



JOAN Z. BERNSTEIN, ESQUIRE

**Oral History Project
The Historical Society of the District of Columbia Circuit**

**Oral History Project
The Historical Society of the
District of Columbia Circuit**

**United States Courts
District of Columbia Circuit**



Joan Z. Bernstein, Esquire

Interviews conducted by:
Professor Vicki Jackson
June 1, July 7, and December 4, 1998,
February 11, May 12, and July 8, 1999,
and May 1, 2000

NOTE

The following pages record interviews conducted on the dates indicated. The interviews were electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

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PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges who sat on the Courts of the District of Columbia Circuit and lawyers, court staff, and others who played important roles in the history of the Circuit. The Project began in 1991. Interviews are conducted by volunteers, trained by the Society, who are members of the Bar of the District of Columbia.

Indexed transcripts of these interviews and related documents are available in the Judges' Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N. W., Washington, D.C., the Library of Congress, and the library of the Historical Society of the District of Columbia. With the permission of the interviewer, oral histories are also available on the internet through the Society's web site, www.dcchs.org.

Such original audio tapes of the interviews as exist, as well as the original diskettes of the transcripts (in WordPerfect format) are in the custody of the Circuit Executive of the U.S. Courts for the District of Columbia Circuit.

INTERVIEWEE ORAL HISTORY AGREEMENT

Historical Society of the District of Columbia Circuit

Oral History Agreement of Jeanne (Jodie) Bernstein

1. In consideration of the recording and preservation of my oral history memoir by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Jeanne (Jodie) Bernstein do hereby grant and convey to the Society and its successors ~~and assigne~~ and assigne all of my rights title, and interest in the tape recordings, transcripts and computer diskette of my interviews as described in Schedule A hereto, including literary rights and copyrights. All copies of the tapes, transcripts and diskette are subject to the same restrictions herein provided.

2. I also reserve for myself and to the executor of my estate the right to use the tapes, transcripts and diskette and their content as a resource for any book, pamphlet, article or other writing of which I or my executor may be the author or co-author.

3. I authorize the Society to duplicate, edit, publish, including publication on the internet, and permit the use of said tape recordings, transcripts and diskette in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

Jeanne J. Bernstein Jan. 25, 2005
[Signature of Interviewee] Date

SWORN TO AND SUBSCRIBED before me this
25th day of January, 2005.

Debrae M. Peters
Notary Public

My Commission expires January 1, 2008

ACCEPTED this 24 day of February, 2002, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

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INTERVIEWER ORAL HISTORY AGREEMENT

Historical Society of the District of Columbia Circuit

Oral History Agreement of Vicki C. Jackson

1. Having agreed to conduct an oral history interview with Jodie Bernstein for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Vicki C. Jackson, do hereby grant and convey to the Society and its successors and assigns, all of my right, title, and interest in the tape recordings, transcripts and computer diskette of interviews, as described in Schedule A hereto, including literary rights and copyrights.*

2. I authorize the Society to duplicate, edit, publish, including publication on the internet, or permit the use of said tape recordings, transcripts and diskette in any manner that the Society considers appropriate,* and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I receive permission from the Society.

* I do not give permission to use of the oral tape recording of my voice in digital form on the Internet. Otherwise I give permission to the Historical Society to make any use the Society considers appropriate.

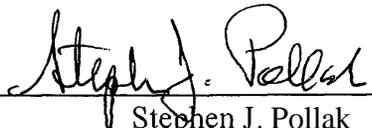

[Signature of Interviewer] March 15, 2007

SWORN TO AND SUBSCRIBED before me this
15th day of March, 2007



Notary Public **Teruko R. Scriven**
Notary Public, District of Columbia
My Commission expires My Commission Expires 4/14/2011

ACCEPTED this 28th day of March, 2007, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.


_____ Stephen J. Pollak

Schedule A

Tape recording(s) and transcript(s) resulting from 7 interviews of
(Number)

Jodie Bernstein on the following dates:
(Interviewee)

<u>Date (Month, Day, Year) & Title</u>	<u>Number of Tapes</u>	<u>Pages of Transcript</u>
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There were a total of 7 interview sessions, conducted between June 1, 1998, and May 1, 2000, described in more detail in my transmittal letter of May 21, 2004, which is incorporated herein by reference. On that date I sent transcripts of these sessions along with the tapes. There would have been at least 7 tapes, but I do not recall if some sessions used more than one tape. It is my intent to donate all of them on the terms set forth above. Officers of the Historical Society are authorized to fill in details from the originals they now have.

The transcripts of the 7 interviews are contained on 7 diskette(s).

**ORAL HISTORY OF
JOAN Z. BERNSTEIN - FIRST INTERVIEW
JUNE 1, 1998**

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit.

Professor Jackson: This is June 1, 1998, and I am Vicki Jackson. I am interviewing Joan Z. Bernstein, otherwise known as Jodie, who is currently Director of the Bureau of Consumer Protection at the Federal Trade Commission. I'm going to start asking you what you remember about the place you were born.

Ms. Bernstein: Okay, that would be good. Here's what I remember about it. I was born in Galesburg, Illinois, March 17, 1926, and I lived there throughout my youth, up to and including my graduation from high school. And in fact it remained my home and hometown, really forever. In lots of ways it remained my hometown, but certainly through college and law school, until I was married, when I began to think about another place as home.

Professor Jackson: Galesburg was where you would go home for vacations, and –

Ms. Bernstein: Yes, yes, went home on vacations, and in every sense considered it home. I think of it to this day with great warmth and affection, and I don't know whether that's because one tends to forget the bad things and remember all the good or not, but I remember it very warmly. I remember it as an environment that I felt able to deal with. I felt secure in both my family and my community.

Professor Jackson: What kind of city or town was it?

Ms. Bernstein: A town of 30,000 people, in the middle of Illinois, in the middle of agricultural country, very rich agriculturally in terms of soil and even in terms of productivity. It was a community about 40 miles from the Mississippi River. Not a river town in the sense of

Quincy or Burlington as those towns were, but it had connection with the river, surrounded by farms that were successful and productive. I associate with the agricultural nature of the surrounding areas, not manufacturing but agricultural – development of hybrid corn and other kinds of innovative farming techniques that I think were largely developed in the middle west. One of my first recollections or knowledge of what the federal government did was that there was a Department of Agriculture research center in Peoria, which had a large building that to a small child looked like it must be a very important place. And in fact it was a very important place – among other things there were early studies there of the development of penicillin.

Professor Jackson: How far is Galesburg from Peoria?

Ms. Bernstein: Fifty miles, and I was very early aware of and knew a good deal about it because my mother's family was from Peoria. My mother grew up in Peoria. And as a child we visited Peoria almost weekly to see her mother and father and subsequently her sister and so forth, so I was very much aware of the two communities and some differences. Peoria was much bigger than Galesburg, the second largest city in the state. And in terms of my identification as a Jew, Galesburg's Jewish community was very, very small – about 25 families total. That meant I knew every Jewish person in Galesburg, and it was almost like an extended family.

Professor Jackson: Was there a synagogue in Galesburg?

Ms. Bernstein: No, not then. There was a community but they didn't have a building until after the war when a little temple was built.

Professor Jackson: Did you have an itinerant rabbi or –

Ms. Bernstein: Yes, we had itinerant rabbis through the years and when they didn't have one, or if one year they didn't have one, the men in the community, that is my

father's generation, would conduct the service themselves. Like most, and I'm sure you've heard this before, Vicki, unbelievable as it may seem, there were virtually two communities among those 25 Jewish families: some who came earlier, some who came later. We were part of the later group, so we were part of the more conservative part, those who were more observant. In Peoria there was a much larger Jewish community and there, too, were at least two or three different communities. My grandfather in Peoria was a very, very observant Jew, kept kosher, went to synagogue twice a day, et cetera. We visited this larger Jewish community from time to time. I never felt part of it.

Professor Jackson: Your mother grew up in Peoria and –

Ms. Bernstein: My mother and father were both immigrants. My father was about 13 or 14; my mother was like one. Obviously all the grandparents were adult immigrants and all the grandparents that I knew, and that was three because one had died before I was born, spoke Yiddish, spoke Yiddish to me. I was expected to understand it, and I didn't know that I wasn't supposed to, so I did.

Professor Jackson: What part of Eastern or Central Europe did –

Ms. Bernstein: My mother's family was from Poland. It was the all-Czarist Russia; my father's family was from what is now Moldova, I believe, around the Kiev area.

Professor Jackson: Can you recall what your parents might have told you about their experiences growing up in Peoria and Galesburg?

Ms. Bernstein: My father's family came first to Burlington, Iowa, and I never was quite clear about why they moved to Galesburg. Well first I remember asking, when I was big enough to begin to think about it, why they went to Burlington – and I never got any answer from that, except that someone had a friend from Europe who was somehow in Burlington. I

think the truer answer, which they did say later on, was because the middle west and small town community was the way they had lived in Europe. They were not big city people. My father used to say jokingly that when his father, who had come before the rest of the family, took one look at the lower east side of New York and said, "If we're going to be poor, we don't want to be poor here," which I thought was good judgment. It was much easier to live in a smaller community. They had lived in a village in Europe. I didn't know where my mother's family had lived in Poland. My mother never really knew much about it, and unfortunately I don't believe I ever asked her about it until it was too late to find out. I don't even know how they got to Peoria, probably for the same reason – they knew somebody from somewhere, I suppose. I did ask about – my father had very little formal education. He did read and write English. And how much he went to school after he got here I doubt very much because by the time he was 15 he was working full time.

Professor Jackson: Was he in agricultural employment?

Ms. Bernstein: No, he was a tailor. He and his older sister had been apprenticed to tailors in Europe. He worked first for his brother, his older brother who had come with his father and had already opened a clothing store, a men's clothing store, and they were doing tailoring and cleaning in Burlington, I think, but I am not sure of that, but certainly in Galesburg.

Professor Jackson: Did your mother help in the tailoring business?

Ms. Bernstein: No, my father's family were the tailors. My mother's father ran a pawnshop and was successful, financially successful. How I'll never understand because I never heard him speak a word of English, but I don't know how he did it. But I think maybe one of the sons took it over, I just don't know that part of it. But my mother's family was more successful financially than my father's. As I said before, they were a very religious family, and there were

only a couple of them who basically never left home. The adult children who worked in various enterprises lived at home until marriage, one after they were married even, and that was in part so they would be sure to have kosher food.

Professor Jackson: And these are the people in your parents' generation who lived at home?

Ms. Bernstein: Yes. My mother was at home until she married, and she was 30 before she was married. There were six of them; three siblings never married. One of her brothers, after whom I am named, had a very early death. I believe, though I do not know, that he committed suicide. Never was told; there was never any mention of this sort of thing. I mention that only because these families never really talked about personal matters of that kind.

Professor Jackson: Even though they lived so intimately together.

Ms. Bernstein: Yes, yes.

Professor Jackson: It is quite interesting. What were family gatherings like? It sounds like you did that.

Ms. Bernstein: Oh yes, a lot, a lot in both families and sometimes together, less often together as a child, but later on they would be together. Every Friday night at my grandmother's house.

Professor Jackson: This is in Peoria?

Ms. Bernstein: No, this is the Galesburg side of my family. In a way I was much closer to my father's family than my mother's although we spent a lot of time at both. I think I felt I had more in common with them. My father was one of eight, and he had two younger sisters who were very influential in my life. They were so much younger than my father that they were almost the same generation as some of my cousins; in fact they were the same age.

They were smart; they were Americanized. They were funny. Especially there were two women, and they were wonderful to me as a child growing up, and I have a great deal of closeness to both of them. One, I think I mentioned to you before, Vicki, became a doctor, and I was very close to her from an early age and up until, really until she died. And it certainly eased my way into the professions, any profession. She really had been the pioneer in the family. Lots of people say to me, my, you're such a pioneer, and I don't think of myself that way because there was somebody before me.

Professor Jackson: What was her name?

Ms. Bernstein: Mary Zeldes. She went to medical school at the University of Illinois. She said that her two brothers, my father and his brother, who did not have a younger son to send to medical school, sent her because she was the smartest. She used to tell people she had no interest in going to medical school but "the boys" said she was going. They put her on the bus, she said, and sent her to Chicago, which is where the medical school was.

Professor Jackson: So, it's a wonderful story of the men in the family pooling resources to send this –

Ms. Bernstein: To send this woman to medical school in, I suppose, 1932 or 1933– can't have been much before. I knew it wasn't much before then, and it couldn't have been much after that I don't think.

Professor Jackson: Now did she come back to Galesburg?

Ms. Bernstein: No, she didn't come back to practice. She graduated second in her class from Illinois Medical School, I used to kid her and say, "Well who was first?" And she said, "Well he doesn't count." She became a pediatrician. She became among the very first board certified pediatricians in the country. And as she completed her residency, married a

doctor (I think a classmate), and of course when they were completing training and so forth, he went into the army, because of the war, and was gone. By that time she had a child, and I don't remember where she was working before that, but at the onset of the war she accepted a post at a large medical clinic in Wichita Falls, Texas. I don't know why, but she did. Maybe because others weren't hiring women at the time, and there weren't clinics that paid. I suppose basically she didn't want to hang her shingle out by herself and have to take that on and borrow the money and all that. I don't remember how that happened but I spent a summer with her.

Professor Jackson: How old were you?

Ms. Bernstein: Just finished my first year in college. And she called home – this was the way the family operated – and my grandmother had been down there with her, and she and my grandmother were very, very close, but they also fought with each other terribly. And Grandma had called and announced that she couldn't take it any more, and she was coming back to Illinois, and they should send someone else because Mary shouldn't have to be there alone with the baby and being a busy practitioner, and so forth. So I was sent to Texas that summer. I came home from college, and they said get packed up; you're going to Texas. I got on the train for what seemed like three days, with every seat taken with young soldiers; it was really quite a trip. It was quite a trip. So I got there, and my main purpose of being there was just so she would have company, I mean I wasn't supposed to be. I spent time with the baby, of course. He was about 18 months old; he lives here, and I'm still good friends with him. She didn't make me into a servant. It was mostly to have somebody to spell her, particularly when she got called at nights, that there would be somebody in the house with him, and so forth. I had quite an enjoyable summer. She introduced me to people she had met who had young people my age in college, and I kept up with some of those young people for a long time but not forever.

Professor Jackson: I was going to ask you the role that gender played in organizing family activities. And it sounds like there were things that were not necessarily what one thinks of stereotypical about that.

Ms. Bernstein: I think that's right, Vicki. I always think of it as non-stereotypical. Principally because of my father's unusual attitude toward me, towards his sisters, toward other women. There were eight children in the family. The first four were the children of a mother who died in Europe, and the second were from a second wife who I believed was my grandmother, and not finding out until I was eleven or twelve that she was actually a step or whatever you call that grandmother. My father treated her as his mother because he had been a baby when his mother died. And when the father died, the year before I was born, my father moved into the role of being the patriarch of the family. Everyone turned to him for everything always. He comfortably played that role and was, oh, non-judgmental, non-dictatorial, liked to work things out in a moderate and conciliatory way – everyone loved Louie – Louie solved everybody's problems.

Professor Jackson: You've given some examples of the non-stereotypical attitude toward women, of financing his sister's medical school, and then being supportive, but we haven't talked actually specifically about his attitude toward you.

Ms. Bernstein: No, and we should because it was quite remarkable. He almost made a fetish of treating me and my brother identically in terms of support, of help. He said to both of us, I'll support you in your education, whatever you decide to do, you can do. This is a great country, you only have to be smart enough and work hard enough and we'll manage– even in days when resources were, you know, money was limited. He was always very optimistic and said, "We'll find a way, we'll find a way." And he helped the other women in the family. My

cousins (I have three women cousins), the children of his older sister whose husband died, their father died very young and my father helped them. And, in fact, my cousin Bernice, whom I'm very close to, lives in Arizona now, told me (and she always will remember it) she married at 18 to a prosperous family in Iowa, a Jewish family in Iowa, and my mother and father had the wedding. She remembers vividly my mother taking her to buy a wedding dress and so forth. I wasn't aware of any of those things at all, but others were. Obviously I was young. I'm sure they didn't tell me things like that because I was, I suppose, nine years old or so. Anyway those things went on, always that was my recollection, and when my father died there were people who came to the funeral who I had never seen. One woman particularly told me this really wonderful story of her husband who had worked in a factory (and most women didn't work then) in the late '30s, and her husband was killed in an accident and left her with two small children. My father rented her a house, and she had no money whatsoever, except \$1,000 insurance money, and she said, "What will I do?" and he said, "Well you can live here without payment for six months." And she said, "I just don't know what to do." So he said, "What can you do?" And she said, "Well I can cook, that's about all I can do. I know how to cook, I'm a good cook." He helped her to rent what I suppose was a fast food restaurant, not a chain, across from the factory, and eventually got her a liquor license. Women were not permitted to hold liquor licenses at that time, which I didn't even know, and he held it in his name for her until she could "get on her feet." There was another woman, she and her husband had converted an old hotel into what was then called Helen and Mead's Hotel for Elderly Gentlemen. It was essentially a nursing home without a license. And my father helped them get that. He did that kind of thing for people, all very quietly without anybody much ever knowing about it. We do know about much of it, though it was very quiet in that sense. He had a good sense of humor, very strong, very

comfortable with himself. And obviously an enormous influence on me and my brother.

Professor Jackson: What a wonderful parent.

Ms. Bernstein: Oh, he was. He was wonderful. My mother was also supportive of all the things that he did. My mother had been very successful herself. She went through the 8th grade. She did not go to high school. Two of her sisters did, and she went to work. She became a buyer in what was then a major department store in Peoria, in the linen department, which was very unusual for a woman. This was in 1920. She also told me that when automobiles first were available, she bought a car and her brothers begged her not to do it because only "loose women" drove around in cars. They would take her anywhere she wanted to go, but she insisted upon having her own car. So there was a certain streak of independence in my mother, which I think got totally diminished after she got married and became a housewife. It was not entirely her doing I think, and that is partly my father's doing. That was interesting to me. My mother's friends, and they were the few, I suppose, 10-12 couples of their age who were in one business or another. They were all in some sort of jewelry store or this or this. Not unusual, but the women all worked in the store; all of those women worked in the store. My father never wanted my mother to work in the store. So she never did. She did a lot of the family gatherings, not the Friday nights. As long as my grandmother was alive, she did the Friday night gatherings. But my mother did Thanksgiving and Hanukkah and my birthday and my brother's birthday, and her family came for Sunday dinner very often. They would drive over from Peoria for middle of the day dinner and things of that sort. She also was sociable in the sense that the ladies group (which was the Jewish group which she belonged to) they played poker every week. Poker! I was embarrassed beyond words about that when I was in high school because my friends' mothers all played bridge. Where did you grow up, Vicki, just by

way of contrast to all this?

Professor Jackson: I grew up in the New York area and my grandmother was the matriarch of the family. We went over there every Sunday and we frequently had dinner with them Friday nights. And she had a group and they played mah-jongg or bridge. I don't know whether she knew poker or admitted to it. She did work; my grandfather was a doctor and she did work in his office and she could get away from home. So some of this sounds actually very familiar and very lovely actually.

Ms. Bernstein: It was very, very warm, and you know not all of it was, of course. My father's one sister married, and my grandmother always lived with her and her husband, Bert, whom we all called Dark Cloud. He was one of those people was a failure at everything, including life, and he wanted everybody to be miserable, so there were things of that nature, as well. And of course it was the Depression.

Professor Jackson: What kind of impact did that have?

Ms. Bernstein: I think I was certainly aware of it. I was trying to think about when I saw it in your little note because I was aware of Franklin D. Roosevelt being elected in 1932, even though I was only six years old, and that is not something I've conjured back on. I was literally aware of it. I was aware of the excitement in my father's family and my father particularly because it was so optimistic. My father had lost his business, his clothing business, which I was barely aware of the fact that he lost it. I mean he closed it up because nobody was paying anything at all. And my mother's family helped them through that because they would have lost the house, and I think I only knew about that after the fact, Vicki. I don't think I knew it at the time. I know my mother's family paid the mortgage until things got better and things of that sort. And I suppose the pawning business must have been fabulous then although who you

sold the stuff to, I don't know.

Professor Jackson: Did your father then start another tailor shop after?

Ms. Bernstein: No, he never did. As soon as, and I don't think he contemplated this, but maybe he had, it was under consideration to repeal Prohibition, I suppose before the election of '32 because it was an election issue and then it was repealed in '33, my father got one of the first liquor licenses in town and opened with his brother. His brother my mother always considered to be not quite respectable. He wasn't married, and I think he was, what did she call him, did she call him a "womanizer"? No, that wasn't the phrase— "chaser." I can remember saying to her, "I thought a chaser was a guy who married and chased other women." "Ah shaa, shaa, such questions she asks." And he and my uncle Moshe opened up a tavern, and my mother just was horribly embarrassed about that. She was just humiliated and worried that she'll be known as the barkeep's daughter or saloon owner's daughter, and she'll never amount and never be able to succeed socially, and I was just not very aware of that. I was a little bit because I would hear her saying so, and by that time I was beginning to be more aware of the economic crunch. My father's attitude was "I can run a respectable business; neither you nor the children will be in the business. I can make a living and I will." And he did. He became successful. He and Morris opened up another one that was also successful, and ultimately he went into the package liquor store business and opened up one on Main Street. By that time, it was totally respectable. Of course he was a merchant by then and he did very, very nicely.

Professor Jackson: What about the impact of events in Europe and then the entry into the war? I was trying to figure out how that related to when you started college, but I think you started college near the end of the war.

Ms. Bernstein: I started college in '44 so the war was still on, but in the spring of

my freshman year the war was over; '45 the war was over.

Professor Jackson: So in your teen years – that was the time of Europe?

Ms. Bernstein: Yes, that was the time of Europe. My first recollection of it is when the first (I guess there were two) one was Fred Shuboch and his father arrived in Galesburg from some place in Germany. They opened a cleaning and tailoring shop. Fred was a tailor, and what I learned about why were Fred and his father there was things were getting bad in Germany. I equated it with what my father and that part of the family had told me, the ones who could remember about how bad things were in Europe when they left. I had heard of pogroms; I knew of pogroms. I knew that Jews weren't allowed to own property; Jews couldn't do that. This and the other thing in Czarist Russia or in any part of that part of Europe and I kind of equated what was going on in Germany with that. I was like *déjà vu* all over again. That's what we kind of equated it with. I was gradually becoming aware of fascism in Germany and not until another couple came, Franz and Frieda Lang. The community brought them to Galesburg; they brought several, which was quite amazing. It also brought these split communities together for the first time. My father went to what he called the other side and said enough of this, we've got to raise enough money to help out. So they obviously knew. I knew and I was quite aware of that because we all tried to help with that. We all tried to do whatever they wanted us to do to help folks, these new families coming to town because they would have to find a place to live; they would have to find them work to do. There was much tension surrounding that, much tension because there were lots of, I can remember, dissident points of view. Nobody really knew what was going on, and the Langs, for example, were from Vienna. There were some in the community who thought the German Jews deserve it, that they brought this on themselves. God told them not to assimilate; God told them not to abandon the religion of their forefathers, and

this is their punishment. Not uniformly, I never heard that kind of thing from my father at all, but I remember hearing it from “Dark Cloud” and sort of absorbing that as best I could.

Increasingly, I became more and more aware, obviously, and so when the time came I remember vividly, very, very vividly – how old was I then? I suppose about 13 or 14, on Pearl Harbor Day. I remember that vividly, coming downstairs. We always came down in pajamas on Sunday morning and listened to the radio while my father and I read the funnies and things; that was kind of a Sunday morning ritual. That was the one day my father was home because there were blue laws still and the store was closed. So he was home on that day and I remember trying to figure out what it meant. I think I must have been only about 12 or 13, because I had had some history, but it was very hard. World War I seemed to be the same as the Civil War. I mean the same degree of reality, even though my father had been to war, my father was a veteran. A couple of my uncles had been in the war. My father was an active member of the veterans’ organizations and things like that; even so I just didn’t connect with it. And I can remember thinking to myself, well I guess we’ll just have to get to work and we’ll win this war. We, you know, us Americans. I remember the optimism increasing at the same time the economy was becoming better and things of that nature, but I think increasingly as I read more and more about it, I don’t know that any of us had a very good idea of the extent. We knew that Jews were being forced to leave the country, and we knew that Jews were picked up and so forth but none of us knew really the extent of it.

Professor Jackson: Okay, we talked when we had lunch some months ago about how you came to decide to go to the University of Wisconsin as an undergraduate. It would be interesting if you could remind me of the details.

Ms. Bernstein: Let me just add one thing that I think is important about my town,

my community, and my family, And that is I contrasted it to some extent to when I did get to college and met other people my age, especially girls, who had grown up in large cities with large Jewish communities, how different I felt about my own connection with my community, with my high school experience, with my acceptance into the larger community.

Professor Jackson: Can you elaborate?

Ms. Bernstein: Yes. My husband grew up this way and other people did, too. A couple of my friends at Wisconsin had grown up in the south side of Chicago, well-to-do families, in successful households. No one had gone to private; I didn't know anyone who had gone to private school then. They went to very good public high schools, Hyde Park High School, and they were kind of the elite high schools. They never knew a gentile person. They didn't know a gentile person because their whole circles were all Jewish. There was a great deal of segregation among people, as soon as people got old enough to be social. My husband said when he was in elementary school, he didn't even know if there were any gentile kids in the school.

Professor Jackson: And by contrast?

Ms. Bernstein: By contrast, I was one of maybe two Jewish kids all through school, maybe three in my class. My group, which is extremely important, my group of friends, both boys and girls, which I began to know in grade school, all went to dancing school together, and we did the same things with basketball games and all of those kind of community, non-dating activities. Two very, very close friends who remain, one of them is dead, but the other remains a close friend to this day. I was totally accepted in ways that were just unknown to some of my later-on friends who had grown up in different communities. It has served me well throughout my life. I always felt comfortable. In fact when I went to this huge corporation,

midwest gentile corporation, there were hardly any Jews in that entire company. There were maybe two or three in staff jobs, and there weren't any certainly working in line jobs. But people said to me, "Are you comfortable in that setting?" I thought to myself, this is just like the people I knew in Galesburg, some of them come from South Dakota, some of them come from Minnesota, there were a lot of Scandinavians. I knew these people; deep down in my gut I knew these people; I knew what I could trust and I knew what I couldn't trust.

Professor Jackson: It's a very interesting observation because there is this competing theme in American literature about small town intolerance, and your story is very different from that.

Ms. Bernstein: I thought about it and it's partly why I mention it, Vicki, and especially in those years, especially— I don't know what it's like now— but in those years at least in literature, the intensively, very destructive intolerance, because there is no way to get away from it, has been a recurring theme and not everybody had the same experience, even there, that I had. My cousin Bernice again — I've talked to her about that because she had the same experience I did — and one of her sisters did not and felt very disadvantaged, very as if she were excluded in ways that we weren't.

Professor Jackson: Were they related to religion?

Ms. Bernstein: Yes, related to being Jewish in a different way. I thought about it, of course. It was totally segregated as far as blacks were concerned, but there weren't very many, and they all lived in one part of town and we all went to the same high school. Everybody, Mexicans (there was an old Mexican community who had been brought up there to work on the railroads at an earlier time), small Mexican community, small black community, small Irish-Catholic community were also segregated. If there was any intolerance that I heard of, it was

directed at Catholics, but especially Irish Catholics. They went to different schools; they went to a different church.

Professor Jackson: Was there a Jewish part of town or were they residentially entwined?

Ms. Bernstein: There were only 30 families; they were residentially integrated. There wasn't another Jewish family on our block, well for a little while anyway; one family lived there for a little while, not very long.

Professor Jackson: That's very interesting.

Ms. Bernstein: It is. I don't know if it's peculiar or not, I think it was very different in Peoria. The young people that I finally did meet there when I was in high school—and since my mother schlepped there so often, she finally picked up the phone and got us acquainted with people our age so we wouldn't complain so much about nothing to do – they didn't have the same experience I had. They weren't unhappy; most of them as a matter of fact stayed in town. Nobody stayed in Galesburg. Except one friend of mine who was in my class, a Jewish boy whom I was very close friends with, always, he stayed in town and that may have been because his father was very, very successful and owned a factory where they made blue jeans and overalls, and he went to college and came back and ran the factory and eventually sold it to somebody and lives in Florida now, of course. But nobody who had to make a living of the Jewish young people (in fact many, many of my classmates who were not Jewish) left town as well because there were just not economic opportunities.

Professor Jackson: Did any of your classmates go to Wisconsin with you?

Ms. Bernstein: No.

Professor Jackson: Is this an appropriate time to ask you how you came to go to the

University of Wisconsin?

Ms. Bernstein: Yes. My considerations were as follows: the people I admired most before me, particularly one, the Jewish dentist's daughter, Cherylan Ross, had gone to Northwestern as had a couple of other people that I considered successful predecessors. By that time my father could afford for me to go to private school instead of staying home and going to Knox College, which my cousins had done, or even to Illinois. [phone call interruption]

Professor Jackson: In our discussion just before 3:00 today, June 1st, when we broke we were about to talk about your decision to go to the University of Wisconsin, and you had started to talk about your criteria and the fact that some people who you looked up to as successful had gone to Northwestern. I think that's where we were.

Ms. Bernstein: And I thought that is where I would go. My two closest friends, Barbie and Midge (whom my daughters both got hysterical about that because one was called Barbie like the Barbie doll and the other one's name was Midge, and it was my daughter who said, "You made that up, Mother." But I didn't.) – they were both going to Illinois. For some reason I didn't want to go to Illinois, and I think, although this doesn't make a whole lot of sense, in my mind at the time, Illinois was very closely identified with a rigid Greek system—sororities, fraternities, et cetera— and if I were going to go with these two best friends, it was clear that I would not be considered for the same sororities they would be. And that somehow was distressing to me. I knew that the same situation would occur at Northwestern, but I wasn't going with my two girlfriends. So I was accepted at Northwestern, and the policy at Northwestern was that you had to be able to live in the dorm, and I don't remember what dorm it was but there was no room at the dorm, so they said, "We'll let you know as soon as the dorm is available." Part of this was wartime, because dorms at other facilities were occupied largely by

these military training programs, ASTP, and the Navy had programs at almost all of the schools. That didn't seem to come about, and I needed to think about a fall-back school, and my history teacher at Galesburg High School, whose name was Erma Gale (married to one of "the" Gales of Galesburg), had come from Milwaukee and settled with her husband George Gale in Galesburg, Illinois, and after he died she went back to teaching. She had gone to the University of Wisconsin, and I was a favorite student of hers. I loved her history class, and I talked to her about where to go to school. I left one thing out. One of our group was a boy whose name was Jim Thompson from a very prominent family; his father had run for Lt. Governor and his mother's family was renowned in town. His mother had gone to Vassar, the first time I had heard of such a school. I heard of Harvard and Yale, but I never heard of any of those schools. Mrs. Thompson suggested to me that if I wanted to go there, she would like to sponsor me, or recommend me. I spoke to my parents about that, and they were quite opposed to that. That was too far to go, it was too far away from home. We never heard of it anyway, and why wasn't Northwestern okay, and that was kind of prestigious and all, so I didn't really pursue it. But I thought about it a lot afterwards. And so Erma Gale said, "You should go to Wisconsin and that is really the only place for you. It's a better school than Illinois and beside which there isn't all that Greek nonsense there at all." It had a very, very different reputation. Lots and lots of Jewish New Yorkers had gone to Wisconsin through the thirties when there was no state university in New York and all the eastern schools had quotas. It was known to be a center of liberal intellectual activity, both faculty and student. It was a national reputation in those things, and I don't know that that really influenced me as much as the fact that it was not Illinois. Northwestern was clearly going to fall through, and at the last minute they did come through, but by that time I was focused on going to Wisconsin and hence I did.

Professor Jackson: I think we may have touched on the point. But in our little break I looked back over, I had remembered not her name but I had remembered the person, Erma Gale, an influential teacher. I guess before we go back to the University of Wisconsin, I wanted to ask whether there were other people in your early years before college, apart from your parents and your Aunt Mary and Erma Gale, who were very influential upon you.

Ms. Bernstein: Yes, I had a fifth grade teacher whose name was Miss Slattery, who taught us the Greek and Roman myths. I just got (maybe it was the age or I don't know what, I mean I had been a good student all the way through of course) straight A's and all that sort of thing, but with Miss Slattery I just got intrigued intellectually in a way. I really didn't connect anything that had happened before the day I was born hardly until I was in the fifth grade class. And it was an enormous influence on me. Several of those elementary school teachers were. It was a small school and we got to know them, and I remember that Miss Slattery would come to my birthday party when my mother would have a green angel food cake because I was born on St. Patrick's Day. These little girls, I think it was mostly girls, maybe boys— you know just little birthday parties— just coming together. One of them, Miss Weinberg, was I think like my first grade teacher. I just saw in my little hometown paper that Miss Weinberg was 100 years old last week, and one year ago I got a photograph that was the first year class of Miss Weinberg's that one of my classmates had dug up and for some big birthday of hers had presented it to her, and she wrote notes to all of us. Oh it was just lovely. So there were those very close kinds of identification with the teacher, with the school. One other person I would mention was a couple who came to Galesburg from Chicago. Their name was Lawrence. I'm trying to think what his first name was. Gladys was her name. They were quite a lot younger than my parents, but they were a part of the Jewish community. That's how I met

her, and her husband was a Ph.D. in something like sociology and could not support himself or his family and was brought to Galesburg by his sister and her husband who were business people and put into some sort of business. I was early on aware that he really hated being in business. She too had a master's degree, and that was fairly unusual for me to know people like that. I was quite intrigued with them, and Gladys reached out to a number of us whom she knew in the Jewish community. She would teach little classes of some of us who were trying to sort out what our feelings were about religion and life and so forth. I was quite close to her for some time.

Professor Jackson: These were classes on religion or philosophy?

Ms. Bernstein: They started out to be like Sunday school for those of us who had very little of that. Every once in a while there would be somebody trying to teach the children, if you know what I mean. Until later, the boys went either to Peoria or Rock Island for their training because they all got barmitzvahed, including my brother, who was the worst student in the world in terms of his Hebrew education. My brother is younger than I. I always say he used to be younger, but I won't use that gag today. By that time, I think by the time he was supposed to be barmitzvahed, there was gas and tire rationing, so they couldn't take him once a week for Hebrew lessons out of town. Mr. Becker, who was a local person who ran the junkyard and was supposed to be learned in Hebrew, taught, and people still claim Jack was so bad a student that it killed Mr. Becker. It's one of most my hilarious recollections. My brother was so bad. He was totally disinterested and he didn't want to study, and my mother's attitude towards all of those things was to me, "help your brother." And I always helped him with his homework and all that. And she told me to help him with his Hebrew. I said, "I don't know any Hebrew," and she would say things like, "You're so smart, you can pick it up." We made up flash cards. He and I

made up flash cards so that he would at least be able to get through the pronunciation of these words. We're very close and we always have been very close.

Professor Jackson: Is he in town?

Ms. Bernstein: He is a distinguished lawyer who has his own law firm in Connecticut where he went after law school. He went both to Wisconsin and Yale, and is a very, very distinguished lawyer. People in Connecticut will say to you he's probably the best trial lawyer in Connecticut. He's very, very good. And he's a wonderful person besides.

Professor Jackson: I'm sure. So your brother was an influence?

Ms. Bernstein: My brother was an influence, yes.

Professor Jackson: Where did your brother go to college?

Ms. Bernstein: Wisconsin.

Professor Jackson: So he followed your footsteps.

Ms. Bernstein: Yes, my mother sent him along there. As long as I had done so well. In fact, it was still more difficult for out-of-state students to get in the University of Wisconsin. State schools were crowded with returning veterans, and my brother applied because my mother wanted him to go to Wisconsin because I was there and I would look after him, and since I had done well. Then by that time, he said okay. But his grades were not as good as mine, and my mother came to Wisconsin – this is really an episode that honest-to-goodness happened. I was a junior member of Mortar Board and in the spring, it would have been spring of my junior year, Mortar Board breakfast took place for Mortar Board members and their mothers. So my mother came for the Mortar Board breakfast with the president of the university and other distinguished, you know, the deans and all that This was a big deal, Mortar Board was a very big deal. And my mother had been after me to see if I couldn't use some "clout" to get my brother

in there, which I was of course offended by and told her things didn't work that way, blah, blah. She sat next to the president of the university, and my brother was accepted because my mother spoke to the president about how nice it would be for this very successful sister to be able to have her brother go there. He got in. He had an enormously successful time in college. He was the editor-in-chief of the *Daily Cardinal* which has produced distinguished journalists throughout its history. He was just back there for a hundred years of publication.

Professor Jackson: Mothers are amazing!

Ms. Bernstein: Mothers are amazing, and I would do the same for my kids if they would let me. But I was horrified at the time.

Professor Jackson: Of course, that makes perfect sense. Okay, so your family was supportive of your going to Wisconsin I take it.

Ms. Bernstein: Yes, once that was decided they said well okay, that will be fine. They never pushed me about Illinois. I don't know why. It would have been much cheaper although there were reciprocal scholarships, and so it wasn't much more to go to Wisconsin. Northwestern had considerably more tuition but they didn't mind about that. They both always said well, where you would like, where we can afford it, that would be fine. Because they didn't consider they had any expertise in these things.

Professor Jackson: I'm going to ask you to think back on being an undergraduate at Wisconsin and what impressed you most in terms of professors, activities.

Ms. Bernstein: The first thing I would say is one of the dorms opened up about a month before school started, and I got a room in this dorm called Barnard Hall. These two old dorms, Barnard and Chadburn, that were right on campus, wonderful location; they were old dorms but one of the things that Barnard had that nobody else had at the time was single rooms.

I got a single room. My parents took me up there. My parents drove me up there with all my stuff, although we did not have – wait, I did have a portable typewriter– we didn't have stereos, hot plates and refrigerators and VCR's and all that sort of thing. And as we were getting settled in Barnard Hall, and other girls and parents were coming of course, we saw a very, very attractive woman, and my mother looked and said to me, "Oh what an attractive girl," and I said, "Yes, isn't she," and she said, "Do you suppose she's an American Indian?" She had fairly mocha, lighter than that, café au lait almost coloring and dark red hair. My father said, "No, I think she's an American Negro," and at this point my mother almost fainted, collapsed. There were four black women, what we called Negroes at the time, in my dormitory which was unheard of any place that I had ever been or my parents had ever been. One of them was the very attractive red-headed woman I saw about a month ago. She is now married to Walter Washington, Mary Nichols Washington. Two of them became among my fastest friends in the world. It opened up an entire world to me, an entire world that we could talk about for an hour, but we won't. It was a totally segregated world, as you know, both of them were from very upper class families or they wouldn't have been there.

Professor Jackson: From what part of the country were they?

Ms. Bernstein: Mary is from Washington, D.C. (END OF TAPE)

Professor Jackson: The interview on June 1st with Jodie Bernstein continues. We were talking about her friendship with African American women at the University of Wisconsin.

Ms. Bernstein: Laurantita Taylor was her name, lived across the hall from me. Her father was in the thirties the head of the Chicago Housing Authority, a black male– I believe he was a lawyer; I think he had gone to Harvard. Very distinguished, very upper families both of them. As I say, I knew almost nothing about that part of our society. I had known one of my

classmates from Galesburg High School, whose father was a doctor, went on to go to medical school. I had known him but he wasn't certainly a part of our group, but because it was an integrated high school, he was in activities I was in. So in fact I did have more exposure to African Americans than most did at the time we went to college, but not when I met Mary and Lauranita, and we remained friends all through the years of families. I went to Lauranita's wedding in Chicago. We happened to have been back there when her daughter was married. It was lovely. I have a picture of me with Lauranita's mother and Lauranita and her daughter, and it was three generations and a very nice occasion.

Professor Jackson: Was there a civil rights movement or precursors in Wisconsin at that time?

Ms. Bernstein: No, in fact the only issues that I recall – no, I don't think there were any. I didn't think a lot about the fact that it was an integrated dormitory past the first shock and so forth. But there wasn't very much talk about it. I remember hearing things and then I met all the other black Americans who were on campus because they all knew each other. And there were very few men that first year. There were hardly any men on campus, black or white or any color.

Professor Jackson: Still during the war?

Ms. Bernstein: Yes. They weren't back yet. So it was in every sense a wonderful first year. I loved it. It was getting to find your way in a way that, as I thought about it afterwards, there was no pressure to date at all because there was nobody there to date. And it put us all on sort of equal plane of figuring out how we were going to manage our workloads and get to know people and figure out what we wanted to do without any of the social pressures that came later. To me it was great because I wasn't very ready to be able to handle that much of that

anyway.

Professor Jackson: What did you study at Wisconsin?

Ms. Bernstein: My major was economics with a minor in political science. The minor in political science was really the most important, I think, factor because I took a course in constitutional law in the political science department with a professor who had gone to Yale, and it was really why I ended up at Yale.

Professor Jackson: Do you remember the professor's name?

Ms. Bernstein: Yes, I do. David Feldman. He had gotten his Ph.D. at Yale, and when I talked to him about going to law school in my senior year, having done very well in his constitutional law class, he first suggested that I might want to do graduate work in poli sci, and I was very interested in it. But at that point I knew I would have my family's support to go to law school, but I wasn't at all sure about getting something called a Ph.D. in poli sci – what would I do with that? I knew I didn't want to teach. And so it was much more practical, and he was very instrumental, I think, in two ways in getting me to apply early to Yale and getting me not only his recommendation but my economics professor's. I'm going to forget his name now. I think it's very important– had been in Washington and had been one of the architects of Social Security. So people knew his name. He was a very distinguished professor and I think it probably helped a good deal in my being accepted at Yale. I mean I had grades and so forth and certainly had plenty of extra curricular activities to demonstrate I was “well rounded.”

Professor Jackson: What kind of activities were you involved in as an undergraduate?

Ms. Bernstein: Oh, everything. The yearbook, I ended up being editor-in-chief of the yearbook. I had written on the feature staff of the *Cardinal* – in fact I have a funny story. I first went to try out for the *Cardinal* after the first semester. I was going to write features – that

was what interested me the most – and they said they had nobody to cover the athletic contests, such as they were. Would you cover the football game this Saturday? And I said, “Well I don’t know a thing about it, but I’ll go to the library and I’ll try to do it.” They said, “Oh that would be great” because there was nobody to do it. I went there and, of course, the press box at the University of Wisconsin didn’t allow females in, so I sat outside trying to figure it out. That was the last time I ever went to a game! That, what else did I do there? I was on the Student Council; I must have been an officer of the Student Council because I was elected to that. And from those things I got elected to Mortar Board in my junior year. In other words I was a BWOC, a big woman on campus. I really loved that. I thought that was great.

Professor Jackson: Now World War II ended while you were in college. What was the impact of that?

Ms. Bernstein: The impact was incredible. The second year, my sophomore year, I remember vividly – I think it was second semester that I took “Money & Banking” in the econ department. By the time I had completed the mandatory courses, and I walked into the money banking class, but previously any of my economics classes had like about 4 to 6 girls and maybe one 4-F. They were tiny little classes because women didn’t take economics. So these poor economics professors who previously, I’m sure, had lecture classes over 100 people, had just these little bitty classes. I walked into the Money & Banking class and there were about 200 men and me and two other women. It was just a stunning kind of change, really stunning. Huge numbers of returning veterans changed the whole atmosphere of the campus because of the thousands and thousands. Many of them had been out of school for four or five or more years. But that’s a huge difference in age. They had been all over the world, many of them, but not all of them. Some of them had never left the country and so forth, but a lot of them had seen battle

and were returning. A lot of them were married. That was the first time there were married college students, lived differently than we did. They were very serious so we had to be also. I had worked very hard anyway, but it was much more intense intellectually, much more intense. And lots and lots of really heavy, of my group anyway, oh you know, where's the world going and political intellectual discussions. I remember some in which I had no idea of what anyone was talking about, because I didn't know about French intellectuals and movements, I really didn't know. I was quite intimidated by that, but I had a couple of friends about whom I finally concluded didn't know either, they just talked more than I did. I had a very, very wonderful four years at Wisconsin. One summer I was there because something had happened the year before at the yearbook. The editor had disappeared and the annual didn't get finished. They asked me to come up for the summer and take the summer programs and run the rest of it and I did that. I met lots of interesting people and had good professors, I thought. One of them talked me out of trying to be a writer, which was probably good. I mean fiction writer. I had that kind of in mind that I could do that. After I took his creative writing course, which I did well in, I think he really persuaded me that maybe I should do something more practical.

Professor Jackson: One of the things I wondered about, thinking about this ahead of time, was whether when the men returned whether that had any effect on the way women students were treated. It doesn't sound to me like it did necessarily in your description, other than you were now part of a much larger group.

Ms. Bernstein: It didn't for me, but I think it may have for the entering groups. I felt like I was pretty well established by second semester my sophomore year, that's what I associate with the big returning class. And I didn't sense that. I do recall having some of these men, particularly in economics classes, not so much in poli sci classes, but you know I had to

take statistics and things like that for econ, of men making disparaging remarks, like why are you doing this, you know, you'll only get married and have children and you're taking up space and we have to compete with you, and so forth. That never bothered me.

Professor Jackson: Fairly classic kinds of –

Ms. Bernstein: Oh yes, very classic kinds of sayings.

Professor Jackson: Okay, we've talked a little bit about how you decided to attend law school, what we heard was sort of the practical interest, but maybe you could talk a little more. Did you go to law school directly from University of Wisconsin?

Ms. Bernstein: Yes. I graduated in 1948 and I started in the fall of that year.

Professor Jackson: Okay. Of course there were other professions. You had a role model who was a doctor and another was a history teacher. You knew you didn't want to do those?

Ms. Bernstein: I knew I didn't want to do those and from a very early time, and I mentioned being aware of the election of Franklin D. Roosevelt. From a very early time I was interested and intrigued with politics and with democratic institutions and with government generally. I was just intrigued with it. I mean from the time I was a little kid. And my father was interested, maybe that was the reason. My father was interested in politics. He was active in politics. As my mother's brothers were, although they were Republican and my father was a Democrat, which really meant that there were interesting differences that I became aware of. My uncle was an alderman in Peoria for many years. That was very impressive. He ran for office. My father ran for office, for justice of the peace before he was in the liquor business, so it must have been a way to make a living.

Professor Jackson: Did he win?

Ms. Bernstein: No, he lost. And my famous remark was – I remember I was very small, so it must have been before '32 – he won the primary and he lost the election. In order to comfort him, I said, I must have been five years old, “I wish you had lost the first and won the second one,” because all I could figure out was the second one was more important than the first. He never ran for office again. I think he became a Democrat then because I heard rumors afterwards, although he never filled in the details, that he had been double-crossed by someone and it was a Republican who had double-crossed him and hence, he became a, or maybe had always had instincts along those lines. And then, of course, when Roosevelt was elected he was all our hero and the only president I ever knew until I was in college. So I was always interested in that. From an early time it seemed to me that if you were going to have any sort of career life, or whatever you ended up doing, in that arena you needed to be a lawyer. And that was what really drove me, so I decided sort of early, I talked about it in junior high and high school.

I'm sure that I was quite terrified by the time I got to be a senior that I made all these commitments, that I was really going to have go and do it. I don't think I've ever said that to anybody because I was always quite blithe about– well I'll just go on and do that. And then here I was faced with this sort of reality of having committed to the world that I was going to do that. Almost everybody else I knew was getting married that summer. One woman that I knew at Barnard when we first got there, Ruth Weiner (whose family I knew indirectly though she was from Wisconsin) said she was going to medical school. When she and I were freshmen, I was already saying I was going to law school, and she was going to medical school, and one other girl in the dormitory said she was going to be an engineer. Well, nobody even knew what an engineer was at the time. There was not one single woman engineer at the University of Wisconsin at the time. It was a very good engineering school. But when I was a senior I

thought, my God, I'm really going to have to do this now, and thinking to myself, it would have really been easier if someone had asked me to marry him, to get out of this. I really remember thinking that, but nobody had, or anybody that I wanted to seriously get involved with, so at that point it was like this, well this is it, I have to go.

Professor Jackson: Did you apply only to Yale or did you apply to other schools?

Ms. Bernstein: No, I applied at Illinois and I don't think I applied at Chicago. I applied at Northwestern, and I was pretty sure I could get into Illinois without a problem, and it would have been cheaper, and every lawyer I knew, which was about three people, had gone to Illinois, so I felt that would be alright. I'll be able to go there and practice in Illinois anyway if I was going to have a political career. It never occurred to me that I could have gone to another state because I really did want to have a political career, and it never occurred to me that I could go anywhere else than Illinois. And people didn't do that yet. They didn't pick out a district where they could go and live and work and look forward to. And I got into Illinois, and I think I got in at Northwestern, but by that time I had already gotten into Yale.

Professor Jackson: And given your political aspiration, how did you decide to go to Yale rather than Illinois? Because if you wanted to be an Illinois pol, there might have been an argument for going to Illinois.

Ms. Bernstein: Feldman talked me into it. He told me the rest of them are all trade schools. If you really want to eventually end up doing something in government or whatever, you really need to go to Yale, and he convinced me that all the really important people in the Roosevelt administration and so forth were from Yale or Harvard, which was true. I didn't take much talking to, you know, for me to apply and when I got in, well.

Professor Jackson: And your parents said it was ok?

Ms. Bernstein: They said it was okay, although my father said he took quite a lot of grief from people in town who all said, “Well you know every successful lawyer in town, and some of them became members of the legislature” and things like that. One of them was very successful whose mother was a dear friend of our grandmother’s, somebody we had grown up with. He was older than I and was already very successful and had gone to Illinois. They were all saying to my father, “Well, if it was good enough for Berle to go to Illinois, why only your daughter it isn’t good enough for?” He took a little bit of that. He just sort of ignored that and said, “Well, she’s going to go do that.”

Professor Jackson: I have the same sort of questions about Yale Law School that I had about the University of Wisconsin – what was it like as an experience, what stands out in your mind?

Ms. Bernstein: Pat Wald, Pat McGowan Wald stands out mostly more than anything else, and she always has, because I met her the first day I got there. We lived in a house on Hill House Avenue (that was, we may have talked about this before, was housing for women graduate students). I don’t know if we had to live there, but that’s where we did. We could not live in the Quadrangle, but we lived there and we got assigned, Pat and I and another woman, Pat Schwartz, three rooms on a mezzanine with a bathroom, and the three of us got assigned there. Pat and I remained there the whole three years in those rooms, and you know we ate together, we walked to school together, and we studied together. It was an incredibly influential relationship and friendship and support group, and everything else. We also both feel the same way about our classmates generally. We seem to have hit a class or group of students (at least the ones we ended up sort of hanging around with); we just became friends, just warm, friendly friends. Many have continued to be friends. In fact, last year out of nowhere I got a call

from Kurt Melchior whom I haven't seen in years. He called up and said he wanted to nominate me for the what do you call it, the Brent Award. I said, Kurt, what a nice thing to do, blah, blah. Whatever possessed you? He said (he's always been in San Francisco), well I just think you've done wonderfully and I think you should be nominated, blah, blah. I just thought that these were people who were in many ways lifetime friends and colleagues and support and all of the above. Not everyone, and I don't mean to suggest that, because there are some who I can't even remember who they were even. The classes were sort of small. Bigger than the usual, but we just seemed to have fallen in with people that were our kind of people, who you didn't date, you just palled around with.

Professor Jackson: What about professors?

Ms. Bernstein: The professors were – I remember some of them – I remember J.W. Moore.

Professor Jackson: As do I.

Ms. Bernstein: Did you have him too? I didn't think you were –

Professor Jackson: I did. In 1972 for civil procedure.

Ms. Bernstein: That's what I had him for in 1948, for civil procedure for the whole year and I must say that of everybody, I learned more about law and what law was about from him than I think anybody else, in those terms. Others were much more inspiring, if you know what I mean. But what he put us through was just extraordinary. What was the case he usually spent two months on? Do you remember it?

Professor Jackson: No. I was probably a less committed law student my first year than you were.

Ms. Bernstein: What do you mean?

Professor Jackson: Moore's attitude in those days at this period of time struck me as very much lawyers are hired guns, and there is a set of questions you just don't ask. And by this time civil procedure was a one-semester course, and it felt like stuff was going by very, very fast. Please understand, at Yale Law School, I had a marvelous education, but also from 1948 to 1972 was a very different time in the man's career.

Ms. Bernstein: And J.W. Moore was very different then, I'm sure, than he was in 1972. But he wasn't the only one. All of them were. We had, I can't think of his name, our torts professor, James, Fleming James, who was a truly wonderful professor. I used to kid Pat. I was sure, you probably didn't have them anymore in '72, there used to be dances at the law school for first fall weekend. There were hardly any women there; Yale undergrad school was all men. And they would bring women for the weekend, both the undergraduates and the Yale Law School students, and a couple of times Pat and I foolishly agreed to let people stay with us, and I said by the end of one of those weekends, "That's it. I'm not being bothered with these broads; they are nothing but a nuisance."

Professor Jackson: That changed dramatically when Yale College went coed which was '69. I transferred there when they took women.

Ms. Bernstein: Oh, did you?

Professor Jackson: I did. I had been at Wellesley College, which is a women's college, and transferred to Yale in 1969. And within a year or two the busing people in had stopped, it didn't stop right away but –

Ms. Bernstein: My daughter went to the college.

Professor Jackson: Is that right? When?

Ms. Bernstein: I always forget this, Vicki; it's just terrible. I think she was not,

was not the first year, '69?

Professor Jackson: 1969 was the first year undergraduate women were admitted as full-time students.

Ms. Bernstein: I think she went either the second year or maybe the third.

Professor Jackson: I was a freshman counselor when I was a senior, that would have been women entering in '71; I was a freshman counselor, Calhoun College. What college was she in?

Ms. Bernstein: Davenport.

Professor Jackson: It became, I think, a very good place for women and men to have an education. The first few years the transition was hard.

Ms. Bernstein: Yes. Very difficult. I remember that Betty and Sidney Sach's daughter was in the first class. I remember she was a brilliant student, and I remember her telling me how difficult it was the first year. Suzie found it difficult the first year. But Suzie was terribly young when she went. She was too young, it wouldn't have mattered, it would have been hard, and she went to Europe the second year. She stayed out a year and she came back, and it was a whole different story.

Professor Jackson: Is this the child of yours who teaches at Brown?

Ms. Bernstein: She teaches at Brown. And she loves it. She ended up loving Yale. It was a very rocky beginning.

Professor Jackson: Well I think the pace of change was very quick over the five years between when they went coed and the next five years. There was a tremendous amount of normalization that happened, but in the – as an undergraduate up through '71 it was still not normal, and she may have been in the tail end of some of this sort of thing.

Ms. Bernstein: Yes, I'm sure she was, but when she came back she did better. Anyway, among my professors Fleming James was fabulous. Myles McDougal who taught property just died. There is going to be a memorial for him in October. Neither Pat nor I understood one word he was saying, along with everybody else for the first several sessions.

Professor Jackson: I had the same experience with Reisman who became a colleague of his.

Ms. Bernstein: We had no clue. We were freshman and we were in that class, you know, but luckily nobody seemed to know either what he was talking about for the longest time. I remember being desperate about the exam in that class toward the end, but somehow we managed. We must have gotten a hornbook from somewhere else so we had some idea of the problem. If you knew basic property law before you had his course, it would have been wonderful, but afterward I understood just how brilliant his concepts were, but you started out, you had no clue of the existing system— it was very hard. But nonetheless it was certainly interesting. It was stimulating. Let's see who else I had. I didn't take criminal law my first year. Oh, I had Thomas Emerson for something. Con Law? It must have been. Of course all us liberals were looking forward to that and expected him to be this firebrand rhetorician, et cetera.

Professor Jackson: Yes, but that didn't change. I took a course called political and civil rights from him, and I have enormously high regard for him, but it was not a stay-awake kind of class.

Ms. Bernstein: But I really liked him a lot. But it wasn't exciting. You knew you were just going to have to slide through. Subsequently one of my best friends is his widow, Ruth Calvin Emerson, whom you may have met up there. I don't know when they got married. He had been married and his wife died. Ruth was a student, a year ahead of me, but Ruth had

been out a number of years before she went to law school, and she ended up marrying Tom Emerson. I got to know him much, much better because of that. And I just really adored him. And I mean he was just a wonderful man, just wonderful. Ruth is like a Communist or a – I always kid her about that. But he was influential; he wasn't exciting. I think that must have been it. Oh no – contracts – I had somebody who subsequently went to Harvard to teach, and I can't think of his name at the moment. I liked contracts a lot. I liked it better than torts. I just found contracts indefinitely intriguing as a discipline.

Professor Jackson: Did you pursue it in law school?

Ms. Bernstein: Well, I took what those other classes were, negotiable instruments and those more advanced classes like that. Pat and I did; I guess it was second year when we did do it. We did barristers union together; they said we were a disappointment. We thought we were good. We both made the *Law Journal*.

Professor Jackson: Were there other women who made *Law Journal*? Is this the *Law Journal*? (referring to photo in office)

Ms. Bernstein: That's our year. There was one other woman who was invited to and chose not to compete. It was the years when you competed. And in part that was because she was going with this fellow. Pat and I were furious, but we had no influence on Louise.

Professor Jackson: What was the *Journal* experience like?

Ms. Bernstein: Oh terrible for me. I thought it was terrible. I just hated it. Pat did much better than I did. I just thought it was terrible. The upperclassmen, one of whom I was going out with at the time, thought it was impossible, just impossible. I thought the whole thing was oppressive and impossible, but I did it because it was a credential. As soon as I didn't have to go anymore, I didn't do any more.

Professor Jackson: Barristers union, *Law Journal*, were there other activities at school? Was there time?

Ms. Bernstein: That's all there was. There were no clinical programs. Oh there was a sort of semi-clinical program, must have been legal aid. I remember doing it for a very brief time. I must have tried doing it like when I was a senior for a semester or something like that, which is really run by the town. But students could volunteer. And I remember one thing vividly, which drove me out of it. We weren't permitted to take any cases that any lawyer in town could make any money on, so these were really people who didn't have any money and that was okay, but I had a woman client who, when I was going to represent her in a potential divorce, and she had literally been a battered woman, it was my first experience with that phenomenon. I suppose if you had asked me generally, "Do you know these things happen?" I would have said yes, but I really didn't, and I was horrified, and after thorough preparation, when it came to appear, she didn't show up. It was a classic story, and the judge berated me, saying these women take advantage of you girls, these women don't know what they want, all kinds of sexual references. That just humiliated me. The woman wasn't there, and it was so awful that I retain it to this day. I blamed myself because I didn't know about this, I didn't know. For all I knew she was in the hospital or dead, but I couldn't even say that; he didn't let me. Everybody, the usual hangers-on, were making fun of me.

Professor Jackson: Sounds ghastly.

Ms. Bernstein: It was just awful. I never went back to that legal aid thing again. It was just awful. And I'm sure was not atypical of women lawyers who tried to appear in those courtrooms, any courts anywhere at the time, because years later in the seventies, '68 actually when I was working here, not that I ever had an experience like that, but I still was asked in the

Superior Court here, was I the plaintiff when I walked in. There was still that few women doing that kind of work in the court. It didn't tend to make you want to be a litigator, I'll tell you that.

Professor Jackson: One thing I was wondering was, you went to Yale Law School really with a vision of wanting to be involved in politics and government and I guess the question is whether Yale changed or reinforced it or, how did it interact with your –

Ms. Bernstein: Before I went I didn't really have a good idea of whether I was going to like being a lawyer, just a lawyer lawyer, not running for office. I had this adolescent vision of running for the Senate. That, I thought, would be a wonderful thing to do. But I didn't have any idea of what a lawyer really did. And I found that while I hated the journal stuff, I mean I hated having to do that, but it was in part because they made it so difficult, you know, that I really liked the law; I really liked the law. Pat and I both did. I liked being an advocate, gradually understanding that advocacy was something that was quite consistent with my personal needs and my personality, and if that's the kind of thing you could do, well I thought that was pretty good stuff. I really liked that. I liked the intellectual part of it. But I liked being an advocate. I still do. And so from that point of view I began to see there were other options for me other than going back to Illinois and trying to figure how a Jewish girl from down state Illinois is going to get to be a senator. And from that point of view I saw, well there are other options open, and I even thought about coming down here and working for the government. Because obviously after the New Deal, that was when a lot of new things opened up– the SEC, you know there were some other things. But it was the Eisenhower administration and there had been all these things with the loyalty oaths and unpleasantness with the McCarthy stuff was already starting and not that I was a Communist; I certainly wasn't. My most liberal friends considered me to be such a moderate they were embarrassed about me. I was always asking

them hard questions that they couldn't answer. I still do. Bob Pitofsky and I, Christine Varney said last year, "If you and Bob were such raging moderates –"

Professor Jackson: It's a good phrase.

Ms. Bernstein: It is a good phrase. And so I really did, I kind of rejected that, and then the sort of premier place for Yale lawyers at that time to go, certainly members of the *Journal*, was New York. And also they were beginning like no place else in the country they started during the war), they started hiring a few women and a few Jews in the Wall Street firms, and that was known by the faculty as the place people all said: you know you go to Wall Street for a few years and all kinds of opportunity to do that– it's good training, it's good exposure. And I had lots of friends in New York. Some friends from Wisconsin were there. I had no connections in Chicago to speak of. I had had Lauranita there, but that had been a long time ago. I had many more in New York by that time. And then half the class was from New York, or seemed to me, at least my friends, many of them were from New York. And a lot of them were going down to New York, too, and so I thought I better do that.

Professor Jackson: Did you think at all about being a law clerk?

Ms. Bernstein: No, I didn't and Pat did. I was telling somebody yesterday that she was clerking for Jerome Frank, and I don't know why I didn't think about it. I think I probably thought it was going to be like being on the *Journal* again for the court of appeals– I didn't even think about the district court. I would have loved being on the district court. I didn't even think about that. So I just thought I better go get busy learning how to be a real lawyer here, and I'll just go to New York and see what I can do there, not with much encouragement from the law school.

Professor Jackson: Is that right?

Ms. Bernstein: Not much. They said, “Well you know, you can try, we’ll try to make appointments for you, but don’t get your hopes up.”

Professor Jackson: Did they have other suggestions for you, other than New York?

Ms. Bernstein: No.

Professor Jackson: Was this a generally known supportive office at the law school or was this because you were female rather than male?

Ms. Bernstein: Female. Well it wasn’t that they weren’t nice and stuff. They were just being, I think, realistic.

Professor Jackson: So how did you land? You went to Sherman and Sterling.

Ms. Bernstein: I went to Sherman and Sterling. I guess, who was I telling about this yesterday? Oh, I had dinner with Theresa Schwartz and Dan last night, and we somehow got started talking about histories and things. Here’s how that happened. I had three or four appointments. Law firms interviewed at Christmastime. I don’t think they came up to the law school yet. We schlepped down there. And it was over Christmas vacation. I said to my parents, “I’m going to interview in New York and see if I can get a job, so I’ll stay in New York over Christmas.” I had friends who had an apartment and I stayed with them. And I had a bunch of appointments. I had written and then the placement stuff, so I had, I don’t know, a bunch of interviews that day, and I don’t know where they were. I can only remember one was with either Proskauer or the other Jewish firm, which was pretty nice and pretty interesting (I mean pretty interested in me), and Sherman and Sterling was the last one of the day. Everybody else had been absolutely horrible to me. I mean they all said, “Why would we hire you?” It was just a terrible set of interviews, all day, just terrible. I was so depressed by the end of the day. It was all, “Well why would you even think about this? Why did you go to law school in the first place?”

You know we've got plenty of boys." And it was like dismissive time. And so when I got to Sherman and Sterling I thought, oh God, this is just going to be one and the same, and it started out like that. Monroe Singer, who had been in the class ahead of me, was there and when I got there, "Why don't you stop and see Monroe before the partner who is doing the interview has time for you? Monroe said he would like to say hello." I said, "Oh fine." I had known him from law school, not real well but I knew him. And the first thing he said to me, "Are you here for the interview?" and I said, "Yes, yes, why?" And I remember like it was yesterday (gestures indicating question about attire). And I looked down; I was wearing a black file suit, very tailored suit with a yellow or beige shirt, just a shirt with a discreet little pin at the neck and long sleeves. My skirt was the right length. "What's the matter with it?" I said. And he said, "It's just too sexy looking." I said, "Monroe you must have been locked up here in the library for too long, because this is not a sexy outfit." So then I thought this is going to be horrible. I went in to be interviewed by one Henry Harfield, who did all the interviewing and hiring that year. That's how they did it. They didn't have a committee. It was Henry's turn, and Henry was a banking partner. And Henry, as it turned out, was sort of a hidden liberal and a hidden Jew and had changed his name. No one knew he was Jewish, and he had been an enormously successful partner, and he had a hilarious sense of humor. And we had a hilarious interview that got really even more hilarious when he finally said to me, "I think you're very well qualified. I think we would like to hire you, but what if you have a baby?" And I said to him, quick as a flash, since I was single, "Well, so far I've been lucky," and we both laughed and I went away thinking, well, who knows what will happen. And about two weeks later he called up the law school, and said we can't find this Miss Zeldes they wanted. Now Henry told me afterwards he just thought it would be so much fun to see his partners have to struggle around with accepting me and they

did. And now we have to stop.

Professor Jackson: Okay. This has been a pleasure.

**ORAL HISTORY OF
JOAN Z. BERNSTEIN - SECOND INTERVIEW
JULY 7, 1998**

Professor Jackson: Today is July 7, 1998, and this is the second interview with Joan Z. Bernstein, a/k/a Jodie, who is Director of the Bureau of Consumer Protection of the Federal Trade Commission. Jodie, as we've been discussing and as I mentioned in the letter, it would be helpful to the historical society if you could state on the tape your intentions, with respects to the tapes and transcripts, just in the event that events prevent us from finishing the process. So if you could say what your plans are.

Ms. Bernstein: I'm very comfortable with the project that you've undertaken and I would be happy to express my intent to donate the transcripts and the tapes to the historical society upon their completion. In the event we come to a point at which I would like to restrict some portion of it, obviously I'm free to do that.

Professor Jackson: Absolutely.

Ms. Bernstein: I don't anticipate it and I think it would be very useful to have that intention documented.

Professor Jackson: I think this should suffice for this period of time and I thank you. Now before I get into any further questions, I did want to ask you whether since our last session, which I very briefly summarized in a letter to you, you've thought of anything else you would like to add to what we talked about last time, in terms of your early years, your early influences, and your decisions about your education and going to law school.

Ms. Bernstein: I really don't think so. I think we pretty much covered the significant influences, and I think we talked about the influence (I'm pretty sure we did), but it

was a very significant one: a professor of mine at the University of Wisconsin who headed me in the direction of Yale Law School.

Professor Jackson: Was this Professor Feldman?

Ms. Bernstein: Yes. It was constitutional law in the poli sci department, and I just wanted to be sure we had him on record. He was a fabulous professor, and had he not suggested Yale, I just would have gone to Illinois without thinking about other law schools because I just didn't know about it and didn't really have other kinds of advisors about law schools.

Professor Jackson: Is he someone you've kept up with?

Ms. Bernstein: I did for a while. I haven't in more recent years. I did for quite some time, after I graduated and at some point during law school also.

Professor Jackson: That's good to have elaborated on.

Ms. Bernstein: Another influence at Wisconsin whom I would mention was Professor Witte who was in the economics department. My major was in economics.

Professor Jackson: How is Professor Witte's name spelled.

Ms. Bernstein: Witte. Professor Witte had been a principal author of the Social Security Act. He had been in the Roosevelt administration and was very distinguished economic professor. I not only took his course, I worked for him for some period— I can't even tell you— in a sort of stenographic way if he was writing articles, and he needed someone to both take dictation and type up who knew the vocabulary, which regular secretaries didn't. That relationship was a very important one to me because he stressed public service as a career choice even without being a lawyer and how important that had been to him and how important it was to people who were interested in scholarship to have a role in. It was a very important one to me.

Professor Jackson: Oh, good, because I don't recall our discussing Professor Witte.

Ms. Bernstein: I don't think we talked about him, and he was very influential and because I don't know how I happened to take this little job. I was a good typist, and I could take dictation. But somehow I did some work for him. It was not a whole lot, but I did and that allowed for, at a big university, a rather more personal kind of discussion, which we had from time to time.

Professor Jackson: As an academic it is always interesting to hear from people as distinguished as you about the influence that academics made as positive influences.

Ms. Bernstein: And in law school, of course, enormous influences and excitement in terms of some particular professors.

Professor Jackson: We talked last time about Professor Moore and the good grounding he gave you in that civil procedure class. We also talked about Professor Emerson. Were there other professors in particular that –

Ms. Bernstein: There were. One of them was very difficult– and I'm going to try to remember his name– from whom I had negotiable instruments, and he had been the dean of the law school. I'll think of it. (His name was Wesley Sturgis.) He had been the dean but not for very long period of time. But the reason I mention him is I took negotiable instruments because I thought I would have to have it, not because I was interested. Well one of things, I better get some of these tools, and I found it, because I think the way he taught it, enormously engaging. I really had to think back. I think I mentioned to you that I thought I was going to be a labor lawyer when I was going to law school.

Professor Jackson: No.

Ms. Bernstein: There was a famous professor at Wisconsin whose name was

Perlman who taught labor economics, and I had taken his course. I learned about the labor movement in the United States, and I thought that was fascinating, and I thought I would just get specialized and become a labor lawyer. And when I took labor law from Shulman, who was later the dean also, it was so boring, I thought I was going to jump out the window. The facts were interesting, of course, but the law was, I thought, tediously boring, as opposed to negotiable instruments, which I found just intriguing as an intellectual matter. I was quite torn up about that for a while because I thought, what does this lead to now, and concluded by the end of law school that I had no interest whatever in being a labor lawyer. And I was interested in commercial law and what sort of constituted advanced contracts. Negotiable instruments served me very well because I went to Sherman and Sterling, and the bank was the biggest client the firm had.

Professor Jackson: This is interesting.

Ms. Bernstein: It was very interesting; it was such a different time of not having real mentors and not very much guidance. As I said initially, Vicki, that many of us did not have high expectations (including the men) when we entered law school because there was still discrimination in the big law firms, certainly in regard to women and also Jews. It was more open than it had been before the war, but there were two big Wall Street Jewish law firms in New York and the rest, maybe they did and maybe they didn't. It was not a very sure shot at all.

Professor Jackson: At Sherman and Sterling, were you the only woman?

Ms. Bernstein: Yes.

Professor Jackson: Were there other Jews there?

Ms. Bernstein: There were a couple but they were largely not open Jews. I may have mentioned that. Henry Harfield, who was the banking partner and who happened to be the

hiring partner the year I was hired, it turned out, was Jewish, from the Midwest. No one knew he was Jewish. No one knew he was Jewish, was not, I believe, a practicing Jew by that time, but he came from a Jewish family background. There was one other who was about a year or two ahead of me in law school, and I think that was about it. Oh, there was one other partner, who did become something of a mentor for me. Gosh I've forgotten his last name now, (his name was Bill Golub) and he was openly Jewish, had been a lateral, and he was acquired because they were doing some kind of work that he was an expert in, and they needed him. He was not treated like others. He was not a partner, he was like a very senior associate who got paid a lot of money and was sort of chuckled at behind his back because he wore the wrong hat, his wife was in entertainment, and it was really such a conformist era, the '50s, you know. It really was, but for many of those reasons people in my class (at least the people we hung out with) did not have the same kind of expectations that I think people have had in the last decade or so. If you went to the Yale Law School, you knew you were going to have, if you did at all well, you would have a lot of choices.

Professor Jackson: What effects would the lowered or uncertain expectations have had as you went looking for different jobs? How does that affect what you do or how you think of what you do? Does it make it easier to make different choices or does it shut people down in terms of looking for things? It clearly didn't shut you down.

Ms. Bernstein: I think, actually, the way it ended up most everybody got a job. And we got them in pretty traditional ways, I think. As I said the last time, law firms didn't come up to interview. We all went down to New York. The other thing was that very few people sought jobs in the government because it was such an attractive time. It was the McCarthy era. There was the loyalty oaths and all that sort of thing, and in fact I had a

classmate, at least one, who was turned down for membership in the New York Bar because he had belonged to the Young Communist League or something like that in college. There are probably more than one of those. I only happen to know about one who was a good friend and did finally get admitted in Connecticut, but he probably couldn't have worked, obviously, if you don't get admitted to the bar. Now that passed, you know, in ten years or so.

Professor Jackson: Were there student organizations? Did the McCarthy era affect what kinds of student organizations existed at the law school?

Ms. Bernstein: Not that I know of. I don't think there were any. If there were, I was not aware. I mean there was moot court and barristers union, and the *Journal* and defense work at Legal Aid. They were all standard traditional activities that every law school had. I don't know of any others.

Professor Jackson: I was thinking. This may have been a later development of the National Lawyers Guild which might have been quite problematic.

Ms. Bernstein: It might very well have been there because there were faculty members whose reputations were being besmirched because of their leanings in writings and so forth. But I don't remember it being. If it was, I wasn't aware of it.

Professor Jackson: We're sort of jumping around a little bit. That's fine because these events are interrelated and that's how we experience our lives. I'm just apologizing to you for having to look back at my notes. I remember we talked about your interview at Sherman and Sterling and how you came to get the job. And I have a very unformed recollection from our lunch last summer that you had a positive experience at Sherman and Sterling, but could you tell me what kind of work you did there?

Ms. Bernstein: I can. I started in August of '51. I had taken the bar— I guess we

didn't get the results right away— but I had taken the bar and I was one of — and some of this is misty, I've got to admit. It's a long time ago. There were five, I believe, associates, five or six but I believe five. So we reported for work and we didn't even have offices. We all were assigned to the library, which was a big, very lovely library. So you had basically a table. They said eventually we'll get you some office space and so forth. So that was fine and that meant that we were all kind of huddled down there together. Two of them whom I remember (there are some I don't remember) — one was a colleague named Ed Self, who has been for many years, after he left Sherman and Sterling, a partner in one of the big firms in Birmingham, Alabama. And I've been in touch with him and his wife over the years. And Ed was wonderful to work with. The other one's name was John McNiff, and he and I were friendly also. He was one, I remember, who at some point they concluded was not going to make partner. I never expected to be a partner. I mean they practically told me I wouldn't be, but I didn't worry about that. I thought there are lots of others who aren't going to be partners either and working and getting experience. I thought, well, I'll cope with that when that comes along. John was told some time later, I don't know exactly when, that he was not going to be on the partnership track, but the most of the firms then, when they made those judgments, they worked very hard to place people with client companies. You didn't become a general counsel. You got a spot in the general counsel's office at National Cash Register— those were considered second class to being in a law firm. But they helped you, and it did not appear that they cut you loose or you weren't really capable, it's just that you couldn't be a partner there. So those are kind of my early recollections. The next year class ahead of us (none of their names I remember), some of them were helpful to me as well, in terms of kind of mentoring. Here's what the system was. There was an assignment partner and as different partners had me for an associate to work on this case or that

case, you got assigned to it. I don't know if I told you, because it was one wonderful episode. So I was working along, like everybody else, and we would talk about our assignments and doing our research and writings, our memos, and going up to talk to the partner and presenting it, and so forth. I have two vivid, vivid recollections of that process. The first was that as I was working on the very first. I did have one wonderful episode in which again Henry Harfield gave me this assignment that had something to do with what would happen to bank assets as Germany was being divided and where would the assets go, and I'm very vague about that, but it had something to do with City Bank had bank assets in both countries and who got what, and was there any precedent for that. And I remember vividly that the guys said, "Oh boy, that's a set up. There's not going to be any precedent for that, and what are you going to pull out to tell him?" And I somehow, I don't remember how I did this, but I found a case that was practically on all fours at a high level New York court or in the district courts that had to do with India and Pakistan, where this precise kind of thing happened, and it was like in a day I found this thing and wrote up this little thing saying something like, no doubt you know of this episode because it's so closely related, blah blah, you've seen this, but in the event you haven't. And he came down and announced in front of everyone, "How do girls do research? Do they just reach out their hand and a book comes out of the shelf?" because he didn't know about it. So that gave me a big boost initially because this peculiar thing had occurred. Sometimes it's better to be lucky than smart. And the other recollection— I have two more. One was when I went to some other partner, and there was a partner named Allen Troop that I did quite a lot of work for. He was either a trustee or the lawyer for the trustee of the Long Island Railroad, and it was 15 years of work or something like that. I did a lot of work for him. He was very businesslike, very workmanlike. He liked my work. He thought I did good work. He even tried to take me along,

I remember one day, to a lunch meeting with a client. They wouldn't let me into the dining room, and he insisted upon it and said something like “This is a lawyer, and she has to come to this meeting.” (Actual dialogue: Maitre’D at Club: “Mr. Troop, ladies are not admitted at lunch.” Mr. Troop: “This is no lady, it’s a lawyer.”)

Professor Jackson: Was he successful?

Ms. Bernstein: Yes. They let us come in. They put us at a table in the back. They did say, “You know there is a ladies’ dining room downstairs, Mr. Troop.” And he said, “Well I'm meeting a client here.” But he did it in a very businesslike manner. “I'm in charge here, you know.” He was very, very – it was like he wasn't even aware of whether an associate was a male or female. It was if the work measured up, it was okay. He was very nice, very workmanlike. I didn't have any kind of personal relationship with him, but the work went well.

Then I had somebody else, I don't remember who, who was a first timer also and that's nerve wracking, you know. Each one was kind of a new one, and you had to impress the new one. And I stood up to point out to some exhibit or other– it was in his little conference room– and I stood up and had on a new gray suit with gray shoes, and a drop of red blood dropped on the gray shoe, and I thought this is it, I'm going to die. I'm just going to die. And I don't know whether they saw it or not, they probably did. I just said, “Would you excuse me for a few minutes, please?” and took myself away and fixed that up and came back and finished my presentation. I don't think anybody ever said anything about it, but it's interesting that that should stand out in my mind. I have no idea what I was talking about, but I can vividly remember looking down and seeing this what I consider to be an event of embarrassment.

Professor Jackson: I'm not supposed to talk much on these tapes, but I can't resist sharing with you when I working on writing up a section of the report on the gender work and

was talking to a colleague about feeling that it was probably useful to say something about the absence of any facility in the courtroom where women could obtain sanitary napkins or tampons, other than if you were among the – you could ask to go to the nurse. And I said now this is a small, maybe subtle problem but it probably should to be spoken of. And my colleague said to me, there is nothing small or subtle about red drops on a white skirt. I had to share that story with you.

Ms. Bernstein: I'm sure that many, many women have experienced this kind of thing and nowadays when things are so much more open, it would still be a huge embarrassment.

Professor Jackson: I think it is still and I think it was only in the mid-'90s as a result of our bringing this to their attention that they have worked on making these more available.

Ms. Bernstein: We did have it in the law firm and the reason was, of course, the secretaries were females.

Professor Jackson: There are some law firms, I'm told, who had only male secretaries at times.

Ms. Bernstein: Not ours, we had all female.

Professor Jackson: Well, I can understand why an event like that would stand out.

Ms. Bernstein: It did. And the third was with a partner whose name was – I think his son is probably at the law firm now – Robert Clare, Bob Clare, who was the head of litigation at Sherman and Sterling, is very successful, very tough litigator who ran his troops very hard. Everyone wanted to work for Bob Clare because he had such a good reputation as a litigator, but almost nobody could survive his tongue lashings and other things. So when the assignment came, he called and my name was up, and the assignment partner said that, and he said, “Don't be crazy – I don't want this girl.” I believe it was still Henry Harfield who was the assignment

partner as well, and Clare said, “I know you hired her as sort of one of your jokes to see just how shaken up the rest of us get. Well you're not pulling it on me; I'm not having that.” And Henry said, “All right, how long would you like to wait until the next one is available because the rest are blah, blah, and they're all working and that's it.” So Bob, after a lot of huffing and puffing and going to the executive committee and so forth, I was told, had to accept me. To say the least, my assignment was just appalling because I thought there was no way that I can succeed in this. There is no way, and I talked to guys who were pals of mine at other law firms, from law schools, what should I do, and they said, look you've got to do it, you know, you've got to do it. And I said okay. I was even going to go to Henry and say you've put me in an impossible position. I can't satisfy him. But I didn't – I decided I would undertake to do it. It was a long, big assignment with like 15 major questions to write memos on to get him ready for some big trial and trial briefs and so that it was not going to be the kind of thing that you work on and get it ready in a week and have it done. It was huge. Now there was a guy I mentioned before, Bill Golub, who was the Long Island Railroad guy. He was first assistant to Allen Troop and had been brought in, Jewish guy. He helped me a lot on that. I asked him if he would help me as I did drafts and stuff and critique what I was doing. He said yes, and he said he wouldn't tell anybody. And he helped me a great deal. He helped me to focus. He helped me to figure out what Clare really needed because of course I didn't have any discussion with Clare after the first day of his handing me this assignment. And then in the meantime, my other buddies, like Ed Self, would call up at night and say, “This is Bob Clare, haven't you finished yet?” and so forth, plague me with this assignment. It had a happy ending. He was very satisfied with the work and he even said, “Well you know, if she's up the next time, I'll use her the next time.” So that turned out fine. There was another partner whose name was Gil Curlin, whom I did keep up

with somewhat after I left, who I did quite a lot of work for, and he was a very important partner and was very supportive of me. So overall my goal was to see if I could function like everybody else did. That's all I wanted. And they let me do that because they gave me the same assignments that everybody else got and then let me sink or swim like the rest of them.

Professor Jackson: I'm fascinated with something you said earlier, which was that you were led to understand early on that you would not to be a partner. And that didn't bother you. So how were you led to believe that and was it related to your gender?

Ms. Bernstein: Well it was just sort of, I mean they didn't say as a formal thing, "You'll never make partner," but the sort of scuttlebutt of the young partners. One of the things that was a tradition at Sherman and Sterling, two things: we had coffee in the morning in the kitchen in the library. There was a little kitchen in the library and a big coffee maker and most people came and took coffee away back to their offices, but a bunch would have coffee in the morning. It was all of us, and some of the other young associates and a few of the younger partners would hang around and schmooze about cases and things for half an hour, 45 minutes, then we would go back to our desks. You got to know people that way and so forth. It was that kind of thing where they would say, well you know, maybe two of the guys will make partner. Chances are Jodie, you know after all, where you are going to end up, where you would have enough business to generate or whatever the criteria. It was just kind of general scuttlebutt. I didn't really say, if I stayed here ten years, I would never make partner. I didn't really say that to myself because I didn't really expect to stay there. I didn't know what was going to happen to me, or anything. To say that I didn't worry about it is maybe a little bit of an overstatement. I did worry about it as the rest of them did, but we all were starting out fresh together, and you sort of see what happened. And people went to other smaller law firms from there, so that if you

did well at one of those big firms and didn't make partner, there were other things you could do. There were a lot of people who, I think I said this last time, who said to me, why don't you go, since I had two offers. One was from one of the other Jewish law firms, one of the Jewish law firms (I think it was Proskauer, but I can't swear to it). Why didn't you do that? You would have been much safer and more secure there. And I never liked the idea of segregation, ever. I didn't like that in college. I didn't want to do that. I just didn't like the idea of somehow saying we're not as good as what was considered the rest because we are as good. So I kind of felt that way about segregation of women or Jews or anybody else.

Professor Jackson: That's really fascinating, and the optimism it sounds like is partly situational— that you could see other associates who did well and if they didn't get partner, found something else, partly temperamental, the optimism and the drive.

Ms. Bernstein: Right, yes. The optimistic drive and, as I probably said before, my very early ambition was to be in politics, and so I always sort of had that in the back of my mind— well you know, I could go, if I can't run for office, maybe I could be on somebody's staff or something like that. I could be behind the scenes.

Professor Jackson: Now how long was it that you were at Sherman and Sterling?

Ms. Bernstein: I can't remember exactly. I believe it was about two years.

Professor Jackson: And what were the circumstances around your deciding to leave?

Ms. Bernstein: I was getting married to Dr. Lionel Bernstein, who said, and I quote, “Well,” and I said to him, “Why don't you think about relocating in New York?” He had finished his residency and was beginning to work on a Ph.D. I think he had finished his residency, not quite sure, but he was pretty close to finishing a residency in internal medicine and was already thinking, had already taken some graduate courses, to combine a Ph.D. in

physiology at the same time he was doing the clinical work. And I said to him, "Why don't you think (and he was pretty interested in academic medicine) of coming out here and exploring what you could do out here?" And he said, and I quote, "My career is going to be the more important of our two careers. I'm going to be the one that has to earn a living and take care of you and the children, so my turf is really here, in the Midwest, here is where I've got connections, here is where I was trained, I know all the leaders in the field," blah, blah, blah. And I said, "You're right, so I will come there."

Professor Jackson: And where in the Midwest was he?

Ms. Bernstein: Chicago.

Professor Jackson: Where was he trained?

Ms. Bernstein: The University of Illinois. And his internship and residency were at Cook County Hospital, then one of the premier training courses and training hospitals for doctors in the country.

Professor Jackson: When did you meet him?

Ms. Bernstein: Oh I met him I guess after the second year in law school when I was home in Galesburg, being a dutiful daughter and my good friend Toni Chayes, whom you may know. You know my good friend Toni Chayes?

Professor Jackson: I know her work. I've never met her, but sure.

Ms. Bernstein: Toni Chayes, who came to Yale Law School after Abe graduated from Harvard, came to Connecticut and worked for Governor Bowles, and Toni then entered Yale Law School. She could not have gone to Harvard because they weren't taking women, and she was furious about that because Harvard was Harvard, and she never got over that. But she had to settle for Yale, so we got to be friends. Pat and I particularly got to be very good friends.

Professor Jackson: Was she in your class or –

Ms. Bernstein: The class behind us. And in fact I think both Pat and I (although I'm not sure of this, I know I probably did) when I was working on the *Journal*, I know that I took a draft over and had Abe look it over to see what he thought because he had been editor of the *Harvard Law Review*. And Toni would say, "Abe will look that over for you, you know. Come over for supper; Abe's cooking supper." We got to be good friends. Now Abe's sister, Judy, was married to my husband's brother at the time, in Chicago. So that was the connection. Then Toni came out to visit her in-laws one summer, and said, "Can't you come up? You're not doing anything down there in Galesburg. Come up and we'll hang out, and I would like you to meet my sister-in-law Judy Chayes Bernstein." And so I did, and that's how I met my husband.

Professor Jackson: And so you left Sherman and Sterling and what happened next?

Ms. Bernstein: Well, what happened next. First of all I was going to get married, so I didn't leave for like a month before I was getting married, and my mother was losing her mind. We were getting married in Galesburg, that was at my insistence. I wanted to get married at home in Galesburg.

Professor Jackson: When did you get married?

Ms. Bernstein: Fifty-three or fifty-four, something like that. And I took the bar, the Illinois bar, because I didn't have quite enough time to waive in. So I went home, and I borrowed somebody's notes. My father knew somebody who had taken the bar the year before, and he gave me the notes, so I didn't take the cram course. I studied the notes at home and so forth and I had been practicing and all, basic stuff, so I was pretty up to speed on almost everything. And then I went up to Chicago and took the bar for 2½ days. I stayed with some family of my husband who then became very, very good friends– Hazel and Fred Shapiro, who

are wonderful, wonderful friends. He, a very distinguished orthopedic surgeon in Chicago. They were quite a lot older than we were. Their children are still very close to me. Anyway, I took the bar and then I went home and we got married. And we went on a little honeymoon that was pretty close to being a disaster – I think most honeymoons are. And I went up to Chicago and started looking for jobs. My husband was working, but I clearly needed to work and I wanted to work. I had hoped that I could work for the state of Illinois. There were lots of state of Illinois offices in Chicago and I really wanted to do that. I was very interested in state government. I had always been. And I turned to be right, you know The states are really very important institutions, but they weren't considered at the time. I had recommendations from various people. In fact, I had excellent Sherman and Sterling references, and as I visited around the law firms a little bit, they all said, “Well we don't hire women. Are you crazy?” I mean they really said that, openly They said, “What are they thinking of at Sherman and Sterling, hiring girls?” It was just awful, that part of it. So I was focusing on the state, and there happened to be some sort of an off year election year or something. I don't know what it was, but the office in the state that I was particularly interested in was the Illinois Commerce Commission. They had lawyers, and they would have been thrilled to have me, thrilled, but they said, “Look, the election is coming up and if there is a change, everybody gets fired.” In those days everything was patronage in the state. The entire state, the whole government turned over. So they said if you want to take a chance, okay, but you know. So I said that doesn't make any sense, and I sort of worked in the campaign a little bit.

Professor Jackson: Whose campaign?

Ms. Bernstein: The governor's. But lost. So then here I was still unemployed. And I thought, and my father said to me, “I told you that he was going to lose and now the only

Democrat who got elected was the state's attorney, Cook County state's attorney, a Democrat.” I said, “ Well gee, now I've worked in the governor's campaign, I have good credentials, I ought to be able to get a job there.” Oh no, you, this is really a hilarious story. We, by that time, had moved into a new apartment building in the medical center; it was the first time they had built apartments for professionals in the medical center. It was on the west side of Chicago, which was not exactly the best side of the city. My mother-in-law was incredibly embarrassed that we lived on the west side, but it was very convenient. My husband could walk to work. I could get on the EL and get downtown in ten minutes, and it was a new apartment. It was lovely. It was inexpensive and very nice apartment. So they said to me, “Well you have to go and get the recommendation of the ward committeeman on the west side. That's the way these jobs get assigned.” So I called up and made an appointment to see the ward committeeman, and my husband insisted on going with me because it was in such a bad neighborhood that I couldn't go at night. It was seven o'clock at night. And it was ward headquarters, and the machine worked in those years, the machine worked. So there were lots of neighbors and people, and it was still the old Italian neighborhood, it hadn't turned over yet, old Italian ethnic neighborhood, and they were in there asking for favors, you know, getting tickets fixed, and whatever they do there. And I was sitting in line waiting, and I had an appointment and so forth, so I said to Lionel, you just sit here because I've got to go in by myself. But they wouldn't let me go in by myself. “Well, who are you?” “Well, we live in the ward.” And they asked me a lot of questions, and finally they said, “Well you want to tell us really why you're here?” I said, “Yes. I want a job in the state's attorney's office.” “Oh, well why didn't you say so,” they said. “That's good, that's good. Now you go to work in the precinct, help us out in the precinct, and then when it's our turn for a job in the state's attorney's office, we'll recommend you. What about the Doc?” So

they know about the Doc and what he does, and everything. Okay. So I go home and start waiting working in the precinct, which I did. You know that meant going around introducing myself and saying are you registered, you know, taking care of this, that, and the other thing, and when there's any kind of petition, or whatever, do all that. So that was okay, you know. I didn't mind that. In fact I found it kind of interesting. And in the meantime in our building were all professionals like my husband and a couple women doctors and people doing research, so that was pleasant because there were people in our same circumstances and smart young women— a couple had babies already— and it was a nice environment. I liked it. And so finally the phone rings one day, oh, and then in the meantime we might as well – you know I left something out here somehow. You know, Vicki, I left something out, I've truncated my time somehow. And I don't apologize for it because it's too long ago to remember, but I think I did work in a law firm for a brief period right after we first got out there. I've got my chronology all mixed up here. Because I worked in this law firm— I don't want to leave that out— which I hated, I was miserable in, and they were also miserable I think. It's still in existence; it's called Schiff, Hardin & Waite. Every woman I have talked to – do you know Nicki Heidiprin? This was after the search for the state's attorney job.

Professor Jackson: Well sure.

Ms. Bernstein: Nicki worked there, way, way after I did, and she hated it as much as I did. I kept running into women, totally unconnected, who had somehow worked there. It was terrible. I had a terrible experience there. And I blamed it all on myself.

Professor Jackson: Were you the only woman there at the time?

Ms. Bernstein: Yes, I was the only woman there; I was the only woman they had ever had.

Professor Jackson: It's not surprising because if you're alone in a situation, women often blame themselves, but at the same time you had had such success at Sherman and Sterling.

Ms. Bernstein: It just took me a while. The other thing was first of all the men associates went out to lunch together. It was much smaller than Sherman and Sterling. It was a major law firm, but they went out to lunch every day, and they excluded me.

Professor Jackson: That's awful.

Ms. Bernstein: So I had to, I would call, I knew a few other people in town. My friend from law school, Pat Schwartz, was working at another law firm there, and I would meet her for lunch occasionally, or I had a couple other friends that I would meet for lunch. It was extremely isolating and uncomfortable. I did meet one person there, Bob Hunt, who is now dead, who had gone to Yale, who was considerably older than I was— I think he was a senior associate maybe a junior partner— who befriended me. He did befriend me. But he was even cautioned not to befriend me.

Professor Jackson: How did you get hired in such a hostile —

Ms. Bernstein: I don't know. Well there was one partner, I can't remember his name now— John, well I just can't remember his name— who hired me, and he was from a lesser law school (he had gone to like Loyola of Chicago or something like that), was kind of connected with politics. He was a different sort. The rest were really uptight suits who had gone to Harvard, and one guy had a big significant SEC plaque because he had been a commissioner of the SEC or something, I don't know. I have such bad memories of it, I can hardly remember much of it. However, the line on lunch was broken by one Frank McGarr, who became a federal district judge and was a splendid judge. He and I were in the same office. We shared an office, and one day after this misery of three or four months, he said to me, “Would you like to

go to lunch today?” And I said, “Frank do you think you can to be seen with me?” And he said, “Oh the hell with it,” you know, and he kind of broke the line. So there were some who – and Bob Hunt was very nice, and in fact Bob Hunt and I often would go out to dinner together – either my husband was working or we would to be working, and it was all quite open. And I learned later that there were partners who were very suspicious of my relationship with Bob. And we were totally open about this friendship. There was no reason not to be. He was a friend of mine and became a friend of my husband and others, and I had been married for two months, you know, or something like that. The whole thing was just terrible.

Professor Jackson: It sounds really quite awful.

Ms. Bernstein: It was awful. So that ended very soon, and that's really interesting to me that I unconsciously left that out.

Professor Jackson: Because it was so unpleasant.

Ms. Bernstein: Yes, it was and it still is.

Professor Jackson: It sounds it. So how long were you doing the precinct work for the ward committeeman?

Ms. Bernstein: I don't know, for several months. I did that and I would call up there every once in a while and say, “How about my job?” In the meantime my husband is saying – I have to tell you the hilarious part – my husband was saying we might as well just go ahead and have a baby now. This would to be as good a time, you're getting older. I was like 27. So I said, “All right, we'll think about it.” Well it seemed like maybe we should just get on with it. So but in the meantime I get a call from them saying, “Is the Doc home?” I said, “No the Doc is not home. Why?” “It's our turn to appoint an assistant city examiner, and we've never had a doc whose one of our people, and you've done all this work, so you know he could

get that job.” “But,” I said, “He's got a job. He's already got two jobs,” which he did. He was working two jobs. He was working all the time. And they said, “He doesn't have to go, he just has to accept. You can use five grand a year, can't you?” I said, “Yes we certainly can, but I'm telling you he isn't going to take that job.” “Well,” they said, “Oh, send him down here to talk to us.” I said to him, “Now you've got to go down and tell him you can't take this job without antagonizing him so that I don't get my job.” And he did. But it was too funny. But that was really the way things were done. I entertained at dinner parties and stuff with these stories about these folks. Finally, after I did decide then to have a baby and I got pregnant, then the phone rang one day and said, “Come down, you know, this slot is yours!” And I was like seven months pregnant, so I never did do it. Every once in a while I think to myself, you know if I had done that I could have ended up being mayor of Chicago because that's really how what's her name started, the woman mayor that Chicago had. She started working for Mayor Daley as a young attorney and ended up being mayor of Chicago. However, I have no regrets.

Professor Jackson: Let me get oriented in time. When was your first child born?

Ms. Bernstein: 1955, I believe, July 1955, Alec Bernstein. Suzie Bernstein, Susan Bernstein, was born in 1957; and Molly was born in 1961.

Professor Jackson: And are your children all living?

Ms. Bernstein: Yes. Alec is married to Judith Hall, a published poet, and the girls – Susan Bernstein is on the faculty of Brown, I probably told you that, and Molly is a film editor in New York City and started a job yesterday for Channel 13 and is doing a program for the next week.

Professor Jackson: One of my best friends ran pledge week for Channel 13 for years and years in the '70s up through the early '80s and now is out of that doing other things, but I

think I went down and helped her as a volunteer, so that's wonderful.

Ms. Bernstein: Yes. She's the editor. So I'm very fortunate. So is my husband. They are wonderful young people with good values and interesting careers, I think. Alec is a designer, an industrial designer.

Professor Jackson: Are there grandchildren?

Ms. Bernstein: No.

Professor Jackson: Let me just look back, because this is so interesting to me. The range of experiences you've had is really, even up in the '50s extraordinary for a woman.

Ms. Bernstein: It's true.

Professor Jackson: Now I forgot to ask when you were practicing in New York, did you appear before any courts during that time?

Ms. Bernstein: I don't think so. I went with Bob Clare a couple of times, but I certainly didn't appear. I did make a couple of very routine appearances at the SEC.

Professor Jackson: In New York?

Ms. Bernstein: No, came down here, off the train, filed the papers, made some routine appearance like, "We'll be ready on the 14th" before, I presume now, must have been an ALJ or then called hearing examiners. But I didn't make any court appearances other than those. But I felt that was quite good. I mean they let me do that. That's why I always felt so positively— in fact Sherman and Sterling got sued in the '70s I guess— discrimination suit, one of the big discrimination suits. And they never asked me about my experience. It was probably too old. But I did write to Henry Harfield, who was still there, and I said you know my experience is probably not relevant to anything, but I just want you to know as a matter of record it was a very positive experience for me.

Professor Jackson: That's really very interesting.

Ms. Bernstein: I'm still on their alumni list. They sent me this book. There are hundreds of people on their alumni list as you can imagine.

Professor Jackson: I had a question of how your marriage influenced your professional choices and obviously the big one was the move and I'm trying to think of your being married to a doctor who was appealing to the ward committeeman and how this may have influenced –

Ms. Bernstein: It was very weird. It was really weird. And I would say this, Vicki, about that: you know the socializing pressures of that period were such that I don't know about any other professional woman at the time, but I always felt that really there were such that in order to really to be successful as a person or as a professional, one needed to really to be successful in both, in both marriage and the career. I found that difficult. I found it difficult to even sort of conceive of, if it doesn't sound too strange to you, but I really felt that way. I don't mean that I got married because I needed to conform; I don't mean that. I was, I think, ready to get married. I was not real young when I got married, and I felt by that time I was more ready to make that kind of a commitment, most everybody I knew was already married before I was. I had some reluctance to marriage for quite a long time because I couldn't figure out how I was going to try to work these two things that I thought were important to me together. And I think, and then I did decide, that we would get married, but it was in the nature of sort of a compromise in career choices and ambitions and bringing them together, and I have never regretted that either. It was a hard one for me to make at the time, and I think that– I mean that– I am so enormously grateful that I had three children and that I probably wouldn't have had three if my husband hadn't been pushing me to having the third one. I mean I would have had two, but I

don't know if I would have had three. I always thought, "Well, I'll have these two kids, and they'll be pretty close together, and then I'll be able to go back to work." And he said that too, which not all of them were saying at the time.

Professor Jackson: A spouse who, I mean the attitude "I'm the primary person" strikes me as likely extremely pervasive then and probably may well be still today, I don't know. But the willingness to envision his partner continuing the professional life after having children strikes me as quite unusual.

Ms. Bernstein: I think it was, and he was always, and always has been, very supportive of me, was never threatened by it, I think that was probably the key to my marrying in the first place. He's very secure in his own abilities and is very, very capable. He's really an extraordinarily capable clinician. He's a doctor in every sense, a very good one, and very challenging intellectually; he's very smart. So it was not a threat to him. And he always said that he was generally bored with women he had gone out with before, and I found some people boring, too, so whatever else, it wasn't going to be boring. And he always said when the kids get to be a certain age, you'll go back to work. We didn't make any time or whatever and sort of worked that through. Now after I did go back to work and got really very busy, there was a period in which it was a very stressful time in the marriage. First of all, such a big shift, this is shifting ahead a lot.

Professor Jackson: How old were your kids when you went back to work?

Ms. Bernstein: Alec was about 13 or so. Molly was just five, she was the youngest, and Suzie was somewhere in the middle. I had always planned to have only two years between everybody, but it didn't work out that way – there were a little bit bigger gaps. Molly was the youngest, and I actually started going back to work, if you will, when Molly was in

kindergarten. Pat Wald was still home with her kids. And she had some sort of grant from the Vera Foundation in New York to listen to tapes of prisoners or something like that. I don't know what we were doing exactly, but she said, "Why don't you come and help me out and work on this grant with me?" And I said, "Fine." Actually we listened to these tapes; I guess it was whether or not they were getting Miranda rights. I think that's what it was. Somebody up there had taped all these things of people being arrested, and we were analyzing the tapes. Pat was going to write a report about it at the end, and I helped her with that. So I did that for the two hours Molly was in kindergarten in the afternoon. I had my tapes at home and I would transcribe the tapes and edit them and so forth so they made sense, you know, and then give them to Pat. And it was very helpful to do that. It was very useful.

Professor Jackson: Now had you been, from the time Alec was born until this period when Molly was in kindergarten –

Ms. Bernstein: I did not work outside the home.

Professor Jackson: That was a period of about 13 years.

Ms. Bernstein: When I only had two children before Molly was born, I had said to him, "Let's see if I can't get some kind of a job, a non-demanding job, and we can get help in the house," and he said, "Okay." We were living in Illinois in the suburbs. And I saw an ad in one of the legal publications for a lawyer for one of the savings and loan banks in their trust department. So I went over there and they basically said, "Well you're really over qualified for this job, and why would you want to leave your children? Your husband is working, isn't he?" And I just walked out, and I said to my husband, "You know, to have to take that shit from people for a basically boring job, I would just as soon not do that. I'll do other stuff." And he agreed. So I did a lot of volunteer stuff.

Professor Jackson: What kind of volunteer work?

Ms. Bernstein: I did a lot with the PTA. I did the legislative work, the national PTA. And the state PTA had legislative committees on legislation that affects education, and I volunteered to do that. Before I knew it, I was like the chairman of the committee. That was fun and interesting and didn't take too much time. Then the kids were always glad that I was involved with the PTA. And then I was very much involved with building a swim club in the village. I was the only woman on this group of men who put together the proposal, got the land from the railroad, got the permits and all that was needed, and I was membership chairman. And on my dining room table, I have a funny little anecdote – (END OF TAPE)

Professor Jackson: This is July 7th and we were describing building a swim club.

Ms. Bernstein: Right. We lived there for nine years, and it's a lovely, beautiful suburb that was laid out by Frederick Law Olmstead and had much Frank Lloyd Wright and Louie Sullivan architecture. It was a very early, one of the first towns laid out to be a commuter community, to work downtown, and it's only eight miles from the city. And I mentioned those things because it was very influential, the physical atmosphere of Riverside was very influential in my son's life and career. I used to walk them around and look at the Frank Lloyd Wright houses and talk about them and weren't they interesting. And it was just kind of my way being with the children and the curving streets and the parks, the green parks and the river (there was a river there by the library)– my kids have all said were just very influential. Alec became a designer, and in part, he always has said, because of my early discussions with him about architecture and design and why it was pleasing to the spirit and so forth. So it turned out to be really a very pleasant place to be. And it was peculiar in the suburbs because it was also very heavily second generation Czech; that meant there were lots of Catholics, there were almost no

Jews, which my children also say that probably was an influence. I don't know whether it was a positive or negative influence. There wasn't any anti-Semitism that we experienced there, but Suzie has occasionally said to me, "I was the only Jewish kid in school." And I said yes, so was I when I was growing up, so that's why I was comfortable with it. I suppose and she became comfortable with it, too. But anyway, so we couldn't belong to the country club because they didn't take Jews, I don't think, I don't know, but we couldn't have afforded it anyway. So I got involved with this swim club because that was going to be very critical to our recreational needs. And they made me the membership chairman because of course I was home. There were mostly lawyers on the board that we constituted, and they were very helpful, capable people, but of course they were working, so Jodie would have all this stuff at home. Fine. I didn't mind. And so I was busy working on proposed membership because we were raising money ahead of time so that we would have money to build the first phase at least, and so forth. And that meant a certain, it was not a big contribution, but it was like \$1,000 or something like that. I would go to the meetings and I would say I got this number of members and blah, blah. And then it came up: were we going to exclude anybody? Well no, we weren't going to exclude anybody, except were we going to exclude blacks. And here it is in the '50s, before the civil rights movement, and I said, "What do we need to worry about that for? There aren't any blacks here. There are none. In two towns. And we're going to restrict membership to Riverside, the town of Riverside, maybe North Riverside also." "Well, what if they come out from the city?" I said, "This is ridiculous. What if they come out from the city, are they going to come out from the city? It's just absurd." So they said, "Okay, we're not going to have any racial restrictions." Fine. So I thought this is great, we're going to open this up and if any blacks move into town, they'll be eligible for membership. If they don't, okay. And in those days if Mexicans came in, that was

considered the same as— they're pretty dark, you know. Terribly, terribly segregated everywhere then. And in fact when we first came back to Chicago, I didn't mention, we had lived one year in Denver and one year in California before we came back to Chicago, that's how I think I got muddled up with some of this stuff. We were looking for an apartment to rent because we had just come back, and I had only one child. And there were no apartments in the west side. My husband had taken a job at the Veterans Hospital as head of GI at the hospital, and so I wanted to live out there nearby. I always wanted to live near the hospital because otherwise he didn't see the children. I started to look for a place, and the real estate people said, "Well, you can't live in Hinsdale; you can't live in various places." And I said, "Why not?" And they said, "Because they don't rent or sell to Jews." So I said, "All right. Well what am I going to do?" Here's what I did. I said I'm going to put an ad in the little papers of two sort of lower middle class suburbs, Maywood and Bellwood, that are two minutes away from the hospital and see if somebody will rent us something, either an apartment or a house. And I'll say it's Dr. Bernstein, and everybody will know we're Jews, and if they don't want to us to be there, they won't call us up. And a man called up and rented us a house which was wonderful. It had three bedrooms and a bathroom, and it was on a nice pleasant street with a playground across the street and some new little houses down the block. And he said to us, "The Catholic church is two blocks away and the other churches too," and I looked at my husband and I said to Cecil, the landlord, "Did you know we're Jewish?" "Oh no," he said, "is that right?" I said, "Yes, Dr. Bernstein and I are both Jewish." He said, "Fine." And that was that. But when we bought our house, we bought the house in Riverside after we had lived in this house for a couple of years. So to go back to the swim club — see I am leaving things out. Maybe we'll straighten it out, maybe we won't; it doesn't matter because most of this, really, is my sense of my experiences. So I got a call one

day, a person came to the door and said to me, "Mrs. Bernstein?" and I said, "Yes." My name is Phil Alderisio, and I understand you are the chairman of the forthcoming swimming club. May I come in?" I knew who he was. "Milwaukee Phil" Alderisio was number two in the Mafia in Chicago, lived in Riverside. Two or three of them lived in Riverside. The number one guy lived in River Forest, the next one over. We all knew who he was. So of course I said, "Yes, please come in." And then he said to me, "I would like my family to be members in this because I have a son who would like to come to the pool. And I know you said there was a membership fee." And he said, "I would like to offer— how much money do you need to build the pool?" And I don't even remember how much it was, \$100,000 or something like that. It wasn't that much, couldn't have been that much. But I was so shaken by this – I had two little children in the house there with me, and I told him how much we needed to build the pool, and he said, "I would like to offer the club the pool. You can pay me back, but why bother yourself by having to raise this money with these members. Just go ahead with the financing; I'll give you the money. And then you can pay back, except for what my membership fee is, with no interest or whatever is easiest for the group. It's a community effort I would like to contribute to." I said, "I'll have to let you know. I'll have to take this to the board. It's a very generous offer Mr. Alderisio." He said, "I have a son who's nine years old, and I would like him to be able to come. I won't use the facility, but I would like my wife or the help to be able to take him swimming." I said, "Fine, thank you very much." I said, "Did you make out an application?" "No, I didn't," he said. I said, "Well, I'll fill it out for you." So I take it to the board meeting, and we had this incredible harangue. I said, "I don't see how we can turn him down. How can you turn him down? You don't have to take the money." I thought we couldn't do; we had to take his money the same as every body else's. We couldn't let him finance the club. But he was not under arrest, he had not

served any time. Why did we know he was number two in the Mafia? That's what the newspapers said he was. But you know, you couldn't make judgments based on what the newspapers said, I didn't think. But they were all horrified. They were just horrified. So we ended up with a membership for the son to let the little boy come to the pool for the same amount of money, but it was just an incredible harangue. I saw these big cars waiting for him outside, these mobsters outside in the car, it was just— I followed his career ever since. He died in prison.

Professor Jackson: The little boy?

Ms. Bernstein: No, no Milwaukee Phil.

Professor Jackson: That's a great story. What happened to the kid?

Ms. Bernstein: I have no idea.

Professor Jackson: I take it he took the turndown okay, as long as you let the son swim.

Ms. Bernstein: He did and also I forgot to tell you this— my sense of humor did prevail then. It was such an intense discussion, and I said at the end, “Okay guys, if you're going to turn him down, I'm not telling him. I'm not putting my name on that letter. You guys can call him up and tell him we're turning him down, not me.” And they said, “Oh Jodie, you're the chairman.” I said, “Yeah right, we're going to work this out.” In fact, Alec, on his way to school, he started school in that house, kindergarten – do you have a boy, children?

Professor Jackson: I have two boys and a girl, the same age spread as yours. Eight years from top to bottom. My 17½-year-old is in Ecuador,

Ms. Bernstein: And is your oldest one a boy?

Professor Jackson: He's a boy.

Ms. Bernstein: Do you recall the extent of lack of coordination or ability to get any place in a hurry when little boys are like four and five?

Professor Jackson: I have seen a similar phenomenon at 17.

Ms. Bernstein: Yes. We lived two blocks from the school. I could see him coming home from the school. That was partly why I bought the house, I could see him coming home from school. And that's such a big wrench when they go to school by themselves. And he was five years old and was going to walk by himself and come home by himself the two blocks. And I got over being a wreck, but I watched him and it would take at least an hour for him to walk home. There would be a worm or there would be another kid he would play ball with for a while, then he would sit down and stuff. One of these mobsters' houses was along one of his ways to go to school. There were two ways to go to school. Sometimes he would pick up George Fortelk and go the long way. And he used to take a stick and run it along the fences, you know. There were fences, and it turned out he was setting off an alarm, so I got a call about that too. "Would you have your child not do the stick?" and I said, "Alec, no sticks on the fences." So I had a lot of fun in those years with the children. They were wonderful. They still are, but they were all wonderfully interesting kids, to me anyway.

Professor Jackson: Were there other mothers, I assume, at that time who were home with their kids?

Ms. Bernstein: Everybody was home. I didn't know anybody who worked.

Professor Jackson: It was the very strong norm.

Ms. Bernstein: Yes, everybody showed up for the PTA meetings; everybody was available for car pools, well not everybody, but you know there wasn't anybody who worked. No one. Even when we came to Chevy Chase in 1967.

Professor Jackson: Okay, that's 1967. Why did you move to Chevy Chase?

Ms. Bernstein: Here's why. Lionel, I think I told you, was first head of Gastroenterology at the Veterans Hospital, then sometime in that 9-year period, he became the chief of medicine at the Chicago West Side VA Hospital. He was a full professor of medicine because there were affiliations between the medical schools and the big VA hospitals. And it was the University of Illinois Department of Medicine, and he ran a huge medical service. Because of that he got well known to the bureaucracy in Washington that ran the Veterans Administration's hospitals. And he would be asked to be on committees and various things, and he was offered a job in the VA in Washington to be basically head of I believe it was Research and Education. There is a Chief Medical Director that reports directly to the Administrator, Secretary now, but the Administrator of the VA, and Lionel reported directly to the Chief Medical Director, so it was a very high-level post, and he got offered that job and we talked about it. We never thought we would leave Illinois. His family was there, and my father was in Illinois, and yet it was a very exciting prospect for him. So we decided to do it.

Professor Jackson: So Alec was what?

Ms. Bernstein: He was almost 13. Well he was barmitzvahed before we left. He was barmitzvahed in July, and we left right after that, in August. So the VA gave us a week; they paid for us to come look for a house. I went to see Pat Wald immediately and she said, "There's no problem here. You have to live within walking distance of us because I don't drive and I want to be able to walk over with the children. And there is no sense looking anywhere except right around here because you'll need to go to the schools here."

Professor Jackson: And that was in the village, Chevy Chase Village?

Ms. Bernstein: Yeah. I said to Lionel, in a week we have to settle on. We can't

go into the District. Friends of ours live in the District, and they loved it in the northwest side of the District, and they said it's wonderful, and I said, "What about the schools? Alec is practically ready for high school; we can't afford private schools. We don't know if we can get him into private schools. We've got to be somewhere where we have the option." And Lionel agreed we had to live on the Maryland side. It was just a matter of practicality. And with Pat's advice we spent the week looking for a house right there. And we found one in Chevy Chase, which I loved and adored and we owned it 20 years. It's a wonderful house.

Professor Jackson: Which street was it on?

Ms. Bernstein: Melrose. East Melrose between Connecticut and Brookville.

Professor Jackson: It's a gorgeous block.

Ms. Bernstein: Gorgeous block. You should see what the people who bought that house did to it. It's gorgeous. It's just absolutely spectacular now. They invited us out last Thanksgiving for a little cocktail party. There was an annual neighborhood cocktail party on Thanksgiving that we always had. We didn't have it all the time, but we had it and it was just great fun. They invited us. Both our girls were here, and we went back to see the house and to see the neighbors – lots of them still live there. So that's how we got to Chevy Chase.

Professor Jackson: So at that time you hadn't been working for 8 or 9 –

Ms. Bernstein: More than that, 12, 13 years.

Professor Jackson: And you came to Washington where you knew Pat. Did you have other friends from law school?

Ms. Bernstein: Yeah I did. I had a quite a few. Several of our classmates were there. Pat and Bob were my best friends. We had been to Washington to visit several times, and I saw them when we were here. We didn't write letters but we were in touch. And so then I

worked on that Vera thing, and Molly started school. Molly's going to school was more traumatic than the others; I suppose it was because she must have known I was going back to work. She was, and I think it was, because we moved in and her little safe environment was disrupted and here she was in this big house on this big street, and all different. I had to walk her to school every day. And wait until the door opened and the teacher came out. And then I had to be there when the door opened.

Professor Jackson: Which school was she in?

Ms. Bernstein: Chevy Chase Elementary. I went there every day. Do you live out there, Vicki?

Professor Jackson: I live in the village. I live on Grove Street which is the other side of Connecticut Avenue, at the corner of Cedar Parkway.

Ms. Bernstein: The Wards used to live over there. Alan and Mariette Ward.

Professor Jackson: You know who lives there that you might know is Merrick Garland with his family, and Tommy Hogan lives there. It's a nice area. But my kids, we lived in the District until '91, and my kids started in a private school where they've continued, but I love Chevy Chase so much. And my husband used to live there. It's lovely.

Ms. Bernstein: Did he go to Chevy Chase Elementary?

Professor Jackson: No, his family came down when my father-in-law was an assistant secretary of HUD for Lyndon Johnson. I think Bob went to public school for one year in high school and then he went to St. Albans, so he went to BCC I think maybe for one year. Then over to St. Albans. I think his younger brother went to Chevy Chase Elementary.

Ms. Bernstein: What's Bob's last name?

Professor Jackson: Taylor. He's over at DOD with Judy Miller. One question I guess

is how the matrix of choices – this is kind of an out-of-time question but – when you had your children in the fifties, you were in a world where even if you had professional training you stayed home with your kids. And if you looked at that world and the world today, the choices that women have, do you have impressions about that?

Ms. Bernstein: Yes I do. Do you mean impressions about women today?

Professor Jackson: Yeah and the changes.

Ms. Bernstein: Oh yeah, I guess I do have some. I think our choices were, it was really foreclosed for us. I mean not only did everybody say you must to be home with your children, but the employment opportunities were foreclosed. They were just foreclosed. And so you didn't think about much. If you didn't have any choice, you didn't have any choice. You know you just did it. Today, I think there are many choices in some senses and fewer choices in others. By that I mean I don't think that I would advise anybody to stay out for ten years or 12 years like we did. I think it would be almost impossible to come back and to be able to have any range of choices. I think you could come back and do something probably, but I think it would be extraordinarily difficult. And that's why I say I think in some ways there is more choice and in some ways less choice. It may turn out to be the same kind of foreclosure on the opposite end that we had. That is, you better not take more than a very short period of time or you will put yourself at a tremendous competitive disadvantage. I don't mean that anybody would say, "We will never hire you." I just think it would be extremely difficult to take any extended period of time. Now the women here mostly take three to six months, that's mostly what they take. That doesn't mean they get six months maternity leave. That's just how it gets worked out. And I think that's probably more generous than you could do in most law firms and other institutions, where it's very much more difficult to cover the work and do all the things you

have to do.

Professor Jackson: Do you think there was a period when you think it was easier for professional women to stay home the ten or twelve years with their children and then come back?

Ms. Bernstein: I think we hit it, Pat and I and others. I identify with her because we did come back at the same time. She had five kids when I was having three. She did some stuff in between that I hadn't done. She worked on that bail bond study with Danny Fried and the DOJ and she may have done other stuff as well. But it wasn't full-time work. She was still a full-time mother. We went back at the same time. And I'm sure you heard me say that before, it was extraordinarily important to me, and critical to my courage to try to do it, personal courage, personal confidence to try to do it again, that she was trying to do it again too. And the other factor was that it did become quickly a time of real opportunity for women who had any training. That was later on, you know, really into the '70s, but we both were wonderfully positioned for the Carter administration. There was hardly anybody who was trained and had experience. In fact, there were some disasters because they put women into jobs that didn't have sufficient experience really. So I think we kind of lucked out in that sense. We kind of hit it at a time in which there was demand for lawyers. I see in the *Washington Post* today that there is a huge demand for lawyers; there's a big story about that. And the other, I think, significant factor for me, and probably for Pat as well, is we did know people. There were a lot of Yale people here. Many of them were already partners. Steve Pollock I remember calling me up one time, and he had been already an assistant attorney general, and here was I schlepping along you know, trying to figure out how to practice law, and I had probably been a year or two ahead of him. So that kind of thing kind of hurt but we knew those people. They were more than willing to help

us. They didn't think it was crazy. They didn't think or say, "What do you know?" In fact, my first job was for one of our classmates.

Professor Jackson: And what was that?

Ms. Bernstein: A classmate of mine and Pat's and Bob's— William B. Wolf, Jr. was a sole practitioner in the District of Columbia. His father had been a lawyer, his grandfather had been a lawyer. They were very successful. They really had more than a law practice – they were into financing real estate, and so forth. He gave me a job.

Professor Jackson: And this was after Molly's kindergarten year?

Ms. Bernstein: Yes, first grade.

Professor Jackson: When you said sole practice, I was thinking Fifth Street lawyers but that doesn't sound –

Ms. Bernstein: No, no, no. It was 1001 Connecticut Avenue where they owned the building. Dad had a big law library. They didn't even practice together really. They ended up practicing together. Neither one of them could really get along with anybody. But they are both brilliant. Billy particularly is just absolutely brilliant – wonderful lawyer, wonderful lawyer. Miserable to most people but not to me. He paid me hardly anything. I really didn't care for a while because I had to do everything. He and I practiced law together – whatever came over the transom, which was a variety of civil practice. We had big real estate stuff, and I would help out with that. But then we'd get divorces and other disputes, contract disputes. We had one big case involving removing a conservator for somebody's estate that I really did the litigation on. I got a judge to sign an ex parte injunction, you know, to remove this guy, just like that. We did innovative stuff. I said to him, "You know the courts of Maryland stiff have equity courts," and he said, "Of course I know that, what's the point?" I said, "The point is I think we can file an

equitable suit to reform a written instrument,” you know, stuff like that. And he would say, “Good, go for it.” I learned so much practicing law with Billy Wolf. It was astonishing.

Professor Jackson: How long did you practice with him?

Ms. Bernstein: Two and one-half years.

Professor Jackson: So roughly, '68-ish to '70-ish?

Ms. Bernstein: Exactly, because I came to work here at the FTC in October of 1970. These dates I do remember.

Professor Jackson: All right. And how did you decide to come to the FTC?

Ms. Bernstein: Here's how. As I said I was practicing with Billy. I was obsessively, I think, absorbed in the law, obsessively. I say this in retrospect. I was desperately trying to make myself into a lawyer again. And I really had a hard time thinking about anything else. The smallest thing would engage me. And I know what it was. I felt I was on the brink of either making it or not making it. To me it was I either go back to being Mrs. Lionel Bernstein and a housewife and mother for the rest of my days or I get myself confident. And I think I neglected by husband and my family during that period. I think I really did. Billy pushed the hell out of me to do more and more because I think he knew also that I needed myself being competent, and he wasn't a bit sympathetic to my domestic needs. It got to be very, very, tense.

Professor Jackson: Did you have household help?

Ms. Bernstein: Yeah I did. I did not have meals prepared; everything got done. It was where my head was.

Professor Jackson: Your emotional energy.

Ms. Bernstein: Uh huh.

Professor Jackson: Were you working nights and weekends away from home?

Ms. Bernstein: Not too much weekends, except that I developed in the course of that a rather extensive domestic practice. I got experienced, and it was at that period that there were a lot of marriages with women who had been led to believe they would always be taken care of who were being not taken care of, lots of divorces that wouldn't have occurred at a different time, and all of a sudden people were looking for women lawyers. It was just at the point – who gets taken care of, who doesn't get taken care of – just an explosive period, I mean it was the sixties.

Professor Jackson: So this meant a lot of phone calls at home?

Ms. Bernstein: Yes.

Professor Jackson: Nfitch Rogovin, for whom I have great affection, once said to me that I needed to have at the phone near my bed the telephone number for a good divorce lawyer and for a good employment lawyer. He was right.

Ms. Bernstein: That drove my family crazy. And they would call on Saturday, “He didn't pick up the kids. He's violating an order. What do I do? Should I call the police?” – all of that.

Professor Jackson: Was your domestic practice in Maryland and D.C.?

Ms. Bernstein: It was mostly in D.C. I never got admitted in Maryland, although I got admitted on motions a couple of places and things like that. We had one big case in Howard County, I remember, and I was admitted on motion.

Professor Jackson: Did you have any experience at that time with what is now called domestic violence problems?

Ms. Bernstein: No. These were mostly upperclass people whose husbands walked out on them and so forth. They had no visible means of support and it was just horrible.

I hated it. I mean I was engaged in doing it and I was in court every week down there in the Superior Court, whatever it was called then, just a “dinky” court, and of course the clerks would say to me, “Are you the plaintiff?” “No, I'm not the plaintiff; I'm the plaintiff's lawyer.” “Oh, we better get a button; you're the plaintiff's lawyer.”

Professor Jackson: Okay so you had been doing this practice very intensely and very wrapped up in it, and you ended up at the FTC by the end of the year.

Ms. Bernstein: It really happened because my husband said, “This can't go on like this.” And made very good rational arguments that if I were in a larger organization I would have more ability to have free time, to have vacations. He was not wrong about that, as I began to look at what toll it was taking. The kids were getting older, so I talked to Bob Wald. Well first I thought it through, and I thought I should really go into the government because at that time I thought they hardly worked at all. They go home at 5 o'clock, and so forth, though Lionel didn't go home at 5 o'clock, so I don't know why I thought that. I guess by then he was out at the NIH. And as I thought it through, I had a friend, Matt Watson, who ended up being, I believe, IG of the District of Columbia or something like that later on. I know how I got to know him. He was a younger lawyer, but he was very smart, and he had been opposing counsel in one of my divorce cases. And he and I had the extraordinary experience of having a joint motion fail because the judge didn't like what – it had something to do with a stipulated divorce and he wanted us to – . He was one of those old fashioned judges who said if there aren't adequate grounds here, I'm not granting this, a divorce. It was just hilarious. Can you imagine Judge denying a joint motion? And we got to be friends through the course of that, and I would have lunch with him, and we would talk. So I said to him, “Listen, if you were going to try to find something else, what would you do?” I thought I need to find something fairly new because if I

go into one of these government agencies, and they all know the law from 25 years, and I'm trying to play catch up, it would be very difficult. What's new, what's happening where I could sort of be on the ground floor? I am an experienced lawyer now. I know how to try cases. I know how to take a deposition and examine witnesses. So Matt mentioned a couple of things, and one of them was Consumer Protection. It was 1970, the Nader report had happened already, and they're hiring down at the FTC. What about that? And I said, "Oh my good friend Bob Wald used to be at the FTC."

Professor Jackson: Oh I didn't know that.

Ms. Bernstein: In the '50s, he was at the FTC. And his law firm had always specialized in FTC work. But there wasn't any consumer protection until the seventies. So I called him up, and asked what do you think? And he said, "Oh you want to work there," and I said, "Yeah, I think I do." By that time I had read some stuff and so forth. So he called up Basil Mezines who was the Executive Director at the FTC and a good friend of Bob's. Bob Pitofsky was just first coming to be bureau director, I didn't know that, I didn't know who he was or anything about that. The new chairman was coming, Miles Kirkpatrick was coming. Basil has changed his story about this over the years, but here's my recollection of it. So Basil said to Bob [Wald], "Send me her resume. We are hiring, but you know this guy Pitofsky is only hiring really first-rate lawyers, he's really snobbish. He's not hiring anybody from Tennessee any more." So Bob Wald said, "Her resume is fabulous, you can't pass it up. She's got fabulous recommendations from everybody." So Basil said he called up Bob Pitofsky, who was still not here from New York, and said, "I've got this resume," and this is just the way Basil talks, "I've got this woman whose got this resume, and she went to the Yale Law School, and she was on the *Journal*, and she's been in practicing," and Bob said, "Stop right there, and make her an offer."

“And Bob Wald recommends her highly. Do you want me to send her up to New York to be interviewed?” And Bob Pitofsky said, “Don't be silly, she's coming as a staff attorney, isn't she? Yes. We'll make her an offer.” So he made me an offer within the week. I accepted as GS-12. He could have given me GS-11, and I would have taken it, except for my good friend Selma Levine, whom I have not mentioned, who was a wonderful friend to me through this period, well always until she died, but she really befriended me when I started to work for Basil in the most wonderful ways. She was already a partner at Wald, Harkrader. She was 3 years ahead of us in law school, was an FDA practitioner, highly respected, wonderful woman. I didn't know her before. My only connection was through Bob Wald, and she was wonderful to me in every way, helpful, you know, just considered me like an equal, which I wasn't, or I didn't think I was anyway. It was a wonderfully helpful relationship to me. So that's how I came to the FTC.

Professor Jackson: You mentioned her name when you said you came in as a GS-12.

Ms. Bernstein: She told me not to take less than a 12. I said, “It says if you're entry level it's an 11.” She said, “You ask him for a 12. I'm telling you ask for a 12; they'll give it to you. If you don't ask them, they'll give you an 11.” So that's why I mentioned her name.

Professor Jackson: So you started here in October 1970. Now at that time – I was looking at this just before we came in.

Ms. Bernstein: I have to stop promptly at 12 today because I have a meeting.

Professor Jackson: As do I. So we have 8 minutes. All right. We're in agreement. I was looking over this, the statement of policy that accompanied the statement of basis and purpose for the Care Labeling Rules. And well, I think of you very often. I have to tell you, as I'm sorting laundry, looking to see, I thought, even if one had done nothing else, to have effected that which has helped so many people.

Ms. Bernstein: I don't take credit for the strategy of the way Bob conceived of it so that it would not to be challenged in the courts, because if we had a challenge, I think we talked about that the last time – it could have had an adverse result.

Professor Jackson: Not on the tapes, so we should talk about that. Why don't I ask a more general question about how you did get involved with the care labeling rules when you came to the FTC.

Ms. Bernstein: Here's what happened. I was assigned to what was called the Division of Food and Drug Advertising, headed by Jerry Thain who teaches law now at Wisconsin, and a guy who had been here for quite some time. I was a staff attorney, and I quickly became acquainted with another woman here named Nancy L. Buc, who was also a staff attorney there in the division, and we became friends. She was a lot younger. She had graduated from law school, I think, in '69. One of our initial assignments was to review toy advertising. You see I came in October, Jerry Thain had assigned me and Nancy to review toy advertising to get ready to see whether or not there were cases that could to be brought before Thanksgiving, because that's a big toy advertising period, and really revving up this whole organization, which I didn't really realize at the time. But so Nancy and I– I used to say this in little talks that I gave subsequently– having gone from being a full-time housewife where one of the things that I had to do was watch television with the children, so I was not unfamiliar with toy advertising because, of course, we saw all that stuff. I thought when I went to work – no more kids' TV. Wrong, that was one of my first assignments!! We sent out access letters, we got the ads in, and we sat around and watched the television ads and looked for violations, and we found them. We brought two cases, Topper and Mattel. We sent them to the commission. There was a huge press conference the week of Thanksgiving that Bob Pitofsky headed, and it was just

unbelievable press coverage. The FTC had never done anything like that, and there were not assurances of voluntary compliance, which was the way the commission had always proceeded—that was the first bite of the apple.

Professor Jackson: We will obviously not to be able to finish this today, but it's helpful to start. So you have this very successful press conference, the FTC does not offer them a chance for voluntary compliance, is that right?

Ms. Bernstein: AVCs, assurances of voluntary compliance, had always been the way the commission proceeded on these insignificant cases that they brought in the '60s and then if they violated the AVC then the commission would get a consent order by settlement or by litigation. And if that was violated, then you get a penalty. So it was a long, long process. The cases were not important cases, and Bob and the chairman had told the staff not to seek nor accept assurance of voluntary compliance. The order will to be sought in the first place. We ended up settling the toy cases afterwards, but we announced them as administrative complaints and got a huge amount of publicity, very positive. And it was very exciting stuff. Nancy and I did those cases by ourselves. We wrote them up, got them up to the commission in three months. Previously it had taken two years to get anything like that through the internal process. Interesting enough, this is just a side line, when I came back here the processes had slowed down again, so it was like molasses here when I came back. Bob said, "It's deja vu all over again. We've got to rev the place up." So that was the first thing we did and we'll have to quit I think.

Professor Jackson: Okay, we can resume next time with the FTC, so we made good progress, I think, today.

Ms. Bernstein: I think so.

**ORAL HISTORY OF
JOAN Z. BERNSTEIN - THIRD INTERVIEW
DECEMBER 4, 1998**

Professor Jackson: Today is December 4, 1998, and this is the third in a series of oral history interviews with Jodie Bernstein. I guess I should ask you generally if there were anything relating to what we talked about last time which sort of took us up to the first couple of months of your tenure at the FTC, that in thinking about it or looking over the transcript you want to add anything to or elaborate on in any way or whether we're at a point of moving forward.

Ms. Bernstein: I think we can move forward. I was pretty satisfied with that.

Professor Jackson: When we ended our last talk I think that you had been describing how you came to the FTC and your first assignment which was with Nancy Buc on Deceptive Children's Advertising. And we discussed the change in strategy that you developed of not trying to negotiate a settlement ahead of time, but going public with the complaint and its effectiveness. And I guess one question is whether there is anything you want to add to that wonderful beginning tale of your time at the FTC. Or if it's time to ask then maybe who some of your other colleagues were who were significant to you in your early years at the FTC?

Ms. Bernstein: Okay, good. That was a significant move for the entire agency. We happened to be among the first to take one of the first assignments of no longer accepting what used to be called assurances of voluntary compliance, a three-step process, before anyone was ever in violation of an order.

Professor Jackson: Jodie, was that change in agency practice something that was developed initially as an agency-wide policy? Did you and Nancy develop it? How did that come

to be?

Ms. Bernstein: It came about (and maybe I mentioned this, perhaps I didn't), Vicki, in 1969. Ralph Nader did an investigative report on the FTC and concluded that in the previous decade nothing of significance had occurred at the FTC. It was an extraordinary report. And with a lot of very negative, very negative and true commentary on people who read the newspaper all day, who went out to lunch and stayed out to lunch all day—really horror stories of bureaucratic slough. President Nixon then asked the American Bar Association to constitute a committee to do its own investigation and make recommendations to the President. It had been a really terrible time at the FTC. That report, the chairman of the committee that did the report for the ABA was Miles Kirkpatrick who became chairman of the FTC. I should interject that the first new chairman, the new appointee, appointed by Nixon, was Caspar Weinberger.

Professor Jackson: I didn't know that he ever served there.

Ms. Bernstein: Six months. He was there six months. And he began to reform the commission. He began it. Interesting, I have since learned that Bob Pitofsky, now chairman of the FTC, headed the staff that did the ABA investigation and report.

Professor Jackson: The staff of the ABA commission, or was he already at the FTC?

Ms. Bernstein: No, he was a professor at NYU. And he headed it and hired two or three students, two of whom became good friends of mine. One still is. They were students at NYU Law School at the time, very smart, very capable and obviously led by Bob. What I was going to tell you, which I think is interesting, that Pitofsky told me, was that Paul Rand Dixon had become the chairman of the FTC for the decade of the '60s from 1960 to 1970. He was from Tennessee. He was appointed by President Johnson. President Johnson told him, and Rand told this story himself to Bob. He said, "Rand, I want you to go down there to the FTC and I don't

want you to do nothing. Do you know what I mean, Rand? Don't do nothing." So Rand did nothing.

Professor Jackson: That's a great story.

Ms. Bernstein: It's true I think, too, because there had been some scandals at the FTC at an earlier period and Rand then hired only white males from Tennessee. And you know people who were hired to do nothing for ten years end up reading a newspaper all day, that's what happened. But the particular changes that were recommended by the report, one of the things that I was describing to you in connection with the kids' advertising, had been recommended in the report. Not the subject matter, that was already a public issue of what is television doing to our children.

Professor Jackson: The bypassing of the AVC –

Ms. Bernstein: Going right to complaint.

Professor Jackson: Did the agency in response to the report adopt a formal written change policy or was it left open to the new staff coming in?

Ms. Bernstein: It was left open to new staff. So it didn't really require a change in the Rules of Practice; it really required just new people with new initiatives.

Professor Jackson: You had legal discretion?

Ms. Bernstein: Oh yes, we had legal discretion.

Professor Jackson: That's fascinating. You hadn't talked about it last time, and I didn't realize that was really part of Bob's involvement.

Ms. Bernstein: Yes, that was really part of Bob's, and Vicki, I believe although I don't think I've ever seen it, I heard later that the Kennedy School conducts case studies of institutional change. I believe they did one on the FTC that focused on that area – and the role of

Basil Mezines who is still around town. He is Jake Stein's partner and was here for long time. He had been on staff at the FTC and became the executive director in the new regime of the FTC. Yes, Weinberger, Kirkpatrick, and he really were the ones who devised and implemented the vast job of getting rid of the – these old people. So now that new people could be hired. And he did a fabulous job.

Professor Jackson: What's Basil's last name again?

Ms. Bernstein: Mezines, it's Greek, of Stein, Mitchell and Mezines – one of the exception to the "Tennessee origin rule."

Professor Jackson: Okay. Now it is interesting because the next question that I had written down to ask you about we've already touched on, which is the effects of the emergence, I had in the early '70s but obviously I was off, the emergence in the late '60s of sort of modern public interest-oriented groups, including Nader's consumer efforts, and the relationship that that had to the work that you were involved in. Obviously Nader's '69 report was really important.

Ms. Bernstein: Yes. Key. Mark Green was on that staff, I believe. On Nader's staff, Chris White, who is still here. It's kind of interesting who was on his staff and subsequently came here. Mark never did. Mark went to New York instead. It was really the peak of hiring competent investigators, and reporting/publicizing was the work of the Nader organization, not to take away what they did with the cars and other matters.

Professor Jackson: Was that the organization that was important at the time or were there any other that were around?

Ms. Bernstein: Well Consumers Union was in existence and identifying issues.

Professor Jackson: They have been in existence for some time.

Ms. Bernstein: Yes.

Professor Jackson: And they had some role, I may be jumping a little ahead, I know. The Consumers Union's positions were referred to in the materials published in SFR in connection with the rule on care labeling. But I don't remember myself and I don't know how aggressive an advocacy organization they were.

Ms. Bernstein: My recollection, and it may not be right, was that they were not an aggressive advocacy organization. I believe they were already publishing *Consumer Reports*. But I don't think of them as that kind of advocacy group. Sometime during the '70s they began to develop a lobbying capacity on Capitol Hill, and a couple of people who worked here went to that organization and are still there. The other is Consumer Federation of America and –

Professor Jackson: Was that Esther Peterson?

Ms. Bernstein: Esther headed that organization I believe.

Professor Jackson: Were they involved or did they support the Nader study or did they take a hands-off position?

Ms. Bernstein: Can't remember.

Professor Jackson: Okay. Now in addition to the work on children's advertising, can you describe other of your work at the FTC in what I think of as your first stint at the FTC?

Ms. Bernstein: Yes, and we still talk about this, Bob and I sometimes. You know Bob was the bureau director, and I was down there in a division, quite happily working with the division director at the time, who was a man named Jerry Thain. He had been teaching at Wisconsin for many years. He was a terrific boss for me. I liked him a lot, he was really smart and he was a manager who would give you an assignment and let you do it. He actually hired me. Can we talk how I was hired?

Professor Jackson: I think we did and I remember, I would have to look back but

Pitofsky he . . . your resume saying hire her.

Ms. Bernstein: Yes, but it was Bob Wald who sent over my resume to Basil, and then Basil gave it to Bob, and he said fine, and Jerry actually interviewed me. Or maybe Basil interviewed me, too, I don't know, but anyway it all went very quickly. So I will describe one other fairly far-reaching project that I got. Somebody was investigating, and I don't believe I was investigating it, a proposal, and I don't know how we got into it even. Gillette was planning a marketing program for a new razor blade, and they were going to enclose it in a Sunday supplement.

Professor Jackson: The razor blade?

Ms. Bernstein: The razor blade, the actual razor blade in a plastic package with the ad. You know how you get those insert things in the newspaper on Sunday. Well that struck us – everybody – as outrageous, too. As I say, I didn't work on that part of it, particularly. Here was my part, and mind you everybody was kind of new here. Bob asked Jerry to have somebody research whether or not we could go into court and enjoin the distribution in the supplement that would carry the sample razor blade. So Jerry comes to my office and says look this up, see what you can find. So I'm thinking to myself because I am something of an experienced lawyer, none of them were, none of them had ever been in court. Bob was a scholar, he hadn't had much "hands-on" experience except at Dewey Ballentine – antitrust documents, et cetera. Jerry had never litigated. I don't think any of them had, and the commission people who had been at the commission hadn't done anything. I didn't really understand all of that. Because I didn't know all these people. So I'm thinking to myself, and I said, "How soon does Pitofsky want it?" And he said, "Oh you know, as soon as possible." I said, "Well, I presume that prior research has been done. The commission has been in business since 1918. Somebody has looked to see if

there is injunctive authority.” “No,” Jerry said. I was very suspicious. I really thought it was some sort of setup to trick a new lawyer into something or other because it was hard to believe that nobody ever researched a topic like that.

Professor Jackson: I don't remember whether the FTC was in existence, but the misbranded eggs case, which is a federal commerce claims case, I always thought that had to do with eggs and commerce and getting them off retail shelves and the commerce power reach that far but I would have assumed that if there was a federal regulatory power someone would have tried an injunction – no one had done this before.

Ms. Bernstein: The results of my research was that nobody had done it at the FTC. There was no mention of injunctive authority in the FTC Act, which had been around a long time. The amendments to the FTC Act that had passed in the late '30s that were the food, drugs, and cosmetics portion that we share with the FDA did not have injunctive power for this kind of product. And it appeared that agencies that had specific injunctive authority was in the statute and it said you can go into X court and get this kind of relief and so forth. We didn't have that. But I thought to myself, I used to think because I was Yale-trained, this is ridiculous, you know this is ridiculous, and then I would start thinking – powers in court, surely there must be a way to do this. And I was conjuring, you know, trying to do that. And then, and I don't remember exactly how I came across this, but I was, I think I know, I was close with a number of lawyers at Wald, which was then Wald Hardkrader, including my dear friend Selma Levine, whom I may have mentioned to you before.

Professor Jackson: Yes, she was the one who advised you not to take anything below a GS-12.

Ms. Bernstein: Yes, right. And I called her up and said, “Selma, you have been

doing research here, you guys have been doing a lot, what do you think about this?” She said, “I don’t do anything about things like that, Jodie. You know I do labels on cosmetics, but talk to Joel Hoffman, he’s my associate and he graduated from Yale recently and he’s really a scholar.” So I said okay. I think I went to lunch with Joel Hoffman. He was truly a scholar, he is a scholar. Difficult person but he’s a really good one. And he said to me, you must find a way. I said yes, but instead of my just saying do it –

Professor Jackson: Oh no, no, this is great. I love this story.

Ms. Bernstein: It’s a wonderful story. And he said to me, I think that because he had done a lot of research about the FTC, because they were doing FTC practice, he said, “I think that there is an old statute called the Rivers and Harbors Act of 1896 or something that is almost identical to the FTC Act in structure. Why don’t we take a look at that because that was pre-environmental stuff.” I subsequently used Rivers and Harbors Act for other things. He was right. There was no provision for any injunctive relief, but the courts upheld the ability to enforce the Rivers and Harbors Act, joining together with what the purpose of the statute were with the equitable powers of a federal court. I wrote that up and after I got out the Act and all, looked up the cases, and so forth. Whether I would have ever come across the Rivers and Harbors Act case, I doubt it, but I might have because I might have read a text about the development of the FTC Act or something like that, had I had time. And I wrote that up and sent it up to Bob, and he took it to show the General Counsel, and the General Counsel’s view was “I don’t think we even need this.” He said, “No court would tell me I can’t enjoy this.”

Professor Jackson: Who was General Counsel?

Ms. Bernstein: Oh a wonderful guy who is now dead. He was an older experienced lawyer, Joe Martin. There was a law firm, I think no longer in existence, called

Petit and Martin, and it was a San Francisco firm with no office here. Wonderful seasoned lawyer. So we got it all together and that is exactly what we were planning to do when Gillette came in and pulled the thing. So I don't believe we ever went into court, but we were ready to.

Professor Jackson: Did Gillette pull it in response to pressure?

Ms. Bernstein: Yes. Bob called them in.

Professor Jackson: I'm sure many parents thank you.

Ms. Bernstein: I'm sure they do. Children and dogs.

Professor Jackson: Oh gosh, yes, dogs, I hadn't even thought of that.

Ms. Bernstein: That was a wonderful episode, and Bob remembers it vividly. He sometimes doesn't remember what I told him last week, but he remembers things like this.

Professor Jackson: That's marvelous and thinking about how electronic databases have changed the way we research, now you would go online or you would have one of your colleagues go online to do a word search and –

Ms. Bernstein: Yes, and it would come up in five minuets.

Professor Jackson: Really interesting. I know that from our prior discussions another major initiative that you were involved in, but I don't remember whether it was when you were still in the division or you became acting before you left the FTC. I thought you had...acting consumer protection chief in 1975 is that –

Ms. Bernstein: Yes, well it's before that. What happened was after I was down in the division for a year, a year and a half, and partly because of this stuff I had done, Bob asked me to come up here to be one of his assistants. He had three assistants, no chief of staff, and we basically ran the bureau, the four of us. One of them left, Bob Skital left, and then it was me, Mort Needleman, and Bob Pitofsky. I never worked harder in my life. But I obviously learned

enormously because then I was not doing just advertising cases, I was doing a whole work of the bureau, everything that came up for the approval of the bureau director went either to me or Mort. At that time we still didn't have— we have so much more superior staff now than we had then because we were still in transition and still had what I call clunker people.

Professor Jackson: Was the bureau, or is the bureau, forgive my ignorance, divided into divisions? What are the divisions? You worked in advertising?

Ms. Bernstein: The divisions are advertising practices. At that time there was one that dealt with credit. There still is— it's now given a new name. Then there were Marketing Practices that did things like undelivered merchandising in mail order and land sales and things like that. Enforcement, enforcing administrative orders, and flammable fabrics included jurisdiction now at the Consumer Product Safety Commission. It was transferred over there when the CPSC was established. We now still have five divisions. They are slightly different, but pretty much the same.

Professor Jackson: I didn't realize there was this structure.

Ms. Bernstein: The agency was reconstructed pursuant to the ABA report. It had previously had a lot of bureaus. One of them was called Rules and Guides, and they put out a lot of anti-competitive guides that basically helped industries protect themselves. It was protectionist out of the '30s. It was still going on.

Professor Jackson: How big was the advertising division when you were in it in the early '70s?

Ms. Bernstein: I would say 15-17 lawyers.

Professor Jackson: And how big was the bureau at the time when you moved up to be bureau director?

Ms. Bernstein: I suppose it got to be about 300-350 people. And that doesn't count the regional offices – we had then ten regional offices, and still do. They didn't do anything useful at the time, nothing.

Professor Jackson: I'm stepping out of order, but now as director, do you have to go out and visit your regional offices to –

Ms. Bernstein: I visited them all when I first got here. I don't do it routinely and partly the reason I don't is we have teleconferencing now and instant communications, and they come in here twice a year. One of my management initiatives was to move them into the planning process that I established for the bureau so that I no longer have what was my worst problem then. It was as follows: a case would come up to me fully developed that I was supposed to approve, and it would be one I'd consider a useless case. Then when you're in a position to have to kill off people's work, I knew it had to change. It was wrenching kind of change but it has worked. The regional offices are now doing very good consumer protection work with our guidance and interaction. We put them together with people in the divisions and it works extremely well. They are now productive.

Professor Jackson: Sounds like a much better way to have it organized. Let me take you back to the '70s and the care labeling regulations, which I know when we had our first lunch you told me I should when I asked you what you were proudest of, I think you said care labeling regulations. So I have actually read the old stuff; I brought it with me in case you wanted to look at it, to refresh your own memory.

Ms. Bernstein: ...process of amending it or possibly amending it.

Professor Jackson: I did see that when I first went online to LEXIS, but that's the old one and –

Ms. Bernstein: Oh look how short it is, Vicki. Isn't that wonderful? It really was historic, too, I thought.

Professor Jackson: You really don't have to read it. I just thought you would enjoy seeing it, and I didn't think to bring a copy with me, but I would love to just ask you to tell about your involvement with the care labeling regulations.

Ms. Bernstein: I don't know where it originated in the bureau; I just don't remember it. But I recall that one of the things Bob said to me as soon as I got up here is this thing is just emerging as an issue, and he said I want you to play a central part in whatever we're going to do with it.

Professor Jackson: Can I just interrupt for one minute? When you said as soon as I got up here, is that as soon as you got to the division or when you moved up from division to Bob's okay?

Ms. Bernstein: We were across the street in the Indiana building. Our division was over there. We had the most wretched office you had ever seen over there.

Professor Jackson: I've seen some pretty wretched offices.

Ms. Bernstein: Yes, you probably have. You wouldn't be surprised at this. I used to say I was going to put a sign in the window because it was over the drug store, People's Drug Store. I was going to put a sign in the window that said "Attorney at Law, One Flight Up." Anyhow, I came over here, and Bob was in this very office, so I started at the bureau when there was another very significant legal issue. It wasn't clear that the FTC had rule-making authority; in fact most people thought we didn't. There was no provision in the statute, nothing.

Professor Jackson: Is that right? Had the FTC been involved in cigarette labeling at all?

Ms. Bernstein: Yes, yes.

Professor Jackson: Would there have been a similar issue then?

Ms. Bernstein: Yes, there would have been; it was in the '60s. I can't remember, Vicki, because I wasn't here, but the FTC had done a fabulous job on recommending health warnings. They were cut off by Congress. But there was a famous, we used to consider it famous, Statement of Basis and Purpose about the rationale for cigarette labeling that we used for years as a precedent for various things, written by Judge Posner, who is now on the 7th Circuit Court of Appeals. It's brilliant, brilliantly written. I don't know if I have a copy of it anymore. And I can't remember – I don't know if they were purporting to do that by rule or what they were purporting to do, but I do know this was an early issue, and I got involved with it quite early with Bob, who was managing or trying to manage it from here. And he had 48 million other things to do as well, and I kind of worked with him until I could get grounded in what needed to happen. As I may have mentioned before, it was enormously controversial – couldn't possibly do this, and it was expensive, et cetera.

Professor Jackson: But it can't hurt for the tape to hear your description of it. I would encourage you to describe this one, which was a major initiative.

Ms. Bernstein: It was a major initiative, and there were articles in *Women's Wear Daily* with headlines that the FTC was putting them out of business and why do we need to do it. It was "big brother run amok." "There was already plenty of information on the hangtags." Of course our response to that was— mind you it became almost my issue because most of the men didn't buy anything, then. They also had no responsibility in washing and dry cleaning because all their wives did everything for them then. I knew what it was like to buy a blouse and not be able to find the damn hang tag because it was lost somewhere and not know what to do with it.

And I think importantly this really came about because the nature of the fabrics had changed by then. Prior to World War II there had been basically four fabrics in the market: linen, wool, cotton, and some rayon. There wasn't anything else. So as sort of a historic matter people knew how to care for these things. It was cotton and you knew what to do with it. Now post-War comes all these mixtures of materials, synthetics mixed with this and that and the other thing. A whole new array of materials that people and consumers were complaining that they were ruining them because they didn't know how to take care of them. That was the genesis of it. But it was considered by some as sort of a woman's issue which wasn't very important at the time. But it became my issue in part because of that. I must say Bob was enormously supportive of it. Even though he certainly was no different from any other man who had no idea what we were talking about half the time. Here's what he contributed to this. I'm going to skip ahead a little bit. We went to the hearings and then, as we did in those days, either Mort or I would sketch an outline – here is what we ought to provide, the rule, kind of do an outline. We'd come in here usually late in the evening, after everyone else had gone, and sit down with Bob, the three of us, and go through what we thought it should be like, and he would say yes or no or maybe and so forth. Then we had to go to the commission with a position. And that's pretty much the way we did that. We sent it to the commission, and among the things that subsequently became very important in terms of Bob's legal judgments, there were provisions for exemptions. And one of them was, there were two as I recall, one was "Completely Washable and under \$5 or under \$10" – then no label was required. The other one was "Completely Reversible" – the rationale was there would be no place to put the label. And it applied only to textiles.

Professor Jackson: Help me out here, textiles was distinguished from –

Ms. Bernstein: Leather, fur. It was wearing apparel; those were the principle

exemptions. We went to the commission on the first one, “Completely Washable,” and I think it was under \$5 initially, but I can’t remember. Because we had said \$15, it didn’t seem unreasonable, but Mary Gardner Jones, our consumer advocate on the commission, thought that was way too broad—down to \$5. And there were things you could buy then for \$5: underwear and other things you could buy for that, stockings. In fact I think I must have done the hosiery exemption myself. Then we set up a little provision saying “petition the commission if you want an exemption.” They delegated the exemption authority to the bureau director, specifically non-delegatable. That was very radical and nearly unique for the commission to delegate any kind of authority to the bureau director.

Professor Jackson: Radical in that the commission didn’t keep it for itself?

Ms. Bernstein: Yes, though only in a limited way because it established a negative option. The bureau director was to make a decision, put it on the public record for three or five days, so then the commission could then object, if it wanted to; if not, it was done. So we did the rule. Now, at the same time, before I got to the bureau level, or at least I had nothing to do with it, the commission had published the octane rule, which required disclosure at the pump of the octane levels of gasoline. That rule had been challenged in court. And it was pending in the D.C. Circuit. So Bob said to me and Mort as we went through what the issues with care labeling were and what we would provide and what we wouldn’t, he said, “This rule can’t be challenged. I don’t want this rule challenged. And the reason is I don’t want it to go to another court of appeals. If it gets in another court it gets to another circuit court and we have different decisions, it’ll go to the Supreme Court on our rule-making authority.” I don’t think that would have occurred to me at the time. I just wasn’t experienced enough in administrative law to think about that. So he said, “Now we can’t discuss this publicly obviously;” he said, “We’re not even

going to discuss it, but I want you to write a rule that would not be challenged, it will be one that industry decides it can live with and not have to challenge.” So my instruction was to see what I can do to talk any company out of challenging. Which we did. And I think the other advantage we had was that the textile industry consisted of small companies; there were no big companies. It wouldn’t have been in anybody’s interest at that time. I mean it may have been in all their interests, but it was hard to get them organized. Oh, I almost forgot one thing. The thing that was really the most brilliant, I think, on Bob’s part was we did not require the retailers to do the labeling or to have any responsibility for the labeling, but we informally said to them, “You are not going to sell unlabeled merchandise are you?” They said, “No.” And they said to their suppliers, “You better get those labels on.” Retailers then had much more economic power than the manufacturers. Manufacturers were a lot of little Jewish guys in New York that were manufacturing all the wearing apparel in the country. And there wasn’t anything coming in; there was no foreign merchandise except Chanel.

Professor Jackson: It’s interesting that none of the textile manufacturers filed a challenge. With a fair number of small companies any one of them I suppose could have done so.

Ms. Bernstein: Any one of them could have done so. But they were small and they had this pressure coming from the retailers. The retailers called the shots.

Professor Jackson: And how did you informally get the retailers on board?

Ms. Bernstein: There is a National Retail Manufacturers Association, and we met with them, Vicki. Bob would say call them up, ask them to come in here, and we would do that. We went up to New York one time because on the issue of comparative advertising, the NAB had a code of conduct that prohibited ads that name a competitor and hence the “Brand X” ads.

Remember Brand X? Well Bob had this antitrust theory that voluntary restriction was probably anti-competitive and they shouldn't do it. But we didn't challenge it. He sent us up to New York, we got appointments with the networks and the NAB and said to them, "You know you guys better be thinking about dropping those provisions" – it was in terms of "disparagement," but that's what it really meant. They stopped doing it before they were ordered to and said the threat was that we would make them. Allow it, that's all, we weren't saying you have to do it. We were just saying you just have to allow.

Professor Jackson: So it's thanks to you that I get to hear that we're Canon copies not Xerox.

Ms. Bernstein: Yes. These were very exciting times, Vicki.

Professor Jackson: That's absolutely marvelous. Now on care labeling, I remember from our lunch a year ago, wonderful stories about particular products ending up in your office or in an office that you were responsible for, but I've lost the details.

Ms. Bernstein: I can tell you what the segue is into that because what we've been talking about is the challenge to the rule and avoiding it, but the most difficult part for me was Bob then. Remember I told you it was delegated to the bureau director, specifically non-delegatable. As soon as the rule was final, the exemptions started piling in, petitions from all the little guys. He turned it over to me. And he said, "Just get it right." So I said, "Well, how? What will I do if I have to deny one because there will be a challenge?" He said, "We'll just have to work it through to get people to do what you want them to do without denying it." Which was some kind of fun because I have wonderful stories from that that I used for years, years.

Professor Jackson: What are some of your best ones?

Ms. Bernstein: I told you I think at lunch that I tried to first of all put out a little statement saying if you want an exemption, just write a letter and tell us. If it's completely washable, tell us that, and if you run a test, give us the test results. We didn't say you had to do that but so forth. Very simple. And we said, "Do not send samples. Do not send samples." Samples were not going to help us with this. That did not stop them from sending samples. They sent samples. And it was piling up in my office. I'll tell you my best story of all, which I've used over the years. My way of dealing with this was, because it became pretty routine, most of them I would just say your exemption is granted and slap it on the public record. I mean I showed some of them to Bob; most of them I didn't. There wasn't a conflict; he trusted me to do it. And the commission wasn't fussy or anything. But I would save them until like Friday afternoon from 3:00 to 6:00 or so to work them through when I was tired, and it was pretty much routine. So I got one one Friday afternoon, and they really hadn't supplied any information, this little manufacturer in New York. I used to call them, I don't remember what the real name was, it really was a real story. So I thought instead of sending them back to him and saying you know – because his letter had said, "Please exempt this," and it just wasn't enough for me to do anything. So I thought I'd call him instead. So I call. And some woman with a very Yiddish accent answered the phone, "____Manufacturers." I think they were making kids' clothes or something like that, and I said, "Is Mr. Cohen there?" "Who's calling please?" Mr. Cohen was the president. I said, "Well I was Jodie Bernstein for the Federal Trade Commission." There's a long pause, and I hear her saying, "Hymie, Hymie it's the government." When I don't have a cold I tell this story better. And so Hymie gets on the phone and immediately says, "What do you need? What do you want?" She said to him, "It's the government," and he said, "It's the IRS," and she said, "No, no, it's something else." I tried to walk him through and tell him what

to put in the letter. I practically dictate it to him, and he ends up saying, "Fine, fine, so I send it to this Mr. Pitofsky?" "Yes, send it to this Mr. Pitofsky," and okay, okay. And he said, "Do I have to do anything else?" "Oh no, just write the letter." "Oh thank you, thank you, Mrs. Bernstein," blah, blah, blah. So I said, "Just write the letter please, Mr. Cohen and send it in." The letter comes in and it says, "Dear Mr. Pitofsky, Forty years I'm in the underwear business, never have I met such a wonderful person as your Mrs. Bernstein." Honestly, literally in the letter, Vicki. I said to Bob, "What am I going to do with this? I have to put this on the public record." He said, "Put it on the public record, it's wonderful." So I had all those things. It was a balance, and we got through all them.

Professor Jackson: Did you have any favorite items of apparel that ended up in your office? Samples that you didn't want?

Ms. Bernstein: There were huge numbers of bikini underwear and brassieres that they claimed could not be labeled because they were too small or they were reversible or this and that. I had tons of them, and I just didn't know what to do with them. I think I may have told you. This is another funny story. I had all this stuff and everybody was hysterical over my room full of merchandise.

Professor Jackson: Sort of a precursor to Victoria's Secret.

Ms. Bernstein: Yes, and bathing suits, we had a lot of bathing suits because they were really hard to label. Bob came in and looked in my office, and I wasn't there, and he turned and said to Mort, "Where's Jodie?" And Mort, who had this wonderful sense of humor, said, "I think she took the spring line on the road." The other wonderful one is a Mort story. I had a huge petition from the furriers because the lining of the fur coats were textile, so they had to write. Do they have to label the lining? And I worked around it and called people, and I

concluded that it was very impractical to require anybody to clean the lining of a fur coat in part because there is no home care for fur coats. It's professional care only for the whole thing. So really the whole basis for the rule and giving the people information was not significant, and it would tell you professional care, so it didn't quite fit into the categories of exemption. I had to be fairly creative in writing it to say the purpose of the rule would not be served and so forth. So I had done that, and I had talked to Mort about it because I knew it would get a fair amount of attention because it was going to basically exempt the whole industry as opposed to other little things that were individual. So we went to talk to Pitofsky at 6:30-7:00 at night, and mind you, Sally Pitofsky did not have a fur coat. If he ever had anything to do with the fur industry, it would have been a surprise. So I walked him through all this, and the basis really is individual consumers don't have to take care of fur coats. So he looks up and in his usual way of probing questions he said, "Jodie, it is a textile." I said, "Yes I know," but then I launch into it, and so he says, "Are you sure that the only way to clean fur coats is to take it back to the place you bought it or some other place and have them do whatever they do?" I'm about to say yes, and Mort says, "Well there's one other way." I looked at him and Bob says, "What's that?" He said, "Well if you're wearing a leopard coat, you can go to the zoo and stick your arm through and have the leopard lick it. That's the only other way." I just thought this was a hilarious comment. So that is how we did that one.

Professor Jackson: Were you able to get the manufacturers of the brassieres, for example, the last 15 years is that they do have little labels on them; at least they have size labels. And I don't know if I've ever looked for a care label because I know I always hand wash them. Did you ever get them to put labels, but are they able to permanently affix the size labels?

Ms. Bernstein: I don't remember even what we did with them. It was mostly

bikini underpants that they said didn't have room.

Professor Jackson: Okay. Did you ever have to negotiate with anybody or were most petitions that came in were ones that you were able to grant?

Ms. Bernstein: Most of them I was able to grant. But some of them I had to negotiate. But some of them I would push into saying I really think you can do it. I don't even know whether—I think a couple of them we did deny, after I was satisfied they weren't going to challenge the rule.

Professor Jackson: Now once a rule like this is promulgated, I assume the FTC has some sort of enforcement authority, that is if you found a major manufacturer who was not in compliance, were there enforcement actions that you were aware of following adoption of the rule?

Ms. Bernstein: Not that I was aware of then, but there have been subsequently. And there still are now. We brought some cases last year – I think they also had Section 5 violations as well.

Professor Jackson: What's Section 5?

Ms. Bernstein: Deception and unfairness – general –

Professor Jackson: All right. I wondered if you had a most unusual garment. We may have covered that.

Ms. Bernstein: We have.

Professor Jackson: Here's a more general question. I suppose that there are law and economics people or libertarians who would even today be critical of an initiative like this, the Big Brother objections that you mentioned earlier, and I guess I'm just interested in your response after so many years, both earlier in your career and now, in the field of consumer

protection to claims that either the market would take care of it or that the cost that you end up imposing on the garment industry which then get passed on to the consumers really actually don't confer benefit.

Ms. Bernstein: I guess part of my response, and we still hear those things today—now mind you the commission does almost no rule-making now, unless it is directed by statute, and the reason is that in the Perchuk era, which occurred in the Carter administration, Mike Perchuk became the chairman, and it became a very aggressive regulatory agency, which it really wasn't in the '70s. It was aggressive, but not in the way it became. And the agency's existence was at risk in that period.

Professor Jackson: Was that the lemon rule?

Ms. Bernstein: Yes. It was called the national—in the *Washington Post* because of the so-called kid rule, which never passed. The Congress then moved because there was a consensus about the FTC had moved. It was not even such a big—I don't think anybody knew at the time in the Carter administration what was in fact happening. The country was turning conservative and in part it was because of this so-called over-regulatory zeal, et cetera. Congress passed the Magnuson-Moss Act, which authorized rule-making at the FTC but also imposed very heavy procedural requirements. It's a difficult, hybrid rule-making procedure, so it's just slightly less than formal rule-making, formal hearings, right to cross-examine, and so forth. After that in the whole decade of the '80s, I don't think the commission issued a single rule.

Professor Jackson: Do those requirements apply to amendments to existing rules?

Ms. Bernstein: No, they do if the rule was promulgated pursuant to Mag-Moss; if it wasn't—

Professor Jackson: So your care labeling rules can be amended without going

through –

Ms. Bernstein: I think that's right. I'm not absolutely positive of that, Vicki, for this reason. After Mag-Moss was adopted, the commission in the '80s imposed additional procedural requirements that made it even more rigorous than the statute required. The commission's own Rules of Practice. This is just a tidbit on the side. When we first came back here, Bob and I, one of the things that was a priority for him and for me was, like all government agencies, there was this re-inventing government programs which meant you should go back and look at all your old stuff and eliminate what you don't need any more. The commission had started such a project a couple of years before Bob and I looked at it. They hadn't accomplished very much. It was very slow.

Professor Jackson: Is this in the '70s or '90s?

Ms. Bernstein: '90s.

Professor Jackson: '90s okay.

Ms. Bernstein: It started in '92 even though Bob didn't get here till later on. Janet Steiger was still the Chair, but they started some of those initiatives. So Bob and I asked the people to come in and tell us why it took so long and why so little could be done. And they said because in order to eliminate a rule or amend a rule you have to go through Magnuson-Moss procedures, including the encrustations that the commission had imposed on itself. Well it was just the most unbelievable process you ever saw. Bob said to me, "Should we do anything about that?" I said, "I think so." So we took away the crusts, some of them. But now I'm thinking – and what we ended up with, even where you allegedly have to follow the statute, and it is true that courts have said you have to follow the statute, to undo a rule the same way you do. But by that time I had removed the crusts pretty much and given us a lot more ability to proceed. For

example, if you must hold one of those formal hearings, if there are disputed issues of material facts, you can find a lot of ways to make a finding that there are none or one merely disputed issue. And so you eliminate a hearing, or you have to hold one on that one issue. We had moved the ruler and the staff in a more expedited direction, and now we've got a very vigorous program. We have now eliminated, I believe, 50 rules since we've been here. But I think we're going through that same thing with the amendments – that is, there were no disputed issues of material facts.

Professor Jackson: Disputed facts.

Ms. Bernstein: Yes right, disputed issues of material fact, whichever one it is. And so we're going to hold a hearing, but it's not going to be a formal hearing.

Professor Jackson: I tell you what. I need to conclude today because of this unexpected event with my daughter, so we will take up the story at our next meeting.

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

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

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

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

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

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

Ms. Bernstein: Correct.

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

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

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

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

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

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

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

Professor Jackson: Half?

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

'40s. Those were easy ones.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professor Jackson: That's interesting.

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

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

Professor Jackson: You find out about it.

Ms. Bernstein: You find out about it fast.

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

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

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

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

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

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

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

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

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

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

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

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

Professor Jackson: Your gender.

Ms. Bernstein: Right.

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

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

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

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

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

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

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

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

Ms. Bernstein: At EPA?

Professor Jackson: Yes.

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

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

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

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

Professor Jackson: Did he stay in the agency?

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

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

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

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

Professor Jackson: Is that Toni Bickart's husband?

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

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

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

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

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

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

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

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

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

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

Professor Jackson: Was that Bill's idea?

Ms. Bernstein: Yes.

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

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

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

Professor Jackson: Sounds like a great team.

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

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

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

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

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

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

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

Professor Jackson: He was at DOJ then?

Ms. Bernstein: Yeah.

Professor Jackson: In Jim Moorman's division?

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

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

Professor Jackson: Did you not have independent litigating authority?

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

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

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

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

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

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

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

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

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

Professor Jackson: They were more autonomous then?

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

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

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

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

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

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

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

happening at the same time.

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

Professor Jackson: She didn't drive.

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

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

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

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

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

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

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

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

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

Ms. Bernstein: That sounds fine.

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

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

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

Ms. Bernstein: The father of Catharine MacKinnon.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professor Jackson: The RCRA is a more general statute.

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

Professor Jackson: This was finalized after you left?

Ms. Bernstein: Yes.

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

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

Professor Jackson: Oh.

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

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

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

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

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

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

Ms. Bernstein: I doubt it –

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

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

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

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

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

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

FTC, and at EPA as well.

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

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

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

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

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

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

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

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

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

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

Professor Jackson: To elevate the stature of the agency.

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

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

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

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

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

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

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

Professor Jackson: A new administration –

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

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

Ms. Bernstein: Oh yes.

Professor Jackson: I would love to hear about that.

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

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

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

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

controversy.

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

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

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

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

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

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

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

Professor Jackson: Okay. Let me ask –

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

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

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

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

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

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

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

general's opinion taken as established?

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

Professor Jackson: That's fascinating.

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

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

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

Professor Jackson: Time out. HCFA?

Ms. Bernstein: Oh, Health Care Financing Administration.

Professor Jackson: Okay.

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

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

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

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

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

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

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

Professor Jackson: It did?

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

Professor Jackson: Was it all men?

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

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

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

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

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

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

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

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

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

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

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

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

Professor Jackson: Was this an innovation?

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

Professor Jackson: When you were general counsel –

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

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

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

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

Ms. Bernstein: Oh yes, I was. That was a very good brief. Isn't that fun.

Department of Justice. Angus MacBeth, Joan Z. Bernstein, Gerry Gleason, I think he's still there, Jim Moorman, et cetera. Isn't that good? That is good.

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

Ms. Bernstein: Discussions with whom?

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

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

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

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

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

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

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

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

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

Professor Jackson: EPA has an administrative process?

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

Professor Jackson: But he's one.

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

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

Ms. Bernstein: I think probably EPA.

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

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

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

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

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

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

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

Professor Jackson: You're kidding.

Ms. Bernstein: No, there is.

Professor Jackson: I didn't know that.

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

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

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

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

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

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

Ms. Bernstein: What were we scheduled for?

Professor Jackson: Scheduled until 3:30.

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

Professor Jackson: Good.

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

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

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

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

Professor Jackson: This is Bob Wald.

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

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

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

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

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

Professor Jackson: That's wonderful.

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

Professor Jackson: This is now in '95?

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

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

Professor Jackson: That's a wonderful story.

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

Professor Jackson: That's really a lovely thing.

Ms. Bernstein: Right.

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

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

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

Professor Jackson: Very nice. Interesting.

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

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

Ms. Bernstein: Not that I can remember.

Professor Jackson: Okay, we could –

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

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

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

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

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

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

Professor Jackson: This is so interesting to talk about.

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

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

**ORAL HISTORY OF
JOAN Z. BERNSTEIN - SIXTH INTERVIEW
JULY 8, 1999**

Professor Jackson: This is July 8, 1999 and I am interviewing Jodie Bernstein in the continuing series of oral history interviews, and I am going to hand to Jodie right now transcripts, rough draft transcripts, of our meeting of February 11, which I wasn't sure I had given you before, and of our last meeting of May 12 for your review and correction. And I just wanted to say on the tape since I grabbed these as I ran out of the office last night and didn't have time to do a cover letter to you, so we have that record.

Professor Jackson: My notes reflect that in our last discussion we had discussed, concluded, our discussion of your work in three different government agencies, important government agencies in the 1970s, and you had reflected on that. I wanted to ask if you had anything further to add to those reflections since we last talked or whether we should proceed on into the 1980s.

Ms. Bernstein: I think that we probably covered that although just to emphasize the importance of that time for me, this week I talked to, at his request, a *Wall Street Journal* reporter who is focusing on my leadership of the bureau in connection with our role on the Internet in terms of the way we've gone about positioning the commission in terms of the principal agency really that applies existing law to the Internet, which is an interesting theme. Whether he'll ever write the story or not I don't know. But it was his idea and you know how they sort of want to personalize a story rather than institutionalize it, and he asked me about how I felt about coming back to the commission. One of the things I said was because of my experience in the '80s at two other agencies, I felt as if I had much better experience, much better

understanding of how to do this job when I came back because of having been at two other places and had much more experience with the risks of regulatory decision-making than I previously had.

Professor Jackson: In terms of the risks of regulatory decision-making?

Ms. Bernstein: I mean political risks; I'm not talking about risk benefit.

Professor Jackson: Oh okay, I was wondering whether when you talked about risks of regulatory decision-making you were influenced or affected as well by your experience at Waste Management in the '80s at being an in-house general counsel.

Ms. Bernstein: I certainly was because at that point I really had to. It gets deep down into your psyche of how a regulatory decision can affect 60,000 people in a company and your ability to influence its application or lack of the agency's ability to make a decision, which was what I feared was the most troublesome to me. Certainly added to what I consider to be a sort of base of business experience and knowledge that I brought back here.

Professor Jackson: It's an interesting reflection on what is often referred to critically as revolving door but the suggestion that you just make is there is a real benefit to regulators to kind of being on the receiving end.

Ms. Bernstein: I've always believed that, it's more than useful, it's absolutely critical to really understanding what you're doing when you come back into government than if you've never been in the private sector. It makes all the difference in the world to me.

Professor Jackson: That's really quite interesting to me. It makes a lot of sense to me as well. Let me try and bring up to the end of your first prolonged period of government service, which roughly coincided with 1980 election. So I want to get us to the beginning of the 1980s when you were doing, I think you went into private practice at Wald.

Ms. Bernstein: Wald Harkrader.

Professor Jackson: And was that in '81?

Ms. Bernstein: '81, right after the inauguration in, January 1981, the new administration was sworn in, and I think it was January 20th or 21st that we resigned from the government, and I guess the first of February or so I became a partner at Wald, Harkrader & Ross.

Professor Jackson: What was your practice like at Wald?

Ms. Bernstein: Interesting. First, of course, since I hadn't been in practice for such a long time and only very briefly had I been in this kind of practice before, I was frantically concerned and worried that I would not have any business and I would be a total failure because who knew how you develop business. And at that level, when you're a partner, you're expected to develop business. Bob Wald was absolutely wonderful. He said to me, "Look, nobody ever knows where business develops from. The things you think might usually don't develop and totally unexpected things occur and you just can't anticipate it. So just, here's what you should do: just get busy accepting invitations to speak and if there's travel involved where you could go and make sure you visit with old colleagues at the same time, that's the most useful thing to do." And so I started doing that and also, of course, I had accepted the appointment to the Commission on Wartime Relocation and Internment of Civilians, which occurred before the end of the Carter administration. I wasn't yet at the law firm. I was still at HHS, and the Carter administration was making some last-minute appointments that they should have made much before and didn't get around to. There were three appointments that the President had to make, then three from the Senate, and three from the House, which was an unusual arrangement because that meant there would be nine commissioners. And they called me just sort out of the

blue. By that time I knew the people in the personnel office and they were sort of handing out what they thought were interesting appointments to people who had been in their judgment successful appointees of the Carter years.

Professor Jackson: Were you appointed chair? How did you get to be chair?

Ms. Bernstein: I was selected by the commissioners or elected by my commissioners. I was not appointed. I was elected by my colleagues. My theory was, as I said at the Justice Department a few months ago, that they figured the girl would get the work done. And she did. There were eight men, very distinguished colleagues.

Professor Jackson: You wrote a very strong report. Now how long – am I right in thinking that this work got done on a relatively fast track?

Ms. Bernstein: Two years we finished the project.

Professor Jackson: That strikes me as quite fast and intense.

Ms. Bernstein: No one anticipated that we would finish that exercise in two years. I was determined to do so. In fact I remember Senator Inouye saying to me, “You finished, you finished? No one finishes these things so fast, Jodie.” I said, “Senator, I believe this is already 40 years old, that if we don't finish it now, it's not really going to. It really needs to be finished now.”

Professor Jackson: That makes sense as a reason to expedite. Did you have other reasons to try and get it done quickly?

Ms. Bernstein: Just that I always want to finish things that I undertake to do and not have them schlep along. It's one of the things that I share with Bob Pitofsky, who is even less patient in terms of have it done yesterday than I am. But it's one of the things that I just feel that when you undertake – I don't know, it's something inherent – get it done.

Professor Jackson: The political climate that yielded the legislation, was there any change in that in the early '80s or did the political climate remain pretty hospitable?

Ms. Bernstein: Well, I wouldn't say it was very hospitable. In fact, it is my view that the effort that led to the legislation was not to have a commission set up, that was a compromise. It was to have reparations enacted by the Congress. And because of the hostility to the concept of reparations, which was very hostile, that was in every sense a compromise. And I think many in Congress, including the Japanese Americans in Congress, who were really quite uncomfortable about what their role should be here, was that this would be put off for a while. And they wouldn't have to face it. I don't mean to say that they weren't very helpful to me, all three, well there were four actually: Inouye, Matsunaga, were both senators from Hawaii; Bob Matsui and Norm Minetta were congressmen from California. And all four of them were wonderfully helpful to me, wonderfully. To this day Bob and Norm both greet me extremely warmly wherever we meet and make sure I'm included in various things, such as memorials. Now last week or two weeks ago, and it was recently on television, a new documentary film called, I think, "Rabbit in the Moon," or something like that, was just released by a woman film producer, a Japanese-American woman who was 1½ years old when she went to the camp. Her sister, who was co-film producer with her, was somewhat older than that. They produced this documentary about the internment but most particularly on a subject that never would have emerged, I don't think, in the '80s and probably not until now and that is the role of the JACL, the Japanese American Citizens League, which is a mainstream Japanese-American advocacy group that they now accuse of being collaborators with the government. It's very controversial, very. Now that is not the kind of thing that has not happened in other groups, and I'm thinking of my own. Of course, Jewish groups had horrible, horrible relationships at the time of World War II of who was going to speak up, who was going to try to persuade our government, and

others that took the position, which is quite understandable (the same thing went on with Japanese), don't rock the boat, don't make waves. There are plenty of anti-Semites; they will take advantage of it, et cetera. Those kind of conflicts.

Professor Jackson: You could see a little bit in the report, I skimmed it over last night. The period there was the effort to have the voluntary evacuation and I had the sense, I don't know this is spelled out in the report, but I had the sense that some in the Japanese-American community thought it might be a good idea to try to cool things down and you can understand that.

Ms. Bernstein: Oh, absolutely you can understand it.

Professor Jackson: It strikes me as of the reasonable range of reaction that you would get in a situation of rising racism directed at a minority group.

Ms. Bernstein: And indeed this new film focuses on the several people who were resisters and went to jail and who were reviled for years afterwards as traitors to the United States.

Professor Jackson: So this is not or does this include Hirabayashi or –

Ms. Bernstein: It didn't include Hirabayashi. Hirabayashi testified at our hearings. And so did Yasui. I can't remember whether he was alive, the third one was alive or not then. I just can't remember. No there were other resisters I never heard of before. The one was in the state of Washington, one was somewhere else. And I did know, and I think it's in the report, that a number gave up their U.S. citizenship and went to Japan because of the internment.

Professor Jackson: Which may well have been pointed to by advocates of the internment as proof that they were right.

Ms. Bernstein: Afterwards, oh yeah. And we had, you know, God it was so bad, what's his name, one of the principal people in the administration who was a very prominent lawyer (I cannot think of his name, he must be in there somewhere), testified throughout as to the

justification for the internment. I was on the McNeill Leher show with him at the time we issued the report in which he was still justifying, and he was an old man by then.

Professor Jackson: This wouldn't have been Tom Clark because –

Ms. Bernstein: No, no, no. Tom Clark was – I don't know and I should know what his name is – and by that time he was a prominent lawyer and had been the head of a Wall Street law firm, maybe he still is for all I know.

Professor Jackson: I hadn't known until I read in the report about the much more individualized process for dealing with the German Americans and Italian Americans. German Americans mostly it seemed like in the east, where you had something resembling due process and individualized opportunities and proof. And I also hadn't known about the Latin American Japanese and the transfers, that was fascinating, nor about the Aleuts, and I mean there is a part of me that is wondering how politically did the Aleuts get into the legislation because it's such a small group.

Ms. Bernstein: Very simple. Senator Stevens. That's the answer. Principal player on the committee and at the very last minute he said, "I have these Aleuts up there in Alaska, and they tell me that some things happened to them, too. I want them in." The others were saying come on, senator, this was totally different. They had to be moved because of where they were to some military installation. Mind you they had some complaints but not at all the same kind of complaints.

Professor Jackson: No, it seemed that the reason for moving them was the foreign forces were taking over their island, so –

Ms. Bernstein: That is correct. Now did the army leave a mess behind, yes, they left a mess behind. So that when the Aleuts came back, the place was a mess, but the reason was that Senator Stevens insisted upon and Senators Stevens had enough clout that it got in.

Professor Jackson: I'm glad I asked. I'm very glad I asked.

Ms. Bernstein: And then, of course, we had this Aleuts minister, priest, on the commission. He had to be on it.

Professor Jackson: Who was the Aleuts priest? I have a list that I'm showing Jodie now, the list of commissioners in the book copy that I have.

Ms. Bernstein: Right. Ishmael Cromoff, that's who it is, he's an Aleut. W. Marutani was a judge in Philadelphia, and he was obviously the only Japanese American on it. So that was the balance. Cromoff contributed absolutely nothing.

Professor Jackson: This is Ishmael Cromoff.

Ms. Bernstein: Yeah, but he came, and somebody used to come with him, a young Alaska guy had been assigned, I think, from Stevens' office to be sure his views were made known.

Professor Jackson: One question I had for you and I may not have read carefully enough all of the pieces of this wonderful work –

Ms. Bernstein: It is a wonderful work. I'm very proud of it. But I haven't looked at it either for a number of years.

Professor Jackson: My impression, and again this may be that I didn't read all of the pieces carefully enough, is that it was Angus MacBeth, who is a wonderful person (I've known him in other –) and a very good lawyer, pulled together, was it Angus who pulled together most of the report?

Ms. Bernstein: Yes.

Professor Jackson: Okay, the question I had is whether you relied at all on historians. In academic talk there is a big cleavage frequently between historians and, including legal historians, those who were trained and have PhDs in history as well as law, and lawyers who do history. The complaint of the legal historians is that, you know, what lawyers produce is so-called law office

history, which is advocate's history, and so I was wondering whether you involved professional historians in the work or relied primarily on Angus and other lawyers to do the work and what your thinking was about that.

Ms. Bernstein: The legislation allocated nine positions, I believe. And I don't know what the money was, I can't remember what it was, it was obviously quite modest given that you had nine positions, but nine positions was very generous I thought for this kind of an operation. And I think I probably mentioned to you before that I was successful in getting a budget through (this was the Reagan administration). I had to do it two times and both times I got full support. Now mind you, it was very tiny, it was like a million and a half dollars or something like that. I do recall, Vicki, and I want to tell you this just because I think it's a sort of an interesting anecdote that is political. I can't remember what the circumstances were, but it had to do with my getting some kind of approval for an increase in appropriation from the Senate, and I had mistakenly let the time lapse. I did not get up there in time to get it in the bill, whatever it was supposed to be, so I asked the staff what could I do because it wasn't as if they didn't want to, but we just hadn't gotten the paper work up, and they didn't get it done. Whether it had to be in the conference report or something like that. They said the only thing you can do is ask Senator Inouye as a favor to do it for you. So I said, "Okay please make me an appointment with the senator," and they said, "Jodie, you can't work with staff on this, it has to be the Senator," and I said, "I understand." "So you can't send any of your staff, you have to do it." I said, "I got it. I got it." And I had met with him several times and I regularly briefed the members myself. So I went up there and explained to him that it had been my fault, and it was just an oversight, and I was sorry – very briefly. He said, "You know I'll fix it for you, but this means that I have to go on the floor myself." He said that's no big deal, but it is quite a big deal for a senator to go down and write it into whatever you had to write it into himself. So there were these rules you know.

Professor Jackson: In other words he had to do it himself, just like you had to go to him yourself, he had to go and take the formal responsibility.

Ms. Bernstein: He had to go to the floor with the language that I had given him, which was like a paragraph at most, maybe three sentences, something like that, and put it into whatever it had to be put into – senatorial privilege to do this kind of action which could not have been any other way. But it got in, it got fixed, it was done. I thought it was wonderful. I learned so much you know in this process. And it wasn't as if I was really doing anything improper; it was simply an error in my neglect in not getting it done on time. But then in terms of the staffing – so I had these positions, and this is the reason Angus ended up doing what he was doing with this because of this reason. Dan Lungren was my vice chairman, I think I told you that before. Dan Lungren was then a congressman from California. He now just this year lost the governor's election in California, having been attorney general for eight years. He was the only member of Congress that was willing to sit on the commission. That gives you an idea of how controversial this business was at the time.

Professor Jackson: And he dissented on some point.

Ms. Bernstein: Dissented on one point.

Professor Jackson: The significance of the cables right?

Ms. Bernstein: The significance of the cables but more importantly on the \$25,000 payment. But everything else he concurred on. And as I probably mentioned to you before, my going in position, after I talked to a lot of people about what was important, which is something I always do especially if I'm in a relatively new area of what's most important here – how should I proceed in order to do this – and everybody said to “hold your commission together as much as you can, in terms of achieving consensus – that's the most important thing.” I said, “Even if there is only one? Maybe there will be two dissenters.” And they kept saying “as much as you can, be unanimous

at least on the findings, never mind on the remedies, but both if you could.” So I went into it as that as my principal goal. So I went to see Dan, who was very nice but of course was a very busy congressman, although he came to every hearing. He chaired some of the hearings in California because he wanted to, and I said, “That's fine.” I chaired all the rest of them. We did not go to Hawaii even though Senator Matsunaga begged me to come to Hawaii, and the reason for that was political. It just looked bad to take nine people to Hawaii in the winter like some of my colleagues wanted to do. I said, “No, no, we're not doing that. Hawaiians who want to testify can come to California to testify,” and so I made a lot of calls like that, which I was pretty comfortable doing. Anyway I went to see Dan and said, “Now we need to hire a director of the staff or executive director or whatever, and then work with him because I've got a lot of applications for other staff people but I don't want to do that until we have somebody in charge.” He agreed and we both had agreed that it probably should not be a Japanese American, it probably should be somebody else because you could not get agreement from the, you know, whoever there would be. But what happens? He comes back from a trip to California and says, “I know we agreed to that but I found this terrific Japanese-American guy who is just fabulous, and he wants to do it” and so forth. Now I cannot remember his name, but I said okay. I interviewed him, and I said, “Well okay.” Since Dan had to take on this role, I said okay. Now I won't even go into it. He was a complete disaster. He was a total disaster. In the meantime, we did hire staff. I practically did the hiring because he didn't seem to be able to do anything, and in the meantime time was passing. So we hired a few people who I happened to fall across, and I hired some very good people, one of whom was Kate Beardsley, who is now Nancy Buc's partner in a law firm, and she was just returning from raising children, out of the then women's world and had come to see me through – you know the way some women come to see other women – and said, “What should I do? I don't know what to do.” She had a fabulous resume

and all that. I said, “Come to work for me, part-time at the commission. It will give you a chance to get your feet on the ground. You're smart, you can do research, you can write.” She was fabulous. It started her career. That's just an example. Then I had to get rid of this guy.

Professor Jackson: Was the guy a lawyer?

Ms. Bernstein: No, it turned out it was just a political hack that they owed a favor to, the Republicans in California. So I had to fire him. I went up the Hill, and I told each one of them what I was doing and said I'm going to fire him. I didn't say “may I.” They all of course just did what politicians did and said, “Do what you have to do,” meaning if it goes south, it's going to be your problem. I said okay. And luckily he went quietly. He went quietly. Ended up with an appointment in the Reagan administration as the head of – in the VA, but it may be, no it's a separate commission that oversees military ceremonies in government cemeteries. It was a perfect job for him; there was nothing to do there. It was hilarious. In retrospect it was extremely aggravating to me at the time. And then I'm desperate, I'm desperate to find how am I going to get this done. Meantime my good friend Mr. Justice Goldberg and others were pressing and pressing, and we haven't got a schedule, although I had pretty much developed a schedule for hearings. And in the meantime, Bob had given me a couple associates to help me work on some of that part-time, and they loved that; they thought it was great. So I was able to get that kind of help in the interim, and they did a good job, really very good job. You know, they wrote material for me; they got research going so that I could have meetings at least with the commission and not be totally at a loss. Angus and I had worked very, very closely together during my time at EPA, as I probably mentioned. Very closely. We were very good friends, and we really had built a new and really effective relationship between Justice and EPA, the two of us and with Jim Moorman's support. It just changed the way environmental law was getting done. I know I told you it was just in disarray when we got there.

They were fighting with each other all the time. So I considered him. I knew what a good lawyer he was, I liked working with him, and I also knew this – that when he decided to come out of the government, which was about '82 or so, I think, I don't know, '81, he came out at the time when all environmental law seemed to be going away. And he had an awful time getting located in a law firm, and I talked with him several times through that period. It was just one of those awful times in which even a very distinguished person who ordinarily would have a dozen offers was getting nowhere. And so I called up my good friend Dan Margolis, who then had his own boutique anti-trust firm, and he had wanted me to come there to build an environmental practice at the time.

Professor Jackson: Where is Dan Margolis now? Is he at Pattons Boggs? Oh, he's a great guy. I worked with him a task force, gender task force.

Ms. Bernstein: He had been a friend of mine for years, he and his family. In fact, Tuesday night he took Sydney out for dinner for her birthday, and he had us and another good friend. We see them often. So anyway Dan I knew was looking for somebody sort of, and anyway Angus ended up going there. And he didn't have any business yet at all because it was a boutique and trying to get any environmental business then, I mean it was just dead in the water. It was absolutely dead in the water. I was busy thinking how much FTC could I get done. Maybe there wasn't any of that either, so forth. So I thought to myself, Angus is not busy; Angus could do this either part-time or three-quarter time and stay at the law firm. And my other crafty view was: and I think they've got some associates over there that aren't busy either, and he can use them to do some of this as well. And I figured there was nothing wrong with that, and I called Dan and said, "What do you think of this as an idea?" He said, "It sounds good. Sounds good." Angus thought so, too. Anyway the rest is history. Now wasn't that a clever thing to do?

Professor Jackson: Yes, and thinking about it good professional historians are unlikely

to be willing to commit to producing a report on a time frame. It's not –

Ms. Bernstein: You know what, Vicki, this may be my own limitation. It never even occurred to me to try to get an academic. First of all I had a bias that they would never get it done. I had no reason to think that, it just didn't occur to me, and because of the pressure of what I was doing. What I always do look for in people – you know what their capacity is and you know if they can get engaged and you make it possible for them to get the work done. That is what is going to be the best result.

Professor Jackson: As I said I think it is a terrific report but I dabble in projects that overlap with what legal historians do and –

Ms. Bernstein: It is part of what I consider to be my managerial skills that I've developed over the years because that's a real management challenge to organize staff, a whole new organization that has to get up, get running and produce a product in two years.

Professor Bernstein: And hold it together.

Ms. Bernstein: And hold it together.

Professor Jackson: In a setting where the appointment process is political, and –

Ms. Bernstein: Right and I didn't have any obvious influence on that.

Professor Jackson: What was the most challenging? You've told me what was the most important, which was trying to hold consensus. What was the most challenging part of this project?

Ms. Bernstein: What the recommended remedies were going to be was very challenging. In fact, the issue of reparations was still so controversial. That was one area that I didn't know if I was going to have any consensus whatsoever. And I really tried to think through if we really do that, will it just be so divisive that I'll end up with a whole Congress opposed to that except for these four poor Japanese-American guys who will also be torn to smithereens by it. It was

personally very troublesome. And it really, now it doesn't seem so controversial, and I think I told you, I guess it was last year or the year before last, I don't know, Justice finished off the ten-year process of paying out the reparations.

Professor Jackson: I didn't know that.

Ms. Bernstein: A little unit over there that was set up to do that and at the end of the ten years (they were given ten years to pay it out by the legislation that was ultimately enacted), Janet Reno had a ceremony to mark the ten years, and one of the Japanese Americans whom I got to know, a young guy, then ended up working over there. As a result I was invited to participate in the ceremony that Reno had, which was very nice, and I was even invited to speak.

Professor Jackson: That's appropriate, given your leadership of this effort, entirely appropriate. I don't find it hard to understand how that would be very controversial. I think if a proposal were made today as I think some people think it should be, to provide reparations to the families of former slaves, I am quite confident that would be at a minimum highly controversial and contested.

Ms. Bernstein: That was one of the issues in reparations for these folks – what about the slaves? And then people were saying all the civil rights laws and all that are a response to that, to make up for that and so forth. There were arguments like that being made, but that was very troublesome. Those people had been locked up for 200 years in different ways, but they had been locked up and deprived of any rights, people who were born here. So why would you do it here if you didn't do it there. So it was very divisive concept.

Professor Jackson: How did you get consensus on – well Lungren didn't go along with the reparations.

Ms. Bernstein: Lungren didn't go along but we worked and you may recall that one

of the things that we did was we split off the report from the recommendations.

Professor Jackson: The findings from the recommendations, right?

Ms. Bernstein: We decided we would do the findings first, so we really, really worked on getting the findings approved by the commission, and of course they were all were very good about coming to the hearings, all very good about it. They listened, they asked questions. They were really attentive. And of course in terms of opposition to findings, there wasn't very much, there really wasn't very much. Not now. There was at the time you know, there were. We had many, many separate sessions with just me and Angus, not the rest of the staff, that were very useful. And Bob Drinan was great, he was great. They all were. A couple of them were weaker than others. Considering we had Arthur Flemming, who was extremely capable and good; Goldberg was fabulous. I have a lot of funny stories to tell about Goldberg, of course. Some of the others were much weaker, but with their cohesive leadership with me and with Angus who was very effective in working with them and very responsive to them and would draft things for them if they could say "yes, yes, this is what I mean." He was great. He was a fabulous writer anyway. And we did hire a couple of writers. One of them I saw just the other night who was at this movie thing that we saw at the Smithsonian, the screening of this movie; she was there. I don't remember how we found her but I said to Angus at some point, "Listen, we need a professional writer editor. This stuff can't be written in legalese, it's got to be written well." And we had a couple of people who were just plain old researchers. Both Angus and Kate, for example, were the best ones, I remember, were very good writers. But I thought we needed a professional writer/editor, and we got one. And she was terrific. She was just terrific. In fact I remember a very funny episode as we were kind of finalizing the substance, and she was going to do a final edit of the draft report, and it was an executive session of the commission except for Angus. I said, "I'm bringing her because she needs to hear what the

nuances are, what the flavor of these things are.” And Goldberg, “You can't have staff here, you can't have staff here.” I said, “Arthur” (by that time I was calling him Arthur, which was a hilarious story in itself). I said, “She has to be here; she is the one who is going to try to reflect your views. Now she needs to hear it from you. So she's going to sit there and she's going to listen and she's going to take notes, that's it.” By that time I was pretty pushy with him, which you had to be with him.

Professor Jackson: How did you come to be on a first name basis?

Ms. Bernstein: Can I tell you this story? It's really quite funny. It was widely known that everybody was supposed to call him Mr. Justice Goldberg. It was rumored that Mrs. Goldberg was supposed to call him Mr. Justice Goldberg, and so I was calling him Mr. Justice Goldberg, and here I was the chair, and he's calling me Jodie, of course, and it was very uncomfortable. I felt like I just cannot do this because it's not just me personally, it's the chairmanship here, and he's either got to call me chairman or he's got to call me Ms. Bernstein or something if I have to go along with this. So one day we're over, just me and Arthur and Angus and I think one other person maybe, and we were talking about the following (I remember this vividly): For some portion of the Japanese-American group their principal aim was to overturn the Supreme Court decisions that upheld the constitutionality of the internment. We were talking about what we could do to help that happen, and the answer is nothing, basically, basically it's nothing. But we were struggling with that because if there were something that could be even explored it would be something that we should at least debate and consider and maybe have law professors come in to consider it. I said as we were discussing it, admittedly I had done a little bit of research of my own, I said, “Well, Arthur,” no I didn't say “Arthur,” I said, “Well, Mr. Justice, we could perhaps consider a writ of *error coram nobis*,” and his eyes perked up like this – then I said, “I believe that the writ of *error coram nobis* was abolished when the All Writs Act passed in 1948.” And he said to me, “That's very good, Jodie,

very, very good.” I said, “Thank you, Arthur,” and from then on I called him Arthur with no further explanation. He was Arthur, we were all on a first name basis, and I think that is so hilarious because I had gotten to him, I knew what had happened. He considered me just a girl student before that, and at that point he said, “Well I better take her seriously.” And at the end I must say that he, Arthur, was very proud of the report, and when we had our press conference, which attracted a huge amount of attention, there was a big picture of me in the *Washington Post* holding up the report. This was on the findings, not on the recommendations, and they were all coming to the press conference, all nine of them – by that time the issue was who would speak. Well they all thought they should speak, and whoever I had put up to this said, “You know you can’t have nine people speaking at a press conference. One person has to speak, others could potentially answer questions.” So I said I’m the chair, and I’m going to be the speaker. And imagine having them all sit in the back of me having to listen to me, which was horrifying to them I’m sure, at least to some, not to all. So I did that, and I answered almost all the questions. And then they asked, “Are others available to answer questions?” I said, “Yes,” and they had already been introduced, and Arthur answered a couple of questions, but afterwards he said to me, and he said it with all sincerity, he said, “That was a really fabulous job, Jodie, you did a fabulous job.” So coming from him I thought I had achieved some stature with him. He was really a piece of work.

Professor Jackson: That's a terrific story.

Ms. Bernstein: He also did the following, Vicki. When we had what was obviously going to be one of our very last meetings because it was a final, final session, and I had it at the law firm, not at the office, because it was a final session with the commissioners on the remedies, and we were about to put that to bed and were going to release that, and I needed to have them all there, I asked them all to come to lunch at the law firm, and we were going to have our usual cold buffet.

And Arthur got up and left the room – that was at the meeting where he didn't want to have the editor there but he agreed to it. He left the room for a few minutes, went down to my secretary, whom he knew by that time, Betsy, because she had done so much, and said, “Don't you think it would be wonderful if the commission would send flowers to Jodie? She's done such a good job.” Betsy said yes, and he said, “Would you order them?” And Betsy ordered them, and I paid for them, which I thought was hilarious, but it was very nice. They were delivered during the meeting, and I thanked them all cordially.

Professor Jackson: Good intentions. Now after you got the findings out, you have very strong findings, and you held Lungren on almost all the findings, because even when he dissented on the reparations, he said, “I want to emphasize that I'm not,” but how did you get to reparations, once you got the findings.

Ms. Bernstein: Oh Lord, I don't have a very vivid recollection of it. I think because it was so messy I suppose that I really don't, I just don't know. I think we finally just decided Angus and I would write a draft of recommendations and begin to circulate them among them and see what we got back and see what objections we got and see what they would never say. And nobody wanted to say exactly where they were on the money. At first we left out an amount and circulated something that said there will be a money payment or something like that and left out any amount, and when it emerged that everybody but Lungren was going to support a money payment, a reparations payment, then that, now that you ask me, that's about the way we did it. It looked as if we had a very broad consensus for that. Then we took on the question of how much. And that turned out to be fairly arbitrary because –

Professor Jackson: Any amount is going to be.

Ms. Bernstein: That's right. And we wrote in there that no amount really is a

compensation for the loss of liberty, but nonetheless it would be at least helpful. And then we had to discuss the other things, like if the person was dead, would the estate be compensated if children were there or not there, and so forth. And always considering if we did this, how much would that amount to? What would the government have to come up with? And at the time, it was at the time that the government was funding nothing; they were funding nothing. It was the Reagan administration, and they were cracking down on everything, and so was the Congress. Congress couldn't get anything through either. But in the end, my position was "well, let's try to do what we think is the right thing, and the separate issue will be the politics of whether it can be done. Let's see if we can do what we think would be at least a moderately right thing to do here and deal with it that way."

Professor Jackson: What did you decide? Forgive me for not remembering about the children and estates.

Ms. Bernstein: We said it would only be for the person who was incarcerated, who was still living. That was in order to limit what the potential exposure would be. So we did take up the politics of it, but as a subset.

Professor Jackson: Also that occurs to me that distinguishes the case of slavery, so that it may have some practical kind of –

Ms. Bernstein: You're right, it was a very practical kind of thing, and it was pretty controversial among the commissioners as I recall. But those of us, and I was on the practical side, decided that it would be something that we could use in the congressional debate to demonstrate our practicality, if you will, our knowledge that there is a limitation on how much could possibly be available, and why bring the whole thing down by making it so much money that it would be inconceivable.

Professor Jackson: How did it get through Congress during the Reagan years?

Ms. Bernstein: Interesting. It was introduced, it was still a Democratic Congress of course. I don't remember – was the Senate Republican by then? Because we worked mostly on the House side, obviously, since it was the Judiciary Committee and the Appropriations Committee, I can't remember about the Senate. I remember very little about the Senate; I remember quite a bit about the House. And until I went to Illinois, which was '85, I testified about three times, three or four times, so I probably did some before the Senate, and then I came back one year, but it never went anywhere. There would be a hearing, and it would die, and there would be another hearing, and it would die. It didn't go anywhere. It had to keep being re-introduced, and it was only when Barney Frank became the chair of whatever committee it was in the House that we had a hearing, and then he began to move the bill through the committee, through the House. It was not because of the Japanese Americans. They did testify, but they never took a leadership role getting the bill through, not in the House. Now neither one of them were on the right committees, but I think they were just as happy not to be.

Professor Jackson: It's an uncomfortable situation.

Ms. Bernstein: Extremely. Not only politically but personally.

Professor Jackson: So it was Barney Frank who really took it and moved it.

Ms. Bernstein: Not unusual, of course, but he really moved it.

Professor Jackson: It's really a very, very interesting story.

Ms. Bernstein: It's interesting also because one of the other factors was that it was said that the reason I had no difficulty getting the money through the OMB and the Reagan White House was that the Japanese Americans at that time in California were largely Republicans, and that Reagan knew them, and they had been supportive of his governor's campaign, and they didn't care

about affirmative action because they were doing fine in Berkeley and all that, or so it was said. I thought initially, “How am I ever going to get this through OMB? They are going to think this is nuts, this civil rights thing.” No problem. I had no problem. So it was obviously political from their point of view, and it was of course didley-squat money, so it wasn't a big deal.

Professor Jackson: Fascinating. Now the last question I noted to ask about this is whether –

Ms. Bernstein: They never even fussed about my being the chairman. I suppose they could have asked for my resignation. You served at the pleasure of the President. I did because we were appointed by President Carter, but by that time, – I mean I suppose they could have. I guess it would have been awkward because we had already been sworn in and all that. They probably would have had to ask for all three of us, and I guess they didn't think it was worth the trouble.

Professor Jackson: That makes sense. I wonder to what extent the work of your commission bears resemblances to the work of the truth and reconciliation commission that have developed in the last ten years in places like South Africa. I don't know if you ever reflected on this, but they are sort of a controversial approach to justice for past wrongs. Now in this case I suppose it's less controversial because the courts had been exhausted.

Ms. Bernstein: The courts really had been exhausted.

Professor Jackson: So in that sense –

Ms. Bernstein: Although there were people in the community, like Bill Hohri and others that I remember, that were trying to get a class action suit. And Ben Zelenko, who is now a partner of Bob Wald (that's how I first met him), was representing them in trying to launch some kind of class action suit. I think they did.

Professor Jackson: Who would they have sued?

Ms. Bernstein: The government. And they did.

Professor Jackson: They did? Was there a waiver of immunity?

Ms. Bernstein: No. I thought it was a ridiculous expenditure of funds that they paid for a long time. I mean they raised money and paid legal fees and stuff, but you know, I really couldn't take any position on that. If it had come to me, I wouldn't have taken it.

Professor Jackson: Now wait a second. Let me play this back. You were also a partner of Bob Wald.

Ms. Bernstein: Ben was not a partner at that time. He is now.

Professor Jackson: Okay. Let me ask how much of your time for those two years was spent on this commission?

Ms. Bernstein: Well let me think. Oh gosh, it's hard to know, Vicki. I suppose half-time at the beginning at least.

Professor Jackson: Did your private practice develop at this time in regulatory fields?

Ms. Bernstein: Yes, in fact, it began, with my recollection, I had a couple of little clients of EPA. Things like some guy in New Jersey who, what was he? Oh, he had like a half a dozen trucks that were asbestos removal vehicles; he was in the asbestos removal business. I don't remember his name or anything. He called and said, "The government took my trucks." And I said, "They what?" So I represented him getting his trucks back. That was like one of the first things I had to do over Yom Kippur, or something like that, and you know, that kind of thing which I was totally unaccustomed to, but I did it. First of all there was no authorization anywhere for them to take the trucks. They could do a lot of other things, but they could not take the trucks. So I made them give the trucks back. And then my first really major client, which became a client who I did a lot of work for and I loved working for and I have still have relationships with people there, was Pfizer in

New York. How did that come about? Principally in the following way, which I think is a wonderful little vignette about women's networks. A woman whose name is Carol Emerling had been the regional director of the Cleveland Regional Office of FTC in the '70s, and she and I became friends and colleagues. By that time she was the regional director, later in L.A., of the FTC. I was still here, I believe, when she was there, and we were in regular contact, and I went to California often. She'd cook up things for me to do out there, and I would work with both offices, and anyway we were good friends. And one day I had a call from, as I recall, Bob Pitofsky, who was by then at Arnold and Porter. He said, "Do you know anybody who would be interested in going to American Home Products in New York to be the corporate secretary? They want to hire a woman. They need a woman officer." Arnold and Porter represented American Home, and they didn't have anybody to recommend, so Bob said, "I'll call Jodie, she knows." And so I said, "I'm going to get on this, that could be a really good job." And for no particular reason, except I knew Carol was in a domestic situation that she wasn't crazy about and was probably going to be divorced, I called her up and said, "How would you like to go to New York and be the corporate secretary for American Home Products?" And she said, "Basically sounds good to me." She went there and just retired from there after a brilliant career at American Home Products. She was just here two weeks ago. We're still friends. So when I go into practice, she says, "I owe you big time. What can I do?" I said, "You got any business from American Home Products?" She said, "I can't do that because the general counsel does that and he likes Arnold and Porter so I can't get anything done from here." I said, "Well, okay. So you'll think of something else." I didn't even, and then one day she calls and says, "Pfizer is having an in-house legal counsel conference next week, and they would like to have a lunch speaker who could talk about what's happening in Washington in terms of environmental law, other regulatory issues, and so forth who really knows what the scoop is." She said, "To tell you the truth

it was sort of my idea that I thought that would be useful for them, and I told their general counsel that. And I think you would be great doing that.” I said, “Fine, I can do that.” And she said, “His name is Frank Duckworth, he's the general counsel, he's going to call you.” So he called me. I went up there, I gave my speech, which was excellent, they all liked it, and I thought that would be the end of it. At the end of the day, he asked me to discuss something with him. We have a matter that involves such and such and such, and I wondered if you would be free to handle it for us. We were going to use so and so, but I think we'll use you. And it was a terrific opportunity, which I handled with them very well. From then on I did nearly all of their environmental work. I got to know their environmental lawyers, one of whom had been at EPA with me. Mike Richardson had been at EPA with me, and in fact I had recommended him to Pfizer. So he was already happy to have me doing, and they were more and more involved. I didn't do their Food and Drug work. But I did their environmental work, and we had good relationships with the lawyers in their office, both “Bo” Hune and Mike. There were several things that I did for them and got very good results, and I was very happy doing that. In the meantime there were other things that were coming through the office. I represented Bristol-Myers on something, and they had, I don't know, something and said “well our ordinary lawyers can't do that, but Jodie knows something about how you get approval from the National Heart Institute” and things like that. I represented a French drug company. Somebody called up and said this French drug company wants you to do something. I said, “I don't know anything about French drugs,” and they said, “Well that isn't necessary,” blah, blah, you know, that kind of thing. And I got Joel Hoffman, who was a superb food and drug lawyer in the office, and I would take the lead role, you know, try to figure out what the company's problem was and the technical parts. So it was developing very nicely. I was quite happy.

Professor Jackson: I have notes here – Vietnam vets Agent Orange task force.

Ms. Bernstein: Oh yeah, but that was when I was at HHS though.

Professor Jackson: Oh, okay, that was still while you were in the government.

Ms. Bernstein: But I did some work for them afterwards.

Professor Jackson: Can we do that part of the story? I'm sorry to have gotten us out of order.

Ms. Bernstein: Oh no, that's all right. At HHS sometime – [END OF SIDE 1 OF TAPE]

Professor Jackson: Okay I think we're on side two of the first tape from our interview July 8 with Jodie Bernstein, that's July 8, 1999, and at the end of the last side I had asked Jodie about her involvement in Vietnam vets and the Agent Orange task force, and she had informed me that she had begun her involvement in this project while she was at HHS, and we're doing to take up the discussion now.

Ms. Bernstein: Okay. You, I expect, remember that there arose a very, very serious contentious issue as to what was the effect of spraying of Agent Orange in Vietnam. Agent Orange was sprayed as a defoliant in the Vietnam War, and it was 1978-79 that it became a major issue, that is the impact of that spraying in terms of the health of Vietnam veterans. The Veterans Administration that, in my judgment, has over the years been more or less stupid, was being extremely stupid, and they were so unresponsive and so unbelievably obtuse that veterans were literally marching on the VA. I mean there were times when you couldn't get in and out of the VA because of the marches. They were in chaos, they were absolutely in chaos. And, of course, the administrator of the VA, who is now in the Senate, never mind, was totally unable to deal with it. But he was a seriously injured Vietnam veteran, so there was no removing him. There was nobody in the organization that had two nickels worth of sense, and the President, of course, was faced with this. My God we cannot have this. It was in the paper and the news every night. And nobody was

doing anything about it. It was just a political disaster, and every other kind of disaster. Meantime, of course, the Vietnam veterans still did not have the kind of acceptance that I think they have now. I mean there was still this incredible conflict blaming the veterans for what happened in the war, which was horrendous and terrible, but there was such a different climate I think it's worth just making that point. So Secretary Harris goes over to a Cabinet meeting where the President says, "We've got to do something about this. This is terrible. The VA is in chaos. Somebody has got to take this over and do something." So he said to Secretary Harris, "You're my Secretary for Health, do something. Set up a task force, intergovernmental task force to address this and get it settled down. Get it off the front pages." So she comes back and says, "We have this job to do, and it's going to be an intergovernmental task force to address this. See what studies need to be made, try to get the VA to move responsibly, try to deal with the Congress" that was screaming its head off, et cetera. "Jodie, I want you to do this." I say, "Fine, no problem." I had a huge staff, huge. I mean there were a thousand people in the office of general counsel at HHS, but that was because there were lawyers in Food and Drug and there were lawyers in Social Security, and they all reported to me, the heads did.

Professor Jackson: It was still HEW then?

Ms. Bernstein: When we started it was HEW, but we transferred out the education part to become the Department of Education. That gives me another credential you must know about, Vicki. I'm one of the few people in government who was charged with transitioning out to another agency a portion of jurisdiction. When we were here in the '70s, the Consumer Product Safety Commission was set up, and we sent them the flammable fabrics jurisdiction, and I think they took the tobacco laboratory, but I'm not sure of that. And then we got to HHS – I was an old hand. We had to send away Education to the new Secretary Shirley Hufstedler, who was the first Secretary of Education. And Betsy Levin, who you probably know, was its general counsel.

Professor Jackson: Oh I didn't remember that.

Ms. Bernstein: She was the general counsel. I remember Pat saying, "You know, Jodie, Betsy," she already knew Betsy, I didn't yet, she said, "You know she's an academic, she's not going to have your practical experience. Help her out. Don't disadvantage her." I said, "I'll help her out anyway." So we did that.

Professor Jackson: Intergovernmental task force on vets, did you continue your involvement after –

Ms. Bernstein: Yes, let me just finish up with that. The first thing occurred after Harris announced that I was going to chair this thing, and I hired a guy to work for me who had been at HUD with her, Les Platt, who was fabulous, and he headed for me in my office. He was like deputy general counsel for doing that work, but the point I was going to make was the entire health establishment within the department were up in arms that a lawyer was going to head this task force on health effects of Agent Orange. They were up in arms. But by the time we finished, they agreed that it really didn't require anybody who was a scientist to run this task force. We needed them to be on it, and I made very, very good friends with people who subsequently ended up being at EPA and other places who were career government scientists and stuff. It was a very successful effort. We really had a very big success with that. We got done what needed to get done. We brought it down. I was, of course, saying to the administration "Why don't we just cover these illnesses? Why doesn't the VA just say we're going to take care of these boys whether we can demonstrate that the liver cancer came from the Agent Orange or not? In the end you're going to do it. In the end you're going to do it." "You mean without showing it was service-connected or whatever the existing criteria was?" I said, "It's foolishness." I said that at a hearing, at a Senate hearing, and Simpson said to me, "You mean just not spend the millions of dollars on the studies and just take care of them?" I said,

“Isn't that what the answer is, Senator?” And he said, “Well, yes.”

Professor Jackson: Were you in the administration at that time?

Ms. Bernstein: Yeah.

Professor Jackson: Was there in place at the time a system of having to clear testimony?

Ms. Bernstein: Yes.

Professor Jackson: And your testimony to that effect had been cleared?

Ms. Bernstein: No. I was just in questions and answers. I think the administration was just about over then. But I do know that every other witness at that was from the Defense Department or the Air Force. The Air Force had a big study going on because they were the ones who dumped the material, and that of course was controversial also because the Air Force was accused of conflict of interest. So what we did with that was establish an advisory board with outside scientists on it. And that settled that all down.

Professor Jackson: What ended up happening to the vets?

Ms. Bernstein: We took care of them.

Professor Jackson: The litigation was, I'm trying to remember, there was a big class action before Judge Weinstein in the Eastern District of New York.

Ms. Bernstein: And he screwed it up to a fare thee well, and it went on for years.

Professor Jackson: Very controversial I was going to say.

Ms. Bernstein: Right, same thing. I didn't follow it that closely. Then afterwards, but I think we did do a very good job in terms of what we could do at the time. And then when I left the government, and you know, I can't remember this, but by this time – you know who Bobby Muller is, I'm sure. No? He's the head of the Vietnam Veterans of America. He has been the head of the Vietnam Veterans; he's in a wheelchair. He's very articulate. The reason I thought you might

remember him because you remember just recently or in the last year or so the woman who won the Nobel Prize for leading the –

Professor Jackson: Anti-landmine effort.

Ms. Bernstein: That was really Bobby's, and he was on the television. He hired her to be the advocate for that internationally, and she's some kind of weird person who lives in a cabin by herself or something, I don't know. But Bobby was on the TV a lot and really should have won the prize. He was the creator of the Agent Orange political movement, which was a very small organization then. I mean there were like six people, and they never had any money; it was like a shoestring organization then. It was so unpopular, and the American Legion was horrible. It was too controversial, so they hardly reached out.

Professor Jackson: Was Muller head of, there are different groups with Vietnam veterans?

Ms. Bernstein: Yes, there's one called Paralyzed Veterans of America, that's not Muller's. They were also teeny weeny and have become bigger and more established now. Bobby was the Vietnam Veterans of America. I think it's become a lot larger and had a huge success with the landmine initiative, and of course the veterans are older – they are like in the Senate and things like that.

Professor Jackson: And running for President.

Ms. Bernstein: Running for President. I did some stuff for Bobby after I was in the law firm. I don't know exactly what I did, and I really can't remember. Whether it was legislation, I believe I testified before Simpson's committee after I was out of the government on behalf of the VVA. I wrote the testimony for them. I did that pro bono. Simpson was head of the veterans committee. I guess the Senate had become Republican by then because he was the chairman.

Professor Jackson: So that was a smaller scale involvement.

Ms. Bernstein: Very small, certainly compared to the Japanese thing it was, although I spent a lot of time when I was in the government, but not after I got on the outside.

Professor Jackson: Now I have another note of the early '80s, I think this is right, my research assistant found a newspaper article that listed you as one of three or four people wanted to be president of NPR. Does that ring a bell, National Public Radio?

Ms. Bernstein: I think my name was mentioned.

Professor Jackson: Among the top candidates for the job, the *Washington Post* reported, William Sheehan, Douglas Bennett, Tom Quinn, Lester Bernstein, Joan Bernstein, a Washington lawyer and former general counsel at Department of HHS and EPA.

Ms. Bernstein: Oh yes, I had forgotten all about that. Obviously didn't go very far. No, no, I didn't run any campaign or anything. But I was, well I think I've told you this before, I think I was doing well in the practice. I never really liked it as much as I liked other kinds of work. I didn't like the uncertainty of well I'll finish with this matter and then what, then I have to figure out something else to do, over and over again. And also there were a lot of tensions within the law firm, a lot of very, very difficult tensions in the law firm, and I had the feeling at some point I was going to have to leave and the reason was that I thought that the law firm was going to go down the tubes at some point, and it did. But I thought that before that it would split in two and that my loyalties were then and ever to Bob Wald. But Bob Wald's part of the practice was not my part of the practice, and I would not go with the other side of the practice for personal reasons. So it looked to me as if – and I must say they all give me credit for seeing the handwriting on the wall a long time before anybody else did, but to me it was a Greek tragedy playing out. I knew it was going to happen. And I didn't particularly want to go to another law firm because of my loyalty to Bob although if I had to, I would.

And then we get to my relationship with Waste Management and how that came about.

Professor Jackson: How did your relationship with Waste Management come about?

Ms. Bernstein: Well in 1982, I believe, it was right after we finished the Japanese stuff, right afterwards I received a call from a lawyer in Chicago whose name is Joe Karaganis. Karaganis was a sort of public interest lawyer, sort of. He had his own law firm by now, but he had worked for a long time as special counsel to the Illinois A.G. for environmental pursuits and that's how I had gotten to know him when I was at EPA. He brought some lawsuit on behalf of Illinois against Milwaukee, and we had been involved with what position the government would take. Good lawyer. Had been in the A.G.'s office and left and started his own firm but still did some special work for the A.G. He wasn't a personal friend, but I knew him. I get a call from him one day saying Waste Management is – I did know about them but not very much; it was quite obscure until this scandal period of the '80s – they are going to need new counsel. Never had Washington counsel, and they are anticipating there is going to be some reason to have counsel, and they are expecting some difficulties. And he said I am probably going to do some independent work for them, investigative work. But I'm not going to be defense counsel. They want Washington counsel for that. Would you think about doing it? You know, I left out a major client – it just made me think of it. I got a similar call from Ira Millstein, this is before. I guess I'm getting mixed up on my timing. This turned out to be a big client, maybe it was afterwards. Millstein from New York who was a big partner as you know in Weil, Gotshal & Manges, calls up and says, "Clear your conflicts." I said, "For what?" "Westinghouse is possibly going to hire you on a huge case they have in Indiana." So I said okay, cleared, and eventually I did represent Westinghouse in a major, major case which I settled for them. The case was brought by U.S. EPA, Indiana, Bloomington, Indiana: the state, the city, and an environmental group against Westinghouse. I settled that case for them brilliantly. I did. That was

really a brilliant job for them. I don't remember what the timing was of that. But this case, Joe Karaganis calls up and says, "Waste Management is going to hire somebody. Would you be available?" And I look, clear, and I said, "I guess so," after we did and so forth. "What do they have in mind?" "Well I can't tell you what they have in mind," but the next thing I know there is a big story in the *New York Times* on the front page, an investigative reporter story about this company called Waste Management that has incredible, terrible, serious environmental problems across the country. There were going to be a series of two articles, and the first article was devastating. Stock began to plummet, and then it becomes an emergency. I can't remember about the timing, but the first thing that Joe said was, and in the meantime I have had not talked with anybody at the company, Joe is doing this. So Joe had been hired to investigate. They knew this was going to happen, I guess, or they had someone who knew it was. And so he was still advising them on who should be their defense counsel. And then he said, "Here's what they've decided. They want a really big Washington name, really big, to do their principal shmooze work in Washington and then somebody who knows how to do environmental to do the work in different law firms. They want Joe Califano to represent them as the big name, and you to be the real lawyer to do their environmental work." I said to Joe, "That is not going to work. Joe Califano has the biggest ego in the world and a big law firm, and no big law firm is going to let him do that by himself and not use their associates and stuff and let me do the real legal work. That's not going to work." "Well, that's what they want to do. Are you available?" I said, "I'll go along with this gag for a while, but I'll tell you it's not going to be effective." But it hasn't happened yet they haven't retained anybody yet.

Professor Jackson: Was Califano at Williams and Connolly at this time?

Ms. Bernstein: No, Califano was by that time – first they had Williams Connolly, he was at Williams Connolly first. Then when they first came out of government (Califano, Stan Ross,

and Ben Heineman), it was Califano, Ross & Heineman; they started a law firm. Then he went to some New York law firm, Dewey Ballentine, maybe, I don't remember which one, but then when that ended, he went there. It was supposed to be a big rainmaker, which of course I guess he was. As luck would have it, Califano could not do it. He had a conflict. Okay, so then they called me back: "Okay, you're going to be the lead Washington big person. What other law firm could help you out?" I said, "You know, I don't really need another law firm to help me out. We've got plenty of people here." "Well it's not that, they want some other person, quick as a flash." I say, "Well, Angus is at a different law firm." Angus says that you can tell them he's been at Justice, so he and I had different experience. He's got even some criminal experience, which hopefully to God this won't be criminal, but if it is, I knew I could work with Angus. Nutty as it was. I knew I could do that. So I say me and Angus.

Professor Jackson: Was Angus still at the Margolis firm?

Ms. Bernstein: Yes. He was back there. We both had finished the Japanese already. So Joe says, Oh, good idea," and calls back and says, this is Friday, "Come to Chicago Monday morning." "Okay. What we are going to do there?" "Well the company wants to really get to know you, meet you and so forth because the second article is going to come out any minute." So I call Angus and say "We're going to Chicago Monday morning. I have no idea of any of this, but we'll go." So we go in the plane, and the second article is on the front page of the *Times* with more allegations about every place in the country, and I said to Angus, "Well we've got our work cut out for us." We had never heard of any of these facilities. The first thing we did was read all we could in the *Times* about these places, and there were two things: they had both solid waste facilities around the country that was the base of their business and a newer operation, the Chemical Waste Management, was a wholly-owned subsidiary that operated within the company that had hazardous

waste landfills around the country. The article stated they were all permitted and in terrible trouble of being not in compliance.

Professor Jackson: Was Waste Management a publicly owned company?

Ms. Bernstein: Yes, publicly traded. It had been since 1969. Stock had gone from '69 on; it had gone up like this. And then came the second article and went down like this. This was such an extraordinary event. I'm telling you. So Angus and I go in the cab and we go to the headquarters in Oakbrook, Illinois, where we are ushered into a big conference room, and we meet the CEO and president of the company and the head of government and public affairs, et cetera. It's all laid out there for us. And they say we have to have a press conference. The general counsel, Steve Bergeson, said you've got to help us. And Joe Karaganis is there with his helper, too. And he's going to be principal investigator. So I say, "Well that's good. I think your CEO has to be the principal spokesperson, and he has to be able to say what we know about these allegations, if we know anything. And he has to say what steps the company is going to take in order to rectify the situation, and you have to have that in writing – his statement as well as some description of what we know, if we know anything about these allegations. You can't let them go unresponded to. We have to do it by tomorrow morning. Then we will sit here." One of the most frustrating things of all was Joe, who knew a lot more about these sites than we did at that point because he had already been working on them for a couple of weeks, elicited terrific information from the people there to say what's happening at that site, et cetera, et cetera. And he asked them questions; he was able to elicit the information. Joe Karaganis, who ended up being the most frustrated partner in lots of ways, he never could write anything down. He can speak brilliantly. One of the best advocates, he's the best litigator I've ever seen in terms of his skill with putting facts together and organizing them, and he never could write anything down. It was just awful to get a written product out of him. Angus and I

realized it about 11:30 that there was nothing on paper yet. It was maybe a little earlier than that. I said to the CEO, "Do you have a secretary that can take dictation and type up material here?" He said, "No, but I'll call her from home and I'll have her come in." I said, "Would you do that right away? And then would you get us something to eat?" since Angus and I had had nothing to eat since morning. We had no lunch. And about eight or nine o'clock we dictated to her what became the papers that were distributed the next day. They had a Washington office here that knew nothing about any of this, and that guy called me the next day and said, "That's the first time that anybody had put on paper what any response is to any of this." This was just so unbelievable. They said, "Well you know the press conference is going to be tomorrow morning." I said, "Where is going to be?" "Oh we have to get a place." "Did you call the press? Did anybody call the press to let them know?" "Oh, we have to call the press." They had never done any of these things before, never.

Professor Jackson: They did not have a public relations firm working for them.

Ms. Bernstein: Oh no.

Professor Jackson: So you were doing that for them. You were figuring out that piece.

Ms. Bernstein: Yes, figured out that piece. They had a press guy who was hilarious.

I mean he was one guy who dealt with all the press from all over the country by himself, and he was pretty good. He had been a former reporter, and he considered himself sort of an old time reporter, and he was sarcastic with reporters and stuff, things like that. However, he was helpful to me because I could say to him, listen do this, and he would do that and so forth. I ended up for weeks out there afterwards talking to reporters. I can remember saying to the CEO, "You know you're paying me. You shouldn't have to pay that amount of money for me to talk to these reporters from Wichita, and I know that's important." He said, "I haven't got anybody else. Just do it till we get through it." So I did it. And Angus and I worked together. We went to bed at about 5:30 in the

morning. Neither of us had planned to stay over. So they took us to a hotel or a motel there, and we slept for about an hour and put on our same old clothes and went to the press conference. Then I went to New York with them two days later. I came back to Washington and then met them in New York because we had a meeting with the analyst in New York to try to settle that down. And we did that. And from then, let's see, I represented them for two years and basically put together teams of lawyers from Wald, to the extent we needed other people, and we got organized, getting them to hire some other people to handle the PR. A very good friend of mine from EPA was recruited to be the vice president for environmental compliance and so forth at Chem Waste, which was the biggest problem. Walt Barber who had been a good colleague at EPA, very, very smart and very effective engineer, he came into Chem Waste. I handled all of that for them and also tried to handle for them their misbeguided – well I didn't know it was at the time – they bought two ships in Europe called the *Vulcanus I* and *II*, which had operated successfully for ten years in Europe, destroying liquid hazardous wastes. And the job was to get them a permit here, which we never did. The opposition was so that EPA finally called me up and said, “We're not going to do it.” I said, “What are your grounds for not doing it?” “We don't have any, Jodie, it's just too controversial.”

Professor Jackson: The objection was that they were dangerous in what they were doing.

Ms. Bernstein: Yes, there was a ten-year history in Europe of doing this without any harm.

Professor Jackson: One would have thought that environmental activists would have been interested in technologies for clean up.

Ms. Bernstein: They opposed everything in connection with hazardous waste. It's not their job to tell you how to do it. And at least in those years EPA was nearly totally destroyed by the scandals, and that left a residue of being able to oppose everything. In fact, Vicki, when I heard

what Waste Management was planning to do to bring their waste to Virginia – have you followed that controversy at all?

Professor Jackson: I guess I vaguely heard about it but I haven't followed it.

Ms. Bernstein: They were going to bring it down in ships from New York on barges from New York, and they were building wharves to take it into gigantic landfills that are already permitted in Virginia. Virginia has already passed legislation to ban them from using those docks to bring in New York waste.

Professor Jackson: I guess I remember Giuliani's comments.

Ms. Bernstein: They should be thrilled to take our garbage; we're the culture capital of the United States. These wars go on ad infinitum, but it's very different now than it was then. I earned every nickel I made from that company because they simply hadn't anticipated any of this. They didn't have any community support.

Professor Jackson: Forgive me for not knowing, it is not my field and I was having babies at the time, were there criminal prosecutions that resulted from the –

Ms. Bernstein: Very interesting, very interesting. There were criminal investigations of about three principal operators in Chem Waste, not of the parent company, but there were of Chem Waste. The CEO of Waste asked me to handle one of them because he was one of the founders of the company. There had been four or five Dutch families that were the founders of the company and Dean Buntrock, who was the chairman until just recently, said, "Larry Beck trusts you more than he trusts Angus" (for the most part I had Angus if they were going to criminal, I would have him handle them). We divided it up so we both had our hands full with everything, but we coordinated it very well and tried to coordinate with Joe as well. And we ended up, I think I ended up writing stuff for Joe because he never got it written up. All three of us presented to the board of directors at the end of

the first year. We reported every year but at the first time we both gave extensive reports to the board. And I was asked with Angus to give a separate report to the CEO and the president about what other steps needed to be taken that we consider management steps, and we did that as well. So I did handle Beck, but actually nobody was indicted. There were never any criminal charges, but there were criminal investigations. Now, Vicki, I would say that if it were today given where the environmental enforcement effort has gone, it's gone as others, everything has been so criminalized, that it would have been, I'm sure. And my belief is that they were civil violations. I always believed that, and there was never any proof that there could have been any intention, but by now you don't even need any intent, as you know, to have criminal charges, so they were lucky it happened then and not now. In fact the three top people are still under investigation now in connection with accounting practices recently, but it has nothing to do with environmental compliance, I'm proud to say. It had to do with accounting irregularities.

Professor Jackson: And that sounds like you did a huge amount of work for them and –

Ms. Bernstein: For three years, and then when I was at the point where I was thinking to myself, I'm at the crossroads, I've got to go some place, I've got to get out of here. I mean I was terribly concerned about how to handle my personal relationships and things, and so before I called any friends in any other law firms, I thought I better see if any of these clients will come with me or what the constraints are or what I can do. So Bergeson and I, he was the general counsel of the company, were pretty good friends by then. He was also very pleased with the work we had been able to do to get the things under control, and he knew pretty much that the top management of the company had quite a lot of confidence in us. So I called him up and said, "Listen, I'm just thinking of making a change, and I wondered if you had any view." I was trying to do it in a vague way and stuff. He said, "Would you think of coming with us?" I had never thought of that before, never. I

guess I had in mind a law firm because that was all I ever— except for these other long shot kind of things. I said yes I would, and he said, “Right away.” He said, “You mean in Washington or here?” And I had spent a lot of time out there. I also had a very firm notion that I got from experiencing both the Pfizer corporate office and the Pfizer Washington office, the Westinghouse corporate office and the Westinghouse Washington and the Waste corporate office and the Waste Washington office, and I said because of that, I would only consider the corporate office. I knew that I could not do what Washington offices have to do very happily. I could do it but an awful lot of it is trying to find out who’s killing you at the corporate office. And are they cutting you off. And do you really know what's happening. And so forth. And I always hated that sort of thing. Then I didn't want to do that. I didn't have any problem with it, I just didn't want to do it. So he said, “Well come out Friday. Frank and I will have lunch with you and we'll talk about it.” But he didn't tell me what he told me subsequently was that he ran into the CEO and said, “I think Jodie is available. How about if we make her general counsel at Chem Waste?” They had one guy there who was a total disaster, and Chem Waste was still having problems, and the relationships with the government and with the states were so terrible that nothing could get done. If you needed a permit, they wouldn't talk to anybody, it was just awful. He didn't tell me about it at the time so I say to my husband, “I think I just accepted a job in Chicago,” and he said, “Okay. Well, what is it?” I said, “I don't know exactly, but I'm going to Chicago Friday.” So I went and had lunch with them at a place, so the guy who was general counsel at Chem Waste wouldn't see us because nobody had told him, of course, that he was going to be replaced. That's the way things get done, as you know, by men. We went to lunch. Frank Kron was his good friend, deputy general counsel, whom I also liked and had a great deal of confidence in because I had worked with him too. And I knew all these people. It wasn't like, I knew what they were fundamentally. There were still allegations that the company was dominated

by the mafia. I knew that wasn't true. Nobody, not many people, did but I did. I had been out there for almost three years. I mean I knew what I was dealing with. I knew what kind of people they were at that point, and I had had tremendous support when I said, "You've got to remove these four people at these facilities because they don't know shit from shineola, they never will." Phil Rooney said to me, "You've got tremendous insight." I said, "Well, you know it's partly that I have been at that facility for two weeks, and I can see what kind of chaos it is in. You've got to remove the manager and get a different guy in there." And stuff like that. So they knew me, I knew them. So they offered me that job, and we talked about money and things like that at that very lunch and that I would have full authority and full support for building a legal staff because they didn't have one with my ability to pick the people and direct contact to the CEO if I needed it – the CEO of the parent because I already knew that the CEO of the parent made all the decisions anyway. And the president of Chem Waste could do some things but couldn't do everything. And he had already talked to them and said yeah do it. And so I said, "Okay, I'm going to do it." I didn't tell you about the big flap I had within Waste Management, I mean within Wald, about this at an earlier time and I'm not going to because it's too nasty and I don't want to go into it – doesn't have to do with Bob, it has to do with other people there.

Professor Jackson: Was it concerned with the representation of the company based on these mafia concerns or was it based on concrete conflict?

Ms. Bernstein: It was based on the fact that they didn't want me to get that big piece of business.

Professor Jackson: One of those very pleasant law firm situations.

Ms. Bernstein: Yes. Jodie will get control of the environmental practice this way. Although they put it in terms of conflict. Luckily Bob who – I mean they tried to keep me from

going to that press conference that I had described to you. They tried to. They told me I couldn't go.

Professor Jackson: On what basis?

Ms. Bernstein: Well there are conflicts.

Professor Jackson: [I thought that] conflicts were cleared before you went out.

Ms. Bernstein: I did, but suddenly they saw where I was going to be the chief defense counsel and this huge amount of work for the law firm that there were going to be conflicts and tried to stop me. I will not tell you who they were because one of them I will not speak to, to this day, and I never will. But Bob pulled himself together and tried to figure out what was happening, and I was standing in the hall at a pay phone outside going to the press conference, hung up the phone, and went into the press conference. So it was pretty dramatic at the time. So I in the meantime had produced a huge amount of work for the law firm, and people liked working for me, and we had a very good bunch of associates, very good. Anyway, so then I got selected vice president and general counsel of Chemical Waste Management, and Bob thought that was great. Lionel thought it was great, and then we went into full-time chaos while we tried to figure out how we were going to do this.

Professor Jackson: This is wonderful as I'm thinking about the story that your spouse didn't say, "What are you talking about?" and he's such a talented person in his own field, and I assume he really had a fair number of opportunities –

Ms. Bernstein: First of all we had been in Illinois. He had left the government already, and he was trying to put together a sort of entrepreneurial project of his own which had to do a medical database project, which he was way ahead of his time. Unfortunately Dr. Koop is now making a fortune with his, and Lionel was working on it then. He's always been very good about that. And I moved with him, you know, a number of times over the years, and Chicago was not

unknown to him and to me for that matter.

Professor Jackson: By the mid '80s were your children all out of high school? I've lost track a little bit.

Ms. Bernstein: Molly had gone to Putney for her three years of high school, so she was gone earlier anyway, and the other kids were gone. I guess she was in college by then.

Professor Jackson: So you moved back and –

Ms. Bernstein: I moved back first. Of course as soon as I accepted, they were on me to get there next week you know,

Professor Jackson: How long after you left Wald did it fall apart?

Ms. Bernstein: I think it was two years. I believe when it was gone entirely it was two years. Because they split, and the environmental bunch went to Piper Marbury, and Bob then took them to the Philadelphia firm, and then he ended up leaving and going with Nussbaum and – and I believe it was two years. And I was very happy not to be there then.

Professor Jackson: What did Lionel end up doing in Chicago?

Ms. Bernstein: Lionel ended up wonderfully happy there. He had been on the faculty at the University of Illinois always, the whole time we were there, even though his full-time job, his last full-time job before we left, he was head of the Department of Medicine at the Westside VA Hospital, and that was a joint appointment with Illinois, so he was a full-time clinical professor of medicine in Illinois. He went back there, and a very good friend that he had done a lot of work with when he was the National Library of Medicine, Arthur Elstein, who had a Ph.D. in, I don't know, sociology of medicine, (Arthur was then and now in the Department of Medical Education at Illinois Medical School) said, "Come back with us. You don't care about tenure." Lionel said, "Certainly not, I don't care about tenure," and Arthur said, "We don't have a physician in the department. It's a

multi-disciplinary, excellent little department and,” he said, “we sure as hell could use somebody who is an M.D. and is also interested in medical decision-making,” which was one of their fields. And another thing, Lionel had written a book with Arthur many years before basically on renal function, which was his expertise, and they did a teaching text way, way back, which was sort of a precursor to computer learning – something called machine teaching or something like that. But they did a big study and published a book on ways to present basically material on liver disease to medical students and then they tested it against the – and all that. So Arthur said come back, and Lionel came back and within a year and a half he was appointed acting head of the Department, which he served in about three years, or two years or whatever. He had a great time. He didn't have to be there all the time, but he was there four days a week. He loved it in that environment, which he always enjoyed because of his experience and a lot of people knew him. So he was downtown, he had to go downtown. I was ten minutes away from the office. When we first went out there, I didn't know if he was going to get out there or when he would get there. I knew he would get out there, but I didn't know when. So I said to him, “Listen, with Chicago winters being what they are, and my driving ability, which is fine but it ain't good in terms of being trustworthy to driving on those big highways when there is a blizzard, I want to be somewhere so that I can get home if I have to I would be able to walk.” He said, “That's unrealistic.” I said, “No it's not.” The company is in Oakbrook, Illinois, it's a little village and it has places to live, so we found this wonderful condominium that was literally ten minutes away. And I could have walked home. I really could have walked home if I had to.

Professor Jackson: It's nice to have that assurance. I found an *ABA Journal* article in which you were quoted as general counsel at Waste Management “which she claims is one thousand times better than a partnership in a major Washington law firm. She prizes,” they quote you here, “her much more sustained involvement in the decision making process in the wide range of issues. ‘It

is still not a level playing field for women in firms because it is hard to get clients'."

Ms. Bernstein: When did I say that, what year?

Professor Jackson: August of 1989.

Ms. Bernstein: That's interesting. That's probably, I was vice president of Waste Management by then, moved up. I was five years at Chemical Waste as general counsel. I built a superb legal department, small but really superb. So that we were able to manage litigation all over the country, and I managed myself a lot of that litigation, big stuff you know the – law suits and things like that, but we were not in big time regulatory problems any more.

Professor Jackson: Much before the D.C. Circuit?

Ms. Bernstein: We had some but not much. We had a little bit. The company did, but I wasn't handling that – big constitutional questions about waste and whether to be restricted by the states. That is still in issue. And then at about that time, the CEO asked me to move over to corporate. By that time, of course, one of the things we did was take Chem Waste, Walt and I and Bruce Tobecksen, the chief financial officer, took it public. I mean we were the principal spokespersons for the company at that time. We did very well. So you could see how much progress we made if we could take that company public. We were very well received by Wall Street then.

Professor Jackson: I have a question. Is WMX Technologies the same as Waste Management?

Ms. Bernstein: It's one of the numerous, numerous – every year from '95, no wait a minute, from '90 to '95 when I was at the corporate level, the first couple of years were great, and for reasons that are far too complicated to go into, it was one of those internal management problems where the CEO did not appoint a successor. The market began to question the management of the company. They really could not make decisions appropriately, and then they began to do what

companies do when they are in trouble and that is re-organize every year. They would go away to the what we call the boys' retreat in August, and they would come back reorganizing the company. It got to be really ridiculous. WMX was one of the numerous restructurings of the company. It was supposed to be like a holding company that held WMI, and we had a nuclear waste facility, low level not high level. We had been expanding internationally, and so VRAX was supposed to be sort of the holding company. No one ever understood these reorganizations, including them. They didn't work because no one knew – boy did I learn from that.

Professor Jackson: Really happy to hear from Bob.

Ms. Bernstein: Oh I was ready to retire anyway, as soon as I had my ten years in. I mean I was going to retire from them. I was close to having the ten years in. Ten years was the magic number for executive retirement.

Professor Jackson: Did you make it?

Ms. Bernstein: Yeah I did. Only because Bob's confirmation was so delayed.

Professor Jackson: Well this has been terrific, Jodie. I need to stop now because I have a 12:30 meeting. We are very close to being done. I think we need probably another hour or so to do some wrap up. Let me tell you what I have in mind. I think we could finish talking about any impressions or things you knew were going on in the courts here during – but I think for historical purposes it would be valuable to talk about the more recent periods. I also think, I know you are in the midst of your work here but you've done so much in the four years you've been here it might be interesting for you to reflect on that for the historical record. And then the other thing I want to do with you and I want to show you these now and get some sense. These are the forms that hopefully you and I will both sign. They are formal instruments prepared by, my guess is by, Steve Pollak, but they are the forms provided to us who are doing the oral history project. This is the form for me to

sign. I agree that I have no interest in this and I give it to the Society and there are a number of forms that have been prepared for the interviewee and I could, I think these may be my only copies but I could get more, I could leave these for you to look at if you would like or I could do a letter when I get back to the office and send them to you as you like. Consider what you would like to do. From the Historical Society's point of view what they most like to get are the signatures on form 1, which is you give it to them, you reserve the right to use it for anything that you want to write and you authorize the Society to make it available. Now if you, a slightly more complicated form, the same three provisions I described plus a subject to exceptions specified in schedule B, and you will see a number of possible exemptions and of course you can write your own, you're a lawyer, in the event that you want to say, for example, put a time limit, a time period for which they are not available, if you want to retain control over certain uses during your lifetime or if you want to designate other people to do so, and it would be I think we're close enough to the end here that it is appropriate to start thinking about these instruments.

Ms. Bernstein: So if you like I can have Sharon or Linda make some copies of it.

Professor Jackson: That would be great because I make my own copies at the law school generally.

Ms. Bernstein: Should I make a couple copies of these?

Professor Jackson: You can hold on to those and they can either give me or send me copies. That's great. Okay I'm going to turn the tape off now. We've been talking for a little bit over two hours and Jodie is going to be looking over the instruments to decide what forms she wants to use for our next time. I've just put the tape back on and I've asked Jodie to let us know whether it is still her intent to donate these tapes and transcripts to the Historical Society.

Ms. Bernstein: This is Jodie Bernstein. Yes, it is my intent to donate the tapes to the

Historical Society.

Professor Jackson: Terrific. Subject to reviewing the transcript and all those procedures. Thanks very much.

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

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

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

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

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

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

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

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

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

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

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

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

Professor Jackson: So you're waiting on this.

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

Professor Jackson: Have they asked for further briefings?

Ms. Bernstein: No.

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

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

Professor Jackson: She's quiet.

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

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

Professor Jackson: What made it better?

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

Professor Jackson: Before the commission?

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

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

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

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

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

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

Professor Jackson: Did you win?

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

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

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

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

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

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

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

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

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

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

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

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

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

people in the whole agency.

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

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

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

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

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

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

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

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

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

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

Ms. Bernstein: I couldn't.

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

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

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

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

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

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

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

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

particularly important in the future?

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

Professor Jackson: That's –

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

Professor Jackson: Is it on-line?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oral History of Joan Z. (Jodie) Bernstein

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