of them never saw the light of day, either because they were unwise and overreaching or they may have been decent rules but the industry resisted so successfully that they never were issued. And jumping forward to when I became Chairman, I took the position that we would never initiate a rulemaking unless Congress told us to do it. We did initiate rulemakings, but not on our own. Rather we engaged in case-by-case enforcement. So the bottom line was that the commission was in difficulty. The make up was the Chairman and the former-Chairman, Pertschuk and Rand

Dixon; two Democrats, Elizabeth Dole and David Clanton; two Republicans; and that left me, as so often happens, as the swing vote. I went with Dole and Clanton a fair number of times. It was an interesting period politically because there's no question I've always liked and admired Mike Pertschuk. I think he's just terrific. But I think some of the things that happened during that period were not as bad as the outsiders thought. But they were bad enough to give the commission a dreadful reputation.

Ms. Born: Had you known Mike Pertschuk before you went into the commission?

Mr. Pitofsky: Yes. For a long time. Mike Pertschuk was one of the key figures in putting together the Kirkpatrick Commission. And I've known him ever since then.

Ms. Born: What was your relationship with him when you were in the commission? With the other commissioners?

Mr. Pitofsky: Personally excellent with Mike. There were many areas in antitrust where he would defer to me. He would say, as far as I'm concerned Bob is handling that project. And on antitrust I would deliver much of the testimony on the Hill. We've always been and still are very friendly. And of course I got along very well with the two Republicans. Rand Dixon had been the Chairman when the Kirkpatrick Commission Report came out, and I don't suppose he ever forgave me and I'm not sure if things were the reverse if I would have forgiven him.

Ms. Born: How did you come to play such a significant role in the testimony before Congress and other legislative work?

Mr. Pitofsky: Mike Pertschuk was not popular on the Hill. Ernest Hollings compared him to a blind javelin thrower—you sit in the stands and you worry about where the javelin's going to go. He certainly had his defenders as well but he was a very controversial

figure. And much of the testimony involved technical antitrust issues. Mike is as shrewd a legislative advisor as you're ever going to meet. He's not an antitrust professor. **So** I would take on many of those assignments.

Ms. Born: Did you testify frequently? Was there a call for a lot of testimony?

Mr. Pitofsky: It's interesting that one of the differences between the '80sand the '90s;in the '90syou were called upon to testify every week or two. (laughter) In the '80sit didn't come up that often. Maybe every several months.

Ms. Born: Did you have good relationships with the Senators and Congress people on the relevant committees? What are the committees in Congress that are in charge of the FTC?

Mr. Pitofsky: Our direct oversight committee is the Commerce Committee. But indirectly we'd find ourselves reporting to the Judiciary Committee almost as often.

Ms. Born: Certainly on antitrust matters?

Mr. Pitofsky: Yes. I had good relations. Nothing like when I was Chairman and I would be in their offices on a regular basis. And I had very strong support at the commission to help me with my testimony including Michael Sohn, the then general counsel.

Ms. Born: Tell me who your staff was. Mike was general counsel.

Mr. Pitofsky: Mike was general counsel and was more or less of my view that the commission should find a way toward a more centrist course. Robert Reich was head of Policy Planning. I think he was probably to the left of me. I'm sure he was to the left of me on activism. The two bureau directors were Al Kramer and Al Dougherty, and they were both much more activist than I and probably more activist than Mike Pertschuk. (laughter) They pushed hard for a very aggressive agenda, most of which never saw the light of day because

Dole, Clanton and I just wouldn't go along with it. I can think of many cases—I'm not sure I want to put on the record who the companies were—the staff would propose to sue on theories that I just don't think any court would sustain. It was rather hectic. Mike Sohn was very good in supporting me and my reservations about particular projects—not just cases, rulemaking and cases.

Ms. Born: Who was your personal staff?

Mr. Pitofsky: Dan Varney, who's now a lawyer with a firm in Washington. Helen Scott, who now teaches at NYU Law School. **A** young woman named Winnie Sullivan, who I think teaches at Washington and Lee; Paul Bartel, one of the leading partners at Davis Polk; and Toby Singer, now a partner at Jones, Day. It was an extraordinary group of people to help me on these projects.

Ms. Born: What were the important cases on the consumer side or was it all rulemaking?

Mr. Pitofsky: It was practically all rulemaking. That I think was the tactical mistake, because I don't think we lost many consumer protection cases. In fact, I'm really hard put to think of even one. But we were hit very hard on rulemaking. There's another rule I should mention—the eyeglasses rule—because we probably used up more commission resources than in any other two or three rules put together. The argument was that state regulations that prevent chain stores like Pearle and Lenscrafters from competing on a level playing ground with the entrenched optometrists of the community are unfair under Section 5 of the Federal Trade Commission Act. The commission put enormous resources into comparing states with restrictive regulations and states that did not have such regulations. Eventually there was a commission study and report, a notice of proposed rulemaking, a rulemaking which would have

cracked down on the kind of state regulation that prevents a chain from locating in a mall, that insists that a chain have two separate doors, one for treatment by the optometrist and one treatment by the optician, that didn't let optometrists and opticians joint venture in any way and on and on and on. The commission finally issued a rule well after I had left as a commissioner and the D.C. Circuit Court of Appeals struck it down as beyond the authority of the commission to overrule state legislatures. To tell you the truth, I think it was beyond the commission's authority to do that. I think the way those rules should be challenged is constitutionally under the dormant Commerce Clause. But that rulemaking and its variations, including how you handle contact lenses, how you handle prescriptions and so forth, was a major effort of the commission and I think this is an area where the very fact that the commission investigated, rather than succeeded in its rulemaking, made a constructive difference. Because there are now fewer states that have these restrictive rules than was the case before.

Ms. Born: How effective do you think the commission was during your term as commissioner?

Mr. Pitofsky: More effective than people gave it credit for. It's true that all sorts of Congressmen would attack our funeral rule but the funeral rule is probably one of the best rules the commission ever issued and has changed business practices in the funeral industry.

Ms. Born: Why do you think the Congressmen attacked them?

Mr. Pitofsky: I'm going to be candid about this. Funeral directors are major political players. They contribute a great deal to political campaigns. Meetings are held at their facilities. They are very active, especially in small cities and towns, and they are very organized. The result is that when they want a meeting in a Congressman's office, they get a meeting. They were unlike some sectors of the economy. Take Madison Avenue—many advertisers resented

the commission, but others thought the commission was doing them a favor by challenging the bad actors in the advertising community. There were no funeral directors who thought we were doing them a favor. They were virtually unanimous in their opposition to government intrusion into this very local industry.

(Tape 2, Side **A)**

Mr. Pitofsky: Eventually all this hostility to commission rulemaking led to a very interesting legislative initiative—the one-house veto. The idea that any particular rule could be vacated by the vote of either the House of Representatives or the Senate and didn't require the signature of the President. I've always felt that it was funeral directors who were the most powerful constituency pushing the one-house veto. Eventually that case went all the way to the Supreme Court and the Supreme Court declared a one-house veto unconstitutional because our Constitution requires two houses to vote and presidential approval. But it was quite a controversy at the time which incorporated rules that were probably unwise with rules that were certainly justified. And they all got swept up in the same controversy.

Ms. Born: Did it change your views of Congress to go through this experience and deal with Congress as much as you did during this period and have them as critical as they were of the FTC's activities?

Mr. Pitofsky: I don't think so. There were proposals to curtail the authority of the FTC, to cut back on our remedial power as you've heard before. I always thought the reason the FTC was weak was because its remedies were too mild. When we started going for tougher remedies, Congress would propose legislation to cut back on our remedies. And time and again we escaped by the skin of our teeth. The committee would vote roughly 11 to 12 (laughter) in favor of curtailing our authority. I think I felt that Congress had every right to look over our

shoulder and examine what it was that we were doing. They didn't much look over our shoulder about antitrust. It was the rulemaking that attracted all this hostility and all this attention. But at the end of this period when Mike Pertschuk's term was over and two Republicans came in, the fact of the matter is there was virtually nothing that the commission had lost as a result of legislative amendment of the commission's basic authority. There were some riders on appropriations bills saying don't do this and don't do that. But given the full mandate of the FTC, you're talking about less than one percent of what the commission might take on. In terms of major efforts to reform the FTC, they just didn't happen. Incidentally, the established bar, the Antitrust Division, and the American Bar Association came to the support of the FTC. They thought that Congress was overreacting to just a few episodes of misguided enforcement. And there was a second Kirkpatrick Commission Report that essentially ratified the first and said keep performing; don't abolish.

Ms. Born: Did that occur while you were at the commission?

Mr. Pitofsky: No. It came after because I was a member of that commission. (laughter)

Ms. Born: What was the relationship with the Justice Department Antitrust Division in that era?

Mr. Pitofsky: Previously, it had been just terrible. Don Turner was running the Antitrust Division and Rand Dixon was Chair of the FTC. There are no two people in the world more different. This distinguished brilliant economically oriented academician from Harvard and the rural politician from Tennessee. I don't think they talked, much less agreed about anything. When Mike was Chair of the FTC, I don't remember who was head of the Antitrust Division. It might have been Tom Kauper. They got along reasonably well. I don't remember

that that flared up in the same way that the House of Representatives versus the FTC and the *Washington Post* versus the FTC. Maybe I've just forgotten, but I don't recall major difficulties there.

Ms. Born: Tell me about the *Washington Post* versus the FTC. I assume they were publishing many of these complaints.

Mr. Pitofsky: The *Washington Post* very quickly came to the view that the Kid Vid rule was a national nanny example and uncalled for. While they were stewing on that, the Federal Trade Commission declared it was going to hold hearings on concentration and diversity of news in the newspaper business. (laughter) The timing was not perfect. The result was the *Washington Post* and many other newspapers felt that the agency was encroaching on First Amendment rights and trying to get back at the newspapers for treating the FTC so badly. I don't believe that was true. I think concentration in media is a legitimate concern although quite possibly of the FCC, not the FTC. But you put those two things together and there was not much friendship between the *Washington Post* and the FTC.

Ms. Born: Were there other aspects to your role as commissioner during those years? Did you do a lot of public speaking or did you play a role administratively inside the commission at Mike Pertschuk's request? Or did you do any other things?

Mr. Pitofsky: Several things. One is I truly believe being commissioner is not a full-time job. I tried to be a very activist commissioner and to Mike's credit he never tried to trim my sails on this. Rather than sit in my office and wait for the staff to bring projects to me, I would schedule regular meetings with the lowest levels of staff to find out what they were doing and why and whether there are other things they might do. When I became commissioner, I encouraged my colleagues to do that. Otherwise, you just sit there like a goalie and you have to

wait for the game to come to you. Mike didn't take that as a challenge to his authority. As the Democrat who had reservations about what the two bureau directors were doing, I had an immense number of speaking opportunities during that period. I did a lot of speech writing. I don't know if I wrote an article, but I think I began work on another revision of the casebook while I was a commissioner. The Chairman of the FTC has a job that amounts to 100 percent of the person's time. A commissioner might be at 70 percent, no matter how active you try to be.

Ms. Born: Was there a lot of adjudicatory action by the commission during that era?

Mr. Pitofsky: Less than there previously was; more than there is now. Now the commission brings almost all its cases in federal court. In those days there were cases that were brought before administrative law judges ("ALJs"), and then were appealed to the commission. Some of them were extremely interesting. Here's another example of a case that was quite appropriate for the commission to bring but it got no credit for it. And that was a challenge to the AMA's ban on doctors engaging in advertising. The commission challenged. It was argued before the commission, one of the better arguments on both sides that I've ever heard. It was appealed to the court of appeals. The commission won in the court of appeals. And then the Supreme Court took cert. and voted four to four on whether a professional organization was subject to the same rules of deception and unfairness. That was a fascinating case, but nobody ever paid much attention to it in the press. There were some merger cases that were argued before the commission. There was probably an argument once or twice a month. Now there's an argument three or four times a year.

Ms. Born: So you actually had oral argument like an appeals court would?

Mr. Pitofsky: Oh yes. The argument about FTC's commissioners is they're both

prosecutor and judge. Today they hardly get a chance to be a judge. In those days you had a modest role as a judge.

Ms. Born: Did you interact with industry groups as a commissioner?

Mr. Pitofsky: Very much so. I remember that after the Kirkpatrick years the advertising group developed their own self-regulatory scheme, and I was very supportive of that and met often with leaders of the advertising associations in order to design and develop that program which it turns out has worked so very well.

Ms. Born: Were there other industry representatives?

Mr. Pitofsky: I'm sure there were. I'm sure people would come in and see a commissioner once or twice a month. I would give a speech once or twice a month. So there was a great deal of that sort of thing. It was a very lively agency at the time, both for good and bad reasons. You can't say people didn't pay attention to the Pertschuk Commission. Also the Pertschuk Commission continued the very brave efforts on the part of the FTC to play a role on cigarette marketing. I met with the cigarette people numerous times.

Ms. Born: Were there any attempts by the White House to influence the decision making in the FTC? Or issues being considered by the FTC?

Mr. Pitofsky: Let's take this through the entire period. During the Nixon years, both before Kirkpatrick and after Kirkpatrick, there is no question that the White House paid attention to the regulatory agencies and exercised some influence. Remember the White House had gotten in trouble in the Dita Beard episode because of trying to intervene at the FTC. So they were a little at arm's-length but the administration played a role. I remember Richard Nixon said publicly with respect to Miles Kirkpatrick, I can appoint him but I can't control him. That doesn't mean there wasn't some modest efforts to do it, but it didn't work. I don't know

how Carter treated Pertschuk. There's just no way for me to know. I think Mike, because of his long years on the Hill, knew practically everybody in Washington including practically everybody in the White House. But whether they tried to influence his views or not I don't know, Interestingly the Carter people made a decision from the very beginning that they would have nothing to do with antitrust. Nothing to do with antitrust at the Federal Trade Commission, which is an independent agency. Also virtually nothing to do with antitrust at the Antitrust Division. They just felt it was a losing game, to the point where at times I would say to people I knew—that's an issue that we know a lot about. Why would we be precluded from any of these executive meetings? And toward the second half of my term we were more active in an advisory role in the White House than we were before. But that was us reaching out to them. They never reached out to us.

Ms. Born: You were on the Administrative Conference Council during this time. Was it in your role as a commissioner? Were you chosen because of that?

Mr. Pitofsky: Yes, briefly. It was offered to Mike Pertschuk. He wasn't interested. He asked me to do it. It was a fine group. Walter Gellhorn was a dominant figure there. I knew him well. The two of us for the short time I was there—I was only there about six or eight months—joined forces in initiating some interesting projects. I think it's less of a factor now than it was then, certainly in the '70s and '80s. The council had the money and the talent, the reputation and the stature to attract very good people to do excellent projects on administrative law. So I enjoyed very much my role there, but shortly after I was confirmed there, there was a change of administration and I was out. (laughter)

Ms. Born: Did you decide to leave early because of the change in the administration or was your term up then?

Mr. Pitofsky: As a commissioner? Yes, it was because of the change in administration, but not because I couldn't live at the agency during the Reagan years. It's because nothing was going on. For one reason or another we were down to four commissioners—two more liberal, two more conservative. Nothing could get done, and I felt that I had better things to do with my time than to twiddle my thumbs in a large office at the FTC. Besides I only left about six months early. I would have been out anyway.

Ms. Born: Are there any other aspects of your tenure as FTC commissioner that we should talk about before we conclude today?

Mr. Pitofsky: I want to say a word about Bob Reich's role. Policy planning at the FTC had always had a rather ambiguous role. On the one hand the staff doesn't want another group of people second-guessing them, and that's not a good bureaucratic arrangement anyway. On the other hand you do need long-term analysis, not with respect to any particular rule or case, but whether the commission is going in the right direction. I have to give Reich credit. He was probably the best of the various people who have had that role to think in the large about regulatory issues. The interesting thing is a good part of that first book that he wrote—I've forgotten the title—really developed out of some of the thinking about economic regulation and the regulatory system that he addressed when he was director of policy planning. He turned that office in the right direction. Previously I'm afraid it really was a bunch of second-guessers. He gets some credit for having done that. He brought some very good people to that office. The quality of his staff was first rate. And Mike Sohn brought good people to that office including Bill Baer.

Ms. Born: Had you known Mike from Arnold & Porter before you went on to the commission?

Mr. Pitofsky: I did. I knew him well. I didn't know Bill at all. Mike's allegiance has to be to the chair. To call us allies wouldn't be right. On the other hand, I think we both had an instinct of going a little slower than that particular agency and those two bureau directors wanted to go.

Ms. Born: What motivated the bureau directors? Were they off on a frolic of their own? Was it that Mike Pertschuk had, because of his liberalism, made them feel comfortable pursuing fairly extreme agendas?

Mr. Pitofsky: There's a difference between the two. Al Dougherty had his own agenda. He was not working as a Bureau Director for the FTC. He was working as an advocate of his own views, and he was ideologically very activist. He had his own support group in the Senate and so forth. Al Kramer was the protege of Ralph Nader, and he had the commission's welfare at heart but he just felt that the commission ought to be more to the activist side than it was. Put the two of them together and you get a very aggressive public interest-oriented enforcement program. Mike had made the mistake of saying he wanted to turn the FTC into the largest public interest law firm in America. That sounds good, but it's not the right rhetoric from the Chairman of the FTC. You might want to do that, but there ought to be another way to put it.