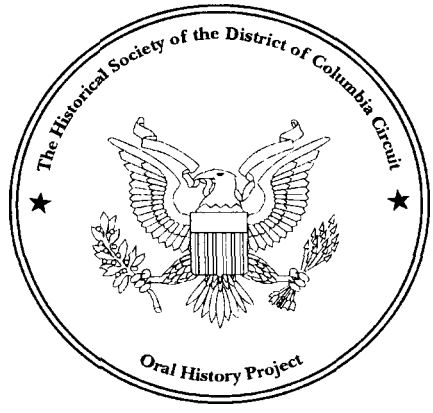

ROBERT PITOFSKY, ESQUIRE

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

ROBERT PITOFSKY, ESQUIRE

Interviews conducted by:
Brooksley Born, Esquire
October 28, December 2, December 19,2003
February 20, March 10, March 30 and May 20,2004

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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.

The contents hereof and all literary rights pertaining hereto are governed by, and are subject to, the Oral History Agreements included herewith.

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 U.S. Courts of the District of Columbia Circuit, and judges' spouses, lawyers and court staff who played important roles in the history of the Circuit. The Project began in 1991. Most interviews were conducted by volunteers who are members of the Bar of the District of Columbia.

Copies of the transcripts of these and additional documents as available – some of which may have been prepared in conjunction with the oral history – are housed in the Judges' Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. Inquiries may be made of the Circuit Librarian as to whether the transcripts are available at other locations.

Such original audio tapes of the interviews as exist, as well as the original 3.5" 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.

Historical Society of the District of Columbia Circuit

Oral History Agreement of Robert Pitofsky

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, Robert Pitofsky, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the tape recordings, transcripts and CD 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 CD 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, or permit the use of said tape recordings, transcripts and CD in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

Robert Pitofsky Oct 14, 2004

DISTRICT OF COLUMBIA: SS
SWORN TO *AND* SUBSCRIBED before me
this 14th date of October, 2004.

Notary Public

My Commission expires My commission expires on September 30,2006

ACCEPTED this 2nd day of February, 2005, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Schedule **A**

Tape recordings and transcripts resulting from seven interviews of Robert Pitofsky on the following dates:

Date (Month, Day, Year) & Title	Number of Tapes	Pages of Transcript
October 28,2003 Oral History of Robert Pitofsky First Interview	2	39
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The transcripts of the seven interviews are contained on one CD.

Historical Society of the District of Columbia Circuit

Oral History Agreement of Brooksley Born

1. Having agreed to conduct oral history interviews with Robert Pitofsky for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Brooksley Born, 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 CD 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 CD 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.

Brooksley Born

Brooksley Born Oct. 14, 2004

DISTRICT OF COLUMBIA: SS

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Oral History of Robert Pitofsky
First Interview
October 28,2003

Ms. Born: This is the first interview of Robert Pitofsky for the Oral History Project of the Historical Society of the District of Columbia Circuit. It is being held on October 28,2003, in a conference room at Arnold & Porter, 555 12th Street, NW, Washington, DC, 20004. The interviewer is Brooksley Born and we'll begin the interview by asking Bob his name and date and place of birth.

Mr. Pitofsky: Robert Pitofsky, and I was born on December 27, 1929, in Paterson, New Jersey.

Ms. Born: Tell me about your family.

Mr. Pitofsky: I never knew any of my grandparents. On my father's side, they both remained in Poland and died as part of the Holocaust, along with many uncles, aunts and cousins who stayed in Poland. My father was lucky enough to have gotten along badly with his father and he ran away from home when he was about 14 and drove a taxi in a large city in Poland. My grandmother, who was quite a gentle soul, felt that that was no life for a young man and somehow scraped the money together to send him to the United States. He and a much younger brother were the only ones that got out of Europe and came to the United States before World War 11.

Ms. Born: How old were they when they came to the United States, Bob?

Mr. Pitofsky: My father ran away from home at 14; he must have come over here at about 16. No language, no education, no money in his pocket. No one really to pay much attention to him. It's a remarkable, private drama of what that generation went through in order

to achieve a base for their families. On my mother's side, both her parents were born in Europe, in a city called Brest Litovsk, which changed sides from Russia to Poland, whoever won the most recent war. They lived in Passaic, New Jersey, which was near Paterson, in very poor circumstances—large family, poor circumstances. My mother had a little education although she left high school after she had finished the second year. So, when people say I'm the first in my family to go to college, I think, that's not much, I'm the first in my family to ever go beyond the second year of high school.

Ms. Born: Tell me how your father made his way in the States when he got here.

Mr. Pitofsky: He did have an uncle who was financially secure and he lived with that uncle for about a year. He learned English by going to the movies in the afternoon. Also, they put him in an immigrant class and he learned a little bit of English there.

Ms. Born: Was this in New Jersey?

Mr. Pitofsky: This would have been in New York. And then, the uncle—possibly because the family in Poland had some kind of connections with the silk business; they were what we call teamsters, they carried silk around from city to city—sent my father to Paterson to become a worker in a silk factory. He stayed there for a few years and then, in a very surprising departure, joined the British army and went to fight in Palestine during World War I. He was not a very belligerent man and even 40 years later, he was hard-put to explain exactly what he was doing. One explanation was that he'd been promised that if he fought in the Jewish Legion of the British army, his parents in Poland would be given land in Israel, and of course, that was a promise that was broken shortly after the war. My father hated the English with a passion for the rest of his life.

Ms. Born: How did he meet your mother?

Mr. Pitofsky: Through mutual friends. A family that my mother and father were separately close to brought them together, and those people remained close fhends for the next 60 or 70 years.

Ms. Born: Was this after he was fighting in Palestine?

Mr. Pitofsky: Yes, it was after he came back. He went back to Paterson to resume his career, He found himself a slightly higher niche among workers in silk mills, and my mother by then was working in a dress shop and these good, close fhends of theirs, who remained saviors of theirs through the depression and later years, brought them together.

Ms. Born: Did you know your great-uncle or any other collateral relatives on your father's side?

Mr. Pitofsky: I met him late in life. He was, to me, enormously wealthy. He was probably just well-off. And they had a summer place on Long Island somewhere. And he had a tiny little woman as his wife, who never learned English and just spent her time cooking old European-type foods. And they had one son, who was my father's age, and they were reasonably close. But then the family split apart and even though there were many cousins on either side, it's only in the last year or two or three that I've reconnected with any of those people.

Ms. Born: How about on your mother's side?

Mr. Pitofsky: My mother's side is the classic American story. These poor people in Passaic—my grandfather was a tailor, my grandmother stayed at home—had seven or eight children, and most of them went to school, not the best schools. They didn't go to Harvard and Yale; they went to Fordham and St. Johns, but they became prominent lawyers and doctors and

accountants and real estate people.

Ms. Born: So, tell me about when you were born. Were you the oldest child in your family?

Mr. Pitofsky: I'm the only child.

Ms. Born: Was your mother still working in the dress shop at that point?

Mr. Pitofsky: Yes. My father and mother at that time had a reasonably successful business in Paterson, New Jersey, selling slightly upscale coats and dresses. But as you recall, I was born in December 1929, just as the Depression started. Within a year, they had gone broke in that business, lost all their money, were not able to pull anything out of it. My father went back to working in the silk mills part-time and eventually they moved to Manhattan where my mother had a sister and brother-in-law who owned some real estate, so that they could have a roof over their heads. And my father went into a succession of 1930s businesses, like selling popcorn, selling candy, selling fudge; one was worse than the other and he just went downhill. It was a very, very difficult decade for them. Eventually, in order to stay afloat, my father began dealing with loan sharks in Manhattan. He couldn't deal with it and one morning, very early, they put a lock on the door of their store, left all the equipment, and an uncle came in a car and helped put their furniture in storage and came and took us to New Jersey. And, the Koslow family, the people who had brought my parents together in the first place, gave my father a job working nights in a silk mill.

Ms. Born: How did this affect you? What age were you?

Mr. Pitofsky: Third grade. I knew that it was very difficult on my parents. I think we moved three times in the last year in New York because, when you went to a new apartment, they gave you a month or two of free rent. I mean, it was that bad. But it was a very loving

family, very supportive. I never felt that I was deprived. And after a summer of living with an uncle, we moved to Paterson. My father got a good job in a silk mill. My mother got a job in a prominent department store in town. And things took very much a turn for the better. And more by luck than anything else, we lived in the part of the city which itself was not very upgrade but was connected to the best public schools in the city. So, I am a great admirer of the public school system in a city like Paterson. As I said once in an interview, the richest kids and the poorest kids in town went to the same school — Protestants, Catholics and Jews — all went to the same school. The teachers were people who, if they'd had a better chance in life, would have been doctors and lawyers. But they were all women and they were first-rate teachers and I thought that we, all of us, received an excellent education.

Ms. Born: What grade were you in when you went back to Paterson?

Mr. Pitofsky: Third grade.

Ms. Born: So you went through grammar school in Paterson?

Mr. Pitofsky: Right.

Ms. Born: Were there particular teachers that you remember as being influential?

Mr. Pitofsky: I don't think influential. My reaction is more that they all set a rigorous, demanding, competent standard. I once went to a lunch in Washington, with Washingtonians from Paterson, including Senator Frank Lautenberg, Justice Brennan and six or eight other journalists, lawyers and business people, and they all had the same thing to say about the education system. Most grew up poor, but they went on to college and they all looked back on that level of education as golden years.

Ms. Born: **A** significant molding effect?

Mr. Pitofsky: Yes. I'm afraid it's not like that anymore.

Ms. Born: Do you remember what your interests were in grammar school?

Mr. Pitofsky: I traveled from puberty to teenage with sports and reading. That's what we did. I always took school seriously. I always worked hard in school. I don't know why, that was just in the blood. It was never an issue.

Ms. Born: Did your parents encourage that?

Mr. Pitofsky: My mother was committed to the educational approach to getting along in life, and at every turning point, she and my father came around to support education.

Ms. Born: What kind of influence did religion have in those early years?

Mr. Pitofsky: My parents were not religious. They attended synagogue on the High Holy Days and that was just about it. I was bar mitzvahed just like all the other Jewish kids in town, but it wasn't a significant matter in my home or in that society.

Ms. Born: Was politics important to them?

Mr. Pitofsky: That's interesting. It was not. I had uncles and cousins who were fanatics of the left, right and center. But my father, for whatever reason, just stepped out of it. They all loved Franklin Roosevelt; that was their politics, that he was the great man who was going to save the country. But beyond that, my immediate family was not interested in politics.

Ms. Born: Was your health good during the early years?

Mr. Pitofsky: Always has been good, fortunately.

Ms. Born: What kind of reading did you do?

Mr. Pitofsky: I started very early reading pulp fiction and sports books of various kinds. I remember when I was about 12, as a present someone gave me *A Tule of Two Cities* and *Kidnapped* and I read them immediately and I've been interested in fiction ever since. **A**

neighbor in the building we lived in had a breakfront with all sorts of 18th- and 19th-century novels and I just started at one end and went through the whole bookcase.

Ms. Born: What kind of sports did you do?

Mr. Pitofsky: **A** little of everything but I eventually played baseball and basketball for my high school. So even in grade school I was playing, mainly baseball and basketball. I never cared for football; it looked to me like a sport where you could get seriously hurt.

Ms. Born: Do you have any interest in music or other hobbies?

Mr. Pitofsky: There's stamp collecting. And since my early teenage years were co-extensive with the Second World War, I had vast scrapbooks of World War II battles and other events. I don't know what's happened to them, but I'd certainly like to see them now.

Ms. Born: And they were quite different countries, weren't they?

Mr. Pitofsky: Right. Exactly.

Ms. Born: Tell me about your high school years.

Mr. Pitofsky: It was a good high school. It was, I think it's fair to say, the best high school in town.

Ms. Born: What was its name?

Mr. Pitofsky: It's called Eastside High School. There were two—Eastside and Central—and Eastside had the advantage of being on the more affluent side of the city. The teachers were good. I had already developed an interest in literature so, if given an option, I would take a literature class. As I said, I played sports. I read a lot and I always had a part-time job.

Ms. Born: What kinds of jobs did you have?

Mr. Pitofsky: Well, the job I liked best was just being a soda jerk. I was that

fellow with the white cap behind the counter and I would go directly from school to the drug store and I would serve sodas for the rest of the afternoon. What else did I do? Oddly enough, a little later on, I became a Sunday school teacher. It's not that I was extremely religious; it was really a slightly secular Sunday school that taught reading, history and the Bible. It was more secular than religious but it paid very well and I did that all through college and law school. I came back on Sundays, even though I was in college at NYU and law school at Columbia and continued that work. I worked behind a fruit stand, selling potatoes and bananas to people. I, quite early, obtained a lifeguard's equivalent at the local Y and as a result, in the summertime, I often worked as a lifeguard in lakes around Northern New Jersey.

Ms. Born: Were there any classes in high school that were of particular interest—English literature, I suppose.

Mr. Pitofsky: I liked literature; I didn't like foreign language. I'm not good at languages. I've learned that, to my disappointment, over the years.

Ms. Born: How about science or history?

Mr. Pitofsky: I liked them all. I'm sort of a characteristic student. I enjoy learning things, studying things, I even enjoy taking exams.

Ms. Born: What language did you take?

Mr. Pitofsky: I took Spanish. I took three years of Spanish and Latin in high school—three years of Spanish in high school, another year in college. And when my wife, Sally, and I visited Spain, we could barely order a cheese sandwich.

Ms. Born: Did you have any opportunities to travel at all?

Mr. Pitofsky: None. First travel I ever took was when I was 26 and a private in the army. I was never out of New York and New Jersey until then.

Ms. Born: What made you interested in going to college?

Mr. Pitofsky: Oh, that came with the territory as far as immigrant families were concerned. My mother was the youngest of about eight children. My father was the oldest of about ten children. The result was that all of my cousins on my mother's side were 20 or 30 years older than me and most or all had gone to college. They had all done well. They were all prospering. So, that was the model that we looked to in that why wouldn't I have a similar progression from high school to college to some professional school.

Ms. Born: What was the impact on you and your family of World War II?

Mr. Pitofsky: You can look at it in several different ways. First of all, financially, it helped. My father didn't go into the defense industry. He stayed in textiles but the wages increased to the point where we lived much more comfortably. The same thing with my mother. Sad to say, it was a prosperous time for the people who were not in the military but stayed home. But it made a difference.

Ms. Born: Were you at all aware of the effects of the Holocaust on family that had stayed behind in Europe?

Mr. Pitofsky: No. None of us. I read these stories about Roosevelt should have done this, Roosevelt should have done that, but the truth of the matter is, the evidence of the Final Solution was really rather flimsy until 1944 and 1945. And it came as such a blow to my father to learn that both his parents and all of his sisters and one or two brothers had perished in the concentration camps. I remember the horrible grieving that took place when they found out about that.

Ms. Born: How did it affect you?

Mr. Pitofsky: I would have been about 13. I don't know if I really took the

measure of it. Of course, I saw how it affected people that I cared for, but I don't think I really understood what had happened or the immensity of the event.

Ms. Born: What were your aspirations as a high school senior? What did you see yourself doing at that point in your life?

Mr. Pitofsky: It was understood I would go to college. Finances were a problem and therefore, at least in college, I lived at home and commuted to NYU. It was going to be NYU or St. John's or Fordham or something like that. New Jersey didn't have a very good college system. It was Princeton, which was out of sight, and Rutgers, which was not very aggressive in making its existence known. Besides, you couldn't commute to Rutgers; you could commute to NYU. I knew I was going to go to college and I wasn't the greatest of students in the first year, but once I got settled, I did well. Once again, I thought I received an exceptionally good education at that school. You had to pick your teachers carefully because NYU in those days was uneven but there were extraordinary academics on that faculty.

Ms. Born: Did you have scholarships or loans to go to college?

Mr. Pitofsky: I did have a scholarship to NYU. No, there weren't loans in those days. It wasn't a full scholarship. I'm not sure it was even half scholarship, but it was substantial and made all the difference to my family.

Ms. Born: Was that a factor in deciding among the New York city schools or how did you decide on NYU?

Mr. Pitofsky: I'm not clear about that. I'm sure I knew that for someone at our economic level there would be some financial help and I think I knew from other people in the community that as compared to the other New York schools, Columbia was the best and NYU was the second best. Interestingly, I applied to Columbia but they offered no financial help. The

same thing happened more elaborately when I applied to law schools. So I went to the school that had offered the most financial help.

Ms. Born: Tell me about what was important to you during your college years.

Mr. Pitofsky: I was very active in college. I was a joiner of clubs, like the history club and the English club, but not a political joiner, although I was aware of the intense political situation between the right and the left during those years. I went through college in three-and-a-half years because I had started in February. In my last year I became part of a group called the English Honors Society in which members rarely attended regular classes. You only read books and came in and discussed the books with the best person on the faculty for that subject. That was a deliriously happy year. Even now, some of the books I remember best were part of that program. Years later, I sent a note to the woman who ran the program saying, I've forgotten almost everything about history, philosophy, sociology, but I remember all the things that you said. She had been awarded a Best Teacher's Award and somehow that came across my desk and I sent her a note. And it is true, it was a wonderful program.

Ms. Born: That's wonderful. Did you do any athletics in college?

Mr. Pitofsky: Not at NYU. NYU was a semi-pro operation by the time I got there.

Ms. Born: Were there particular professors-obviously, this one you just described—who had a great impact on you?

Mr. Pitofsky: The woman who ran the honors program, a relatively young woman, was very good.

Ms. Born: Do you remember her name?

Mr. Pitofsky: Her name was Lind. Dorothy Lind. I haven't thought about her in 40 years. But there was a history professor, well to the left of center, who left NYU to teach in

Rochester and I saw an obituary for him not too long ago. Left, center, right—that man was a super history teacher. And all of the better students took that class and if they could take a second class with him, they did that. And that was first-rate education. You couldn't do better in any school in the United States. There were some other teachers at NYU who were not as well qualified but you did your best to avoid them.

Ms. Born: So you majored in English lit. and—

Mr. Pitofsky: History. I had a dual major. Because I wanted to graduate in three-and-a-half years, I went one summer to Wisconsin, to their summer school. It's the first traveling I had done. I'm *sorry,* I did do some traveling before the army. I went to Wisconsin.

Ms. Born: What made you choose Wisconsin?

Mr. Pitofsky: I heard it was a summer playground where you could acquire a few academic credits. And it was. It was a lovely place and attracted interesting people. I lived in a dorm for the first time and drove out there with some friends in an old, old car; we must have taken four days to drive from New Jersey to Madison, Wisconsin. Maybe five.

(End of Tape 1, Side A)

Ms. Born: Tell me about the teachers that had the greatest influence on you, Bob.

Mr. Pitofsky: I think it was probably the assortment of literature teachers. Although I had a double major, I must have put twice as much time into literature as I did history. I remember there was an extraordinary Shakespeare course that I found very exciting. And then the last year was nothing but literature. It was just literature all day long.

Ms. Born: What influenced you to go into history as well?

Mr. Pitofsky: I think I had an idea that that faculty at NYU was better than, for

example, the philosophy faculty. Or the economics faculty. If I were career-oriented, I probably would have leaned more toward economics. I always advise other people, and I gave myself the same advice, you take courses according to the teacher, not the subject, and there was at that time a solid history department there.

Ms. Born: While you were an undergraduate, were you influenced by what you thought your long-term professional goals were?

Mr. Pitofsky: Not very much because I was of a divided mind. I wasn't at all sure that I would go to law school or I would take a Ph.D. in literature.

Ms. Born: But those were the two options?

Mr. Pitofsky: Those were the only two I considered. And it's very interesting that my older son became a lawyer, but he's now teaching literature.

Ms. Born: What made you decide in favor of law school?

Mr. Pitofsky: It was a close call. I worried about whether or not the practical side of my make-up would be fully satisfied spending the rest of my life teaching literature. I didn't have to be a literature teacher to read literature, to care about it. And today I belong to several book club discussion groups. But if you're a literature teacher, it takes you out of the day-to-day practical world and I think that was the edge that led me to try law school. My attitude going into law school was I'm going to do this for a year and if it turns out I'm not good at it or I don't like it, I'm going to reconsider. But more than almost anyone I knew, I liked the first year of law school. I enjoyed it.

Ms. Born: Before we get to law school, let me just go back and cover a couple additional things in college. Obviously, you were academically very gifted because you got honors in history and English and Phi Beta Kappa. What do you think was motivating you?

Mr. Pitofsky: My son asked me that fairly recently. There are two things. One is, I'm a natural-born student. The other is, I knew that the way, not out of poverty because I never thought that we were exactly in poverty, but the way to a more interesting life, a life where you would have as colleagues more interesting people was to do well in college and professional school. And I wanted to be a part of that life.

Ms. Born: So, what made you decide to go to Columbia for law school?

Mr. Pitofsky: Well, that takes a bit of explaining. I applied to four schools and I was admitted to all four. I had done very well on the LSAT, and NYU offered me a full scholarship. My father, quite understandably, thought I should go to NYU. Columbia offered me a half-scholarship. Harvard offered me no scholarship, but the opportunity to work in the cafeteria to pay my way through. Yale offered me nothing. I wanted to go to Harvard. My father wanted me to go to NYU. It was really one of the most difficult family exchanges we ever had. And we finally compromised on Columbia. It did mean that my father who was just coming out of very, very difficult circumstances because he was still paying off loans that he had made five, six or seven years earlier, had to worry about getting me through college. But I worked every summer. I worked during the year and I was able, pretty much, to pay my own way through law school.

Ms. Born: What kind of jobs did you have during the summers and during the year?

Mr. Pitofsky: In various forms, I was a teaching instructor at camps. Day camp twice, overnight camp three times.

Ms. Born: In the New York/New Jersey area?

Mr. Pitofsky: New Jersey/Pennsylvania. It was an easy job for me to get because

somehow other people didn't try to get their lifesaver certificate and I had one. I always had a choice of which camp I wanted to go to, and I enjoyed teaching swimming.

Ms. Born: What did you do during the school year?

Mr. Pitofsky: Taught Sunday school. They were paying me the princely rate of $10.00 a week.

Ms. Born: Do you think it was an attempt to subsidize bright, young minds?

Mr. Pitofsky: The person who hired me may have had that in mind, but he was fine enough never to suggest it to me. And I was one of a dozen teachers in that program.

Ms. Born: So you say you actually liked your first year of law school?

Mr. Pitofsky: More than that. I loved it.

Ms. Born: What did you love about it?

Mr. Pitofsky: My academic life had been literature. Literature is creative, it's expansionist, it is in the best sense of the word, a little soft. Then you go to law school and it's rigorous, rigorous, rigorous. And I remember the first month in Columbia, I said, ah-h, this is what it's about. This is what really demanding analytical approaches to issues require and I found it very attractive, very interesting.

Ms. Born: Were there professors during your first year that had particular influence on you?

Mr. Pitofsky: Yes. Herbert Wechsler. Among the people who were demanding at the highest level was Wechsler. Walter Gelhorn, who I came to know as a fhend later in life. Milton Handler was not a first-year teacher, but very good in class. There were several. There was a man named Michael, who many people didn't care for. He died a long time ago but I thought from the point of view of clean thinking that he was as good as any of them.

Ms. Born: What did he teach?

Mr. Pitofsky: Civil Procedure.

Ms. Born: Did you find the other students and discussions with them stimulating?

Mr. Pitofsky: Very much so. I lived on a floor with some really outstanding students.

Ms. Born: By this time, you were actually living at—

Mr. Pitofsky: Oh, I was living in a dorm. I wasn't part of a formal study group, but I was part of an informal group-did you understand that, what did you think that was all about—and that helped a great deal. I made up my mind to devote that year to law and nothing else and I cut way back on any other activities. It helped a lot.

Ms. Born: Was it an easy decision at the end of the year to just continue on?

Mr. Pitofsky: To stay?

Ms. Born: Rather than to rethink your decision?

Mr. Pitofsky: I graduated high in the first-year class. I was invited to be on the law review. I enjoyed the work. I thought I would only enjoy the second and third year more. Columbia in those days was very Wall Street-oriented. It was in the air that if you were a good student and you really did well, perhaps you'd get an offer from Cravath. Well I wasn't interested in an offer from Cravath at that time. I was more interested in government or public interest work or U.S. attorney work. And getting away from that commercial outlook and toward more policy-oriented courses—antitrust, labor law, constitutional law—was even more interesting to me than the first year.

Ms. Born: What was your experience like on the law review?

Mr. Pitofsky: I thought it was one of the best forms of training I was ever exposed to. At the time, it was quite exasperating. The draft that you would submit would be reviewed by a third-year member of the law review, word-by-word, comma-by-comma. And I just wasn't accustomed to that kind of review. I can only say I wish current law reviews were like that. I doubt they are. So, it was excellent training although there were times when I got exasperated with people. What difference does it make if the comma goes here or there. And then in my third year, I was put in charge of a very long and elaborate review of the *Rosenberg* case, published in the *Columbia Law Review,* quite controversial at the time, in which the students concluded that the Rosenbergs were guilty but they hadn't received a fair trial. That was quite a project.

Ms. Born: What was your role? Were you in charge of many students?

Mr. Pitofsky: I think about seven or eight people were involved in writing that piece. "Note" doesn't quite describe it. It was half the law review. And I'm not sure the dean of the school was crazy about our doing that.

Ms. Born: Who was the dean?

Mr. Pitofsky: I'm not sure. Young B. Smith was the dean when I started, Warren was the dean when I left and I'm not sure who would have been the dean. It was written during the transition. But the article held up rather well. I read it again a year or two ago and for students, I thought it was a very moderate, thoughtful piece. I had a chance to interview the lawyers for both sides in the trial. I wrote the fact part of that article and edited all the other parts but I didn't write any of the other parts.

Ms. Born: I know you took Milton Handler's antitrust class. Did that have a particular effect on you? Were you especially interested in antitrust as early as that?

Mr. Pitofsky: I was especially interested although I didn't think of it as a career. Handler was a first-rate teacher. He was a dramatic crowd-pleaser and he taught at nine o'clock in the morning. To persuade third-year students to come to a class at nine o'clock in the morning—that's a tribute to the teacher. And I enjoyed it very much and as we'll discuss later on, I became later on in life, a good friend of Handler's. But if you had asked me at the time, are you going to try to become an antitrust lawyer, I would have said no.

Ms. Born: You said you were particularly interested in policy and courses like antitrust law and constitutional law rather than the commercial and business side of law.

Mr. Pitofsky: Very much so.

Ms. Born: Where do you think that bent came from?

Mr. Pitofsky: Out of my background. I didn't know what a check was when I went to law school. My family never had a checking account. I didn't know anything about Wall Street, the financial district—stocks or bonds. It was like Mars to me. So, no background in it and then, you know, I was politically active. I was a Democrat, maybe even a liberal Democrat, but not a Marxist, not a Socialist. The course I had the most difficulty with in my first year of law school was contracts. It's because I didn't care.

Ms. Born: Social policy was more important to you than money?

Mr. Pitofsky: My best courses in law school were constitutional law and federal courts. And that tells you something about where my energy and interest was.

Ms. Born: When you were in law school, what were your aspirations in terms of jobs? Did you think about clerkships? Did you think about other alternatives?

Mr. Pitofsky: I thought about clerkships. Clerkships, of course, were much, much harder to get then than they are now. I thought about it but I was drafted three weeks after I

graduated. I knew that was going to happen, so, there was no possibility of my getting a clerkship and then I vegetated for two years in the military. I really just didn't think about it. And we're getting, again, a little ahead of the story but the reason I went to the Justice Department in a way was to tread water because I didn't know what I wanted to do. And it seemed to me that I would learn something and it was a good place to be and I was proud of being associated with the Department of Justice. But I knew I wasn't going to be a career Justice person. Less than my colleagues, some of whom I occasionally see, I had no idea the day we graduated in which direction I would go.

Ms. Born: Were any of your other professors particularly influential in your thinking and development?

Mr. Pitofsky: Professor Dowling taught constitutional law. He was at the end of his career and he was a moderate New Dealer. You would compare him today to Gerry Gunther. And I loved that man and I loved that class. Charles Black, who you may know, became a bit of a friend. He was much younger than the rest of the faculty and I knew him a little more personally than others. But he was having such a difficult time in his own life at that time that the courses he taught were not terribly influential. Gelhorn's administrative law led me to think about the possibilities of government service. I don't know about the rest of the class—I wouldn't have a clue about what the FTC, the FCC or the SEC were. I was a very unsophisticated graduate of a law school, even by standards of sophistication that applied to many other people.

Ms. Born: Were there friends that you made on the law review or in law school generally that had a significant influence on you? Have you kept up with people?

Mr. Pitofsky: I've kept up with far more of my law school colleagues than my

college colleagues. I don't know if they had an influence on me. I don't think they did, but we've remained in touch and remain friends for many decades.

Ms. Born: Did you know any lawyers when you were in law school and were there lawyers outside the law school who were important to your development?

Mr. Pitofsky: **As** a family matter, my extended family produced one lawyer and he was the most prominent lawyer of Passaic, New Jersey. And it was sort of common family talk—could Bob ever achieve as much as this gentleman has in Passaic, New Jersey. He's the only lawyer I knew.

Ms. Born: Was he a cousin?

Mr. Pitofsky: He was a cousin, although he was 25, 30 years older than me, but he was a cousin. Nice man.

Ms. Born: Did you know as you were approaching the end of law school that being drafted into the military was likely?

Mr. Pitofsky: Yes. In fact I had received deferments three times.

Ms. Born: Student deferments?

Mr. Pitofsky: Yes. Student deferments to finish law school and the last time they gave me a deferment, they said, we'll see you just as soon as you graduate.

Ms. Born: So when did you get your draft notice, Bob?

Mr. Pitofsky: Well, I don't know the dates. If I graduated law school on June first, I was in the army by June 23rd. Probably had my draft notice before graduation day.

Ms. Born: Where did you go to boot camp?

Mr. Pitofsky: I went to what is now Fort Dix, which is near Trenton. And then I was trained as a clerk in Maryland, Aberdeen Proving Grounds in Maryland. So I had eight

weeks' boot camp and then eight weeks of clerk training.

Ms. Born: Being a clerk was essentially an administrative job—typing and filing and things like that?

Mr. Pitofsky: Very much so. It was not formally, but de facto, it was the peacetime army. Fighting in Korea had stopped.

Ms. Born: How long was the commitment when you were drafted? Was it minimum two years?

Mr. Pitofsky: Two years. If you try to go to officers' school it would have been three. If you try to go into the Navy or the Marines, it would have been three, so that was part of the reason that I stayed with the Army.

Ms. Born: What did you do during those two years?

Mr. Pitofsky: I had a very fortunate military career. First of all, I was assigned to Munich, Germany, which is an interesting place. Secondly, I was the clerk in a headquarters company and therefore had far more fi-eedom from the military regimen than most. And third, I did a great deal of travel in Europe. It was the first time I'd ever been turned loose to do that kind of travel. Army life was often boring but for the most part, I knew I was fortunate and even though for a young, Jewish man, any part of Germany was difficult. Still, Bavaria had been less supportive of Hitler than most parts of the country and the German people I got to know there persuaded me that they didn't know what was going on and they were very anti-Nazi. So I did odd things. I saw a lot of opera. I traveled a lot. I went to the University of Munich to try to learn German but my problem with languages arose again. Even after a year of living in the country, I still was pathetic in my ability to speak German.

Ms. Born: Was it frustrating for you to suspend your legal career for this two-

year period?

Mr. Pitofsky: Yes and no. In the back of my mind, I knew that others of my graduating class were U.S. attorneys, they were working in the Justice Department, they were progressing at the great law firms in the country. On the other hand, the idea of having an opportunity to see a great German city and travel in Europe was very attractive. So, the problem of falling behind was more acute when I got back and then the question was, what was I going to do. To seek out a clerkship at that point after I had been out of law school for more than two years — two-and-a-half years — I never tried. I wanted to get going so in that sense, the two years influenced some of my thoughts.

Ms. Born: Tell me about your admission to the New York bar.

Mr. Pitofsky: There was some question about whether I was truly a New Yorker because my family still lived in New Jersey and I had grown up in New Jersey. But I lived in Manhattan for three years, I've worked there both summers and there was a little fuss about it but not much. They accepted me as having been drafted. I was drafted in New York.

Ms. Born: And so you never were required to take the bar exam?

Mr. Pitofsky: Never took the bar. And then I was admitted on motion here (in the District of Columbia) and to the Supreme Court. So I'm a member of three bars without ever taking a bar exam.

Ms. Born: And this was a policy that the New York bar had for students who'd been drafted?

Mr. Pitofsky: Yes. I think it may have been within 90 days of your graduation. I was drafted so quickly that that really was never an issue there.

Ms. Born: Now I realize we didn't discuss the jobs you had during the summers

while you were at law school.

Mr. Pitofsky: Oh, while at law school? After my first year, I did the summer instruction at a camp. The second year, I was a research assistant for Professor Wechsler.

Ms. Born: At the law school?

Mr. Pitofsky: Yes. He was writing the model penal code and I worked on that. And then the third year, I had something lined up, but I got drafted within two or three weeks.

Ms. Born: When did you decide what to do at the end of the Army?

Mr. Pitofsky: I actually did not finish my tour of duty in Europe. I was transferred for several months to Fort Ord, California, so that thinking took place in California. I interviewed a few firms in San Francisco and they wondered why an Easterner would want to be on the west coast, but they suggested that I would be hired as an associate. But I wasn't ready to commit to a firm.

Ms. Born: Why not?

Mr. Pitofsky: I didn't know much about what that life was and I wondered if I wouldn't be better trying to be in a U.S. attorney's office or government service. But those were the main options. First of all, there was a very small public interest sector in those years. The ACLU, I suppose, but not much else. But it was between government and firm, west coast and east coast. I knew about the Honors Program at the Department of Justice so I applied for it and was accepted and I decided to put off whether I would go to a firm and spend a few years of apprenticeship at the Department of Justice.

Ms. Born: Had you ever been to Washington before?

Mr. Pitofsky: Never. There's an interesting little story about that. They sort of killed me with kindness. When I arrived at the Justice Department, I was assigned to the Civil

Appellate Division and within the Civil Appellate Division, there were three or four people who worked with the SG's office on the Supreme Court briefs. So, it was very complimentary in a way that I would be in Civil Appellate and I would be doing Supreme Court work. But after I'd been doing it for a few months, I realized it was just the wrong thing for me to do.

(End of tape 1, side B)

Ms. Born: Why was it the wrong thing for you to do?

Mr. Pitofsky: Looking back on it, I would not have put it in these words at the time. I shouldn't be doing first drafts of Supreme Court briefs; I should be taking somebody's deposition, or drafting a subpoena, or doing motion practice in connection with litigation. I had incidentally done some trial work in the military as a defense attorney for people who were court-martialed and had found that extremely interesting. This was too rarified for me at that time—the Supreme Court briefs. And even though I've really marveled at the skill of these lawyers in the Solicitor General's office, I thought I was moving in the wrong direction. It wasn't the apprenticeship that I had expected.

Ms. Born: Who were you working with?

Mr. Pitofsky: The one I remember best is Phil Elman, who was a Deputy in the SGs office. I wrote a cert. petition on "a takings clause" case involving gold mines. The U.S. Government had seized the gold mines during the Second World War. It was a very tricky brief to write and in one sense, the skill that Phil and others demonstrated about how to present the issue was breathtaking. On the other hand, it was a con law case right out of the case book. It's in all the casebooks now—Central Eureka Gold *Mining*. So I stayed less than a year and decided that, much as I liked the people and enjoyed the work, I thought it was the wrong place for me to be.

Ms. Born: You decided that you needed something other than appellate brief writing?

Mr. Pitofsky: That's right. It's one of the reasons I tell young people graduating from law school, don't pass over too quickly the opportunity to be a clerk to a district judge and leap at the chance to be a clerk to an appellate judge. That's the parallel to what I was feeling in that year in the Justice Department.

Ms. Born: A fourth year of law school, in a way?

Mr. Pitofsky: More than in a way. That's what it felt like. And a fourth year of law school at a very theoretical level.

Ms. Born: So as a result, you decided that you should try the life at a firm?

Mr. Pitofsky: I did and I wanted to be back in New York. I had personal reasons for that. So I went to New York one week and interviewed at three or four firms. The people I met at Dewey Ballantine seemed very interesting. The firm had just been turned around by Governor Dewey and was prospering beyond other firms in New York, but I didn't know much about one firm or the other anyway. We were as a group so much less sophisticated about law firms than the people coming out of law school today. I think I was lucky. I accepted the offer at Dewey Ballantine.

Ms. Born: Who were the people that you interviewed with when you were interviewing for the job? Did you meet Governor Dewey?

Mr. Pitofsky: No I didn't. I met Dewey soon after I began working there, and that's an interesting story that we'll get into, but there were two people I remember. One was Leonard Joseph who was a super lawyer, one of the best. And then there was Charles Stewart, who became a judge. And they were both charming men who I regarded as friends after awhile.

Maybe I spoke to other people during the interview phase, but I don't recall.

Ms. Born: In this time period, Bob, were you at all affected by McCarthyism and the issues of the day arising from McCarthyism?

Mr. Pitofsky: Looking back on it, not as much as one might expect. I think by the time I had left the government and gone back to New York, McCarthy had lost some of his political power. Remember it was in '54 that we wrote the *Rosenberg* note and provoked such a strong reaction. By '57, the country had quieted down, Eisenhower was the President. McCarthy was still a factor, but one had the feeling that that phenomenon wasn't nearly as threatening as it may have appeared a few years earlier.

Ms. Born: Back to the *Rosenberg* article, you said that the dean probably would have been just as happy if the law review hadn't done that project. Was there reaction from alumni or outside interests?

Mr. Pitofsky: I think there was. I think some alums wondered what a bunch of kids were doing, writing about this. But the faculty, the dean, the stronger members of the alumni behaved so admirably in defending the right of the law review to pick its topics and write as they saw fit. There was never a serious threat of either suppressing our article or modifying our conclusions.

Ms. Born: I assume that the law review at Columbia was historically and at that time relatively independent and treated as independent?

Mr. Pitofsky: Yes.

Ms. Born: And that the independence was thought to be important?

Mr. Pitofsky: Looking back on it, I don't think there was a faculty advisor. I don't think anybody knew what was coming out in the law review until it came out. I don't think

that's true at many schools today.

Ms. Born: Back to Dewey Ballantine, tell me what kind of work you did there?

Mr. Pitofsky: What we're going to talk about now is a major turning point in my career, although I had absolutely nothing to do with it. Literally, the week I arrived at Dewey Ballantine to start as an associate, the firm was hired by Eli Lilly to represent it in a government criminal price-fixing case, and unlike most criminal cases these days that get settled, this case was not going to be settled. Many of the very best lawyers in New York were involved. There were five defendants, five major drug companies. Major lawyers and law firms were involved. The lead defendant was Lilly because it had the largest market share and the lead lawyer was Thomas Dewey.

Ms. Born: What was the product?

Mr. Pitofsky: Polio vaccine, something that attracted the attention of the press, so this was a big case involving high stakes with major defendants, and—I think this is fair to say—I was fortunate in the sense that I was low man on this very high totem pole. There were at least three or four partners. There were at least three or four associates working for Lilly. I was the newest. This project took two years. I worked on nothing else for two years. No one ever asked me to write a thoughtful, economic analysis of signaling and price-fixing. They asked me to write memos on what discount was offered to which buyer on what date. I was a principal person on the facts. And that stood me in very good stead once we went to trial. Though it was one case for two years, as far as antitrust was concerned, the case had everything. It didn't have mergers in it, but so many issues that I worked on, written on, including the case work since then were in that trial. **So** it was a very fortunate first experience in private practice.

Ms. Born: It was like a primer on antitrust laws.

Mr. Pitofsky: A primer with high visibility and skilled people. It had all the things that I really wanted. How do you prepare somebody for a grand jury appearance. How do the documents link together. All of the skills that I felt I was not strong enough on was essentially what I was asked to do. And we won. So that helped a great deal. And some of the people that you know—for example, Gerry Gesell represented Parke Davis; Steve Pollak was his principal associate. Unlike Dewey Ballantine that had seven or eight people on the team, they had two people. Some of the other lawyers were Shorty Irvine of Donovan, Leisure, Newton & Irvine, and other excellent partners, good associates. The government was represented by Lewis Bernstein and I had the honor to deliver the Lewis Bernstein Memorial lecture last year. He was what you think of as a first rate govemment lawyer—lifetime commitment, skilled lawyer, fair as fair could be. And we had a good judge. So those were two interesting years.

Ms. Born: Tell me about Governor Dewey.

Mr. Pitofsky: I came to know Governor Dewey very well, perhaps better than almost any other associate in the firm. And the reason was that the further the trial went on, the more he depended on someone who knew the facts inside and out. So we would often actually go off in the evening by ourselves, just the two of us, to prepare for the next day. It was such an odd couple because I'm a Democrat, left of center, and in his later years, Dewey took on some of the color of his more conservative clients, and he became more conservative after his political career was over. But we got along famously and as you'll hear later, he helped me immensely to get into teaching. I told him that I thought I'd be a happier person as a teacher than as a lawyer. And that was hard for him to swallow, but he did. I don't think I could have been appointed to a faculty like NYU without his support at that time. But anyway, he was not an intellectual of the law, but he was as street smart, foxy, shrewd, people sensitive as anyone you're ever going to

find, And of course many people have commented about the fact—I hope this doesn't sound like I'm bragging about myself—he always surrounded himself with A-plus people regardless of race, religion, economics, and so forth.

Ms. Born: Or politics.

Mr. Pitofsky: Or politics. When he was DA in New York, he had one of the greatest staff of assistants that anyone had ever put together. They all became judges or heads of major law firms. So he picked people well, was very clever in front of a jury, and this was a jury trial, and had a retentive mind.

Ms. Born: How did you get chosen to work on the case?

Mr. Pitofsky: Chosen? Oh, because I walked in that week.

Ms. Born: Just the right time?

Mr. Pitofsky: Exactly. They were searching—they had already assigned at least two, maybe three associates and needed another one. Where were they going to find them? Well, look who just came through the door.

Ms. Born: Who was the trial judge?

Mr. Pitofsky: I can't remember his name, but he was the Chief Judge of that district in New Jersey.

Ms. Born: Was he a good judge?

Mr. Pitofsky: He was outstanding. Not just because he decided for us. He kept control of that courtroom. Some of these lawyers could be fairly extravagant in their examinations; just low key, totally in control. And he wrote a good opinion. I think the government did not prove their case.

Ms. Born: Did he not let it go to the jury?

Mr. Pitofsky: Yes. He took it away at the end of the government's case.

Ms. Born: So the defendants never had to put on their case?

Mr. Pitofsky: Gerry Gesell gets credit for this. He said, "Let's put our case on through cross-examination right away. Let's not wait." And he put on some of the best cross-examination performances I think I've ever seen. A tough man. And Dewey did some first rate work in court. William Peale was a Sullivan and Cromwell lawyer. Shorty Irvine and another good younger lawyer. There were five sets of lawyers in that courtroom composing the argument. And we were down there for several months with pretrial and trial. I've never been in a trial since. (laughter) Well, at Arnold & Porter when we go to trial, I drop out, and everything else I ever did at Dewey Ballantine settled the week before trial.

Ms. Born: So this launched you on your antitrust career?

Mr. Pitofsky: It did. I was perfectly happy to stay with antitrust. Dewey wanted me to spread myself around more with non-antitrust partners. He felt that if only they knew me, that would be to my disadvantage. But the truth is the firm was just bursting at the seams with interesting antitrust work—oil companies, drug companies, and so forth. So I did a little corporate work, but very little. Well over 90 percent of what I did at that firm was antitrust. And indeed when I came back after starting teaching and worked as a consultant to the firm, it was all antitrust.

Ms. Born: Had you taken any economics in college?

Mr. Pitofsky: I took the basic courses and I took one advanced course, but you would hardly think of me as an economic expert. Although here's an interesting little thing I was reminded of recently: The firm wanted someone who could act as liaison between this growing crowd of economic consultant firms and the law firm, and they asked me the same

question you just did. You know anything about economics? Economics 101. So they sent me to the New York public library to sit in on some rather low-level courses and to just read economics for a month to learn the jargon. I pulled out Samuelson's book and I read it from cover to cover. And really that's the fundamental basis of any economic training I have and it is what I called upon as Chairman of the FTC when I was supervising the Bureau of Economics. At least I could understand what they were saying, even if I couldn't talk their language.

Ms. Born: How long did you stay with the firm?

Mr. Pitofsky: I stayed seven years, but that's deceptive, because I had been hired by NYU over a year earlier, but NYU didn't have a slot. So they asked me to sit tight, which I did.

Ms. Born: And you continued full time at the firm?

Mr. Pitofsky: Yes. I was an adjunct professor at NYU by then anyway. That's how I got into teaching. So essentially I stayed five and a half years and stayed another year and a half waiting to move on to NYU.

Ms. Born: Did you work primarily with Tom Dewey during the entire period?

Mr. Pitofsky: No, I didn't. I did some other work for him and I actually got into the business of writing speeches for him. It's such a strange combination that I would be writing speeches for Dewey. I guess I did do one or two projects for him. But it was the other partners in the firm who were the antitrust partners. There was a gentleman who wasn't too prominent. The firm was Dewey, Ballantine, Bushly, Palmer and Wood. This man, Wood, was as good a lawyer as I've ever seen and he did antitrust work and I did a good deal of work for him.

Ms. Born: What kind of cases were they, criminal or civil?

Mr. Pitofsky: Almost all merger cases. That's what was going on then. It doesn't

compare to the merger wave from the last decade, but there were many mergers going on, especially in the oil industry, and that firm had several clients—Sinclair, Continental, among others. That was primarily what I did. Then I had one monopoly case where the violation had occurred in Billings, Montana, and the trial was in Denver. I was married by then and my first child was due, and I was getting up at four o'clock every Monday morning and flying to Denver or Billings—returning late Friday nights. That was the last straw in terms of trying to decide between teaching and remaining a practicing lawyer. And that's when I went to Dewey and said I'd really like some help in becoming a law professor because I'd already been an adjunct and I was enjoying that very much. That case went on for the better part of a year but settled on the courthouse steps.

Ms. Born: When did you meet your wife Sally?

Mr. Pitofsky: I met Sally in 1960. She was serving lemonade for a political candidate, Bill Vandenhuevel, and my good friend, Norman Dorsen, was Vandenhuevel's campaign manager. So I went to see Norman and I met Sally. And then we saw each other during the summer because Norman and I and about four other people had one of those group houses in the Hamptons and Sally was visiting one of the other people in the house. So the answer is 1960, lemonade, 67th Street.

Ms. Born: (laughter) So you got married how much later?

Mr. Pitofsky: We became engaged a few months later, but we didn't get married until June because it was the only time I could get away for a long European honeymoon.

Ms. Born: What was Sally's background?

Mr. Pitofsky: Sally grew up in Savannah, Georgia. Her father was a lawyer, but **he** soon stopped practicing and became a dress wholesaler—bad business being squeezed by the

retailers and the manufacturers. She attended Vanderbilt—also an English major—Radcliffe to get a teaching degree, spent a year or two teaching high school in Savannah, Georgia, escaped to New York and she worked for a book publishing house, Macmillan Publishing Company. One of her friends knew Vandenhuevel, so the two of them went up to try to help out on the campaign. But Sally and I and all three of our children are English majors, and all three of my children went to law school, graduated from law school, and there's a chance one of them will practice law.

Ms. Born: So then you lived in New York City itself during your early years with Dewey Ballantine?

Mr. Pitofsky: When we were married, I was still at Dewey Ballantine waiting for my slot at NYU and we lived in Gramercy Park, and then when I did switch to NYU, we moved into the wonderful I.M. Pei buildings on Bleeker Street, which were for faculty and were heavily subsidized and extremely comfortable. So we lived in New York for about nine years, first while I was at the law firm and then while I was teaching at NYU.

Ms. Born: When you were a bachelor and had first gone to New York, where did you live?

Mr. Pitofsky: I had a roommate and I lived in Greenwich Village on Houston Street, and then that broke up—so I joined another friend from Paterson in a very nice apartment on York, on the East side of town. And I guess I was living there when I met Sally.

Ms. Born: What made you decide to begin teaching as an adjunct professor?

Mr. Pitofsky: I was persuaded to do it by my good friend, Norman Dorsen. He had started at Dewey Ballantine just about the same time I had, along with Joe Califano—the three of us started within a week or two. He was not happy there and promptly began looking for a

teaching position and obtained a teaching position at NYU. He's really a constitutional law scholar of the first order, but they had him teaching antitrust. So he asked me if I would come up. The first year he said come up and teach one class. I did. The next year he said why don't you come up and teach a segment? I did. The third year the school invited me to teach antitrust. And this did not happen overnight because I still thought I would be a lawyer at a firm. But I began to think and to say to Sally, you know, I'm enjoying the evenings at NYU. It's not that I dislike practice, it's not like my son who felt he had to get out of it. I enjoy practice a lot, but I enjoy teaching more. J. Lee Rankin had been teaching antitrust at NYU and became the head of the Warren Commission just in time for me to be available for them to hire for the full-time faculty. So you can see, I've had some very fortunate turns here considering what the other possibilities might have been. And then when I arrived at NYU and began teaching and I was at NYU for a month—I think I said to someone, why did I take all that time vacillating. (laughter) It's so clear that this is the right place for me and that I'll be happy teaching and writing.

Ms. Born: It's a wonderful luxury to have found something that you enjoy that much.

Mr. Pitofsky: Absolutely, absolutely.

Ms. Born: Well, at the next interview, we'll go into this in a lot more depth.

Mr. Pitofsky: This is sort of fun talking about the youth and early years. I'll have a lot to say about the FTC, but I don't think it's as much fun.

(End of Tape 2)

Oral History of Robert Pitofsky
Second Interview
December 2,2003

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

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

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

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

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

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

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

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

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

Mr. Born: A lot of antitrust work?

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

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

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

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

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

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

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

Mr. Pitofsky: I loved it then.

Ms. Born: The interaction with the students?

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

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

teaching that is so appealing?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Born: Who was Allan Holmes?

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

Ms. Born: And who was Ira Millstein?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(End of Tape 1, Side **A)**

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

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

Ms. Born: Cease and desist.

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

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

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

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

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

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

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

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

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

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

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

Ms. Born: And he brought you in?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Pitofsky: Yes.

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

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

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

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

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

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

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

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

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

Ms. Born: The industry broadly joined the NARB?

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

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

tenure?

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

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

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

(End Tape 1, Side B)

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

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

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

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

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

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

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

Ms. Born: Not with you.

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

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

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

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

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

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

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

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

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

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

Ms. Born: I didn't realize that.

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

Oral History of Robert Pitofsky
Third Interview
December 19,2003

Ms. Born: This is the third interview of Robert Pitofsky for the Oral History Project of the Historical Society of the District of Columbia Circuit. it is being held on December 19,2003, in a conference room at Arnold & Porter, *555* 12th Street, NW, Washington, DC 20004. The interviewer is Brooksley Born.

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

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

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

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

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

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

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

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

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

Ms. Born: Whom were you editing it with?

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

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

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

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

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

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

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

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

Ms. Born: Balanced in what sense?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Pitofsky: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Born: Who was dean at Harvard?

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

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

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

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

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

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

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

Ms. Born: An interesting time to be there.

Mr. Pitofsky: It was.

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

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

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

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

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

Mr. Pitofsky: Yes.

Ms. Born: What was your thesis there?

(End Of Tape 1, Side A)

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

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

Mr. Pitofsky: Right.

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

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

Ms. Born: You convinced yourself.

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

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

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

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

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

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

Ms. Born: What was his role in that?

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

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

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

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

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

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

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

Ms. Born: Did you know the President?

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

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

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

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

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

Ms. Born: Who was the criticism coming from?

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

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

Ms. Born: Cereal industry being cold cereal?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Born: Certainly on antitrust matters?

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

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

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

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

Ms. Born: Who was your personal staff?

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

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

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

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

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

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

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

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

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

(Tape 2, Side **A)**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms. Born: Were there other industry representatives?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oral History of Robert Pitofsky
Fourth Interview
February 20,2004

Ms. Born: This is the fourth interview of Robert Pitofsky for the D.C. Circuit Historical Society's Oral History Project. Bob, I think the last time we talked about your years as FTC Commissioner and ended as you were leaving that post. What did you do when you left?

Mr. Pitofsky: Well I returned to my life as it existed before I was a commissioner. I returned to Georgetown to teach and I came back to Arnold & Porter as counsel.

Ms. Born: What did you teach at that point?

Mr. Pitofsky: It was about that time that I negotiated an arrangement that allowed me to teach somewhat fewer hours than I previously had, so I taught then and consistently since antitrust, constitutional law to first year students and a seminar each year. I tried to change the seminar and not continue it more than two consecutive years. ***So,*** two courses and a seminar.

Ms. Born: A nice schedule.

Mr. Pitofsky: It's not a bad deal.

Ms. Born: What kinds of research were you doing at that time?

Mr. Pitofsky: I started in research on an article on measuring market power, what technically is called "definition of relevant market." It was quite a hot subject at the time. Bill Baxter who was head of the Antitrust Division had published guidelines that seemed to be quite a departure from previous approaches to the subject. It was really one of the more ambitious pieces of writing that I have undertaken. The reason I put it that way is that I started it in 1981 and finished it in 1989. That was because the deanship intervened.

Ms. Born: When you published it, where was it published?

Mr. Pitofsky: *Columbia Law Review*.

Ms. Born: What were you doing at the firm of Arnold & Porter during those years before you became dean?

Mr. Pitofsky: Generally, the same thing I've been doing with rare exceptions ever since I've been at the firm. Counseling clients on deals, generally speaking prior to litigation, because if any transaction that I'm involved in turns to litigation, I drop out of the picture. The firm was very busy in those days and I was quite active. I think that was the period, in fact I'm quite sure it was, when I first secured General Electric as a client, and of course General Electric is 15 different top firms in 15 different industries. So the fact is during those years 90 percent of my work was probably for GE.

Ms. Born: Was this a period when your business development was more effective than it had been before?

Mr. Pitofsky: Yes. Coming out of the commission and with an academic background, it seemed that people would more quickly think of me as an advisor or counselor and I developed an arrangement with Mike Sohn, now chair of the firm, that we would take on almost all projects together so that I had the advantage of having backup at all times and the client had the advantage of having one of the best lawyers I've ever dealt with. It worked well.

Ms. Born: Did this increase the time you were spending in practice or not?

Mr. Pitofsky: I've always tried to put a cap at 500 hours, and yes, there would be a year when I'd go to 600 but I know I've never gone to 700 or 750, and that's why the firm is such a comfortable place for me. I will say, look, I know its only June but I'm exceeding my quota, and people were very understanding and said, so let's get somebody else in to handle that.

Ms. Born: Were you active in the organized bar during this period?

Mr. Pitofsky: I've always been active in the Antitrust Section of the bar. I didn't go on the council of the ABA Antitrust Section until some years later. I had been the head of the Consumer Protection Committee and I may have been active in other committees during that period. That's been a constant with me since 1970.

Ms. Born: Weren't you on the D.C. Bar board during that time too?

Mr. Pitofsky: Yes, I was. Shortly after I left the commission, I ran for and was elected to the D.C. bar. It was a very interesting three years. Jamie Gorelick was on that board, David Isbell, Jodie Bernstein and other first-rate people. There were some very tough issues about the extent to which the board was perceived to represent the large firms in Washington as opposed to the smaller practitioners in the city. Each side had their candidate and their views on practically every issue. Jake Stein became the president. By the time my three years were up we had managed a modus vivendi on that issue which was quite successful. I was not a leader in working this out, but I certainly was anxious to see that the bar not be divided on every issue along that fault line between big firms and private practitioners. The fact of the matter is that we did work it out.

Ms. Born: How?

Mr. Pitofsky: A lot of it has to do with who's on the board, and I think as time went on neither of those groups dominated the board. The president of the bar became quite sensitive to the feelings of both groups. Much of the debate was over minor issues. It was really just a question of each side regaining the confidence of the other side that they were not trying to use the Bar and the board to the advantage of their style of practice of law.

Ms. Born: What motivated you to run for the board?

Mr. Pitofsky: I had not been active in local bar matters and I wanted to play a role.

I knew about the local bar's work with indigent people who needed representation. I was very anxious to be a part of that. I was encouraged to run by some people who had already been on the board and felt that maybe I could be a moderating influence on what had become a very testy relationship. Those are probably the two reasons.

Ms. Born: Did you play a moderating influence, do you think?

Mr. Pitofsky: I don't want to give myself too much credit. But I think, Jodie and I and Lois Schiffer and Jamie and David Isbell, as a group, did manage to ease what had previously been absolutely unnecessary tensions.

Ms. Born: When did the opportunity to become dean at the law school come along?

Mr. Pitofsky: The previous dean had been David McCarthy, and he had served seven or eight years and I think was worn out and announced that he would step down at the end of the then academic year which I guess was 1983. I was not the most aggressive candidate for the position at that time. My position was that it might be interesting. On the other hand, if I didn't become dean, I would continue with what was a very satisfactory teaching and scholarly life. I do feel that if you've been in academia for a lifetime, which is practically the case with me, you owe it to yourself and to your ideas about the way a law school should run to take a shot at being a dean somewhere along the line. Terms are five years long. It doesn't have to be 15 years, it doesn't have to be 20 years. But you come in and you try to change things or introduce ideas that you think are important, and it was on that basis that I accepted the president of the university's offer to become dean.

Ms. Born: What was the selection process that went on?

Mr. Pitofsky: The same as it is now. **A** committee is elected by the faculty to do

the screening. They usually cut to perhaps five candidates. Those candidates are interviewed by the faculty, by the students and eventually by a collection of executives on the main campus and then the president of the university. Georgetown, unlike almost any other law school I'm aware of in this country, automatically makes a law school dean a high official in the university. You're an executive vice-president. I would say 20 to 25 percent of your time is addressed to university, not law school, issues. So, it is important that the people at the university are comfortable with the person who is going to become the dean.

Ms. Born: So you were one of the five chosen by the selection committee?

Mr. Pitofsky: Right.

Ms. Born: And then did the selection committee choose you?

Mr. Pitofsky: That's the president's call. In fact, I am now the chair of a new committee and the president said now what I believe the president said then, give me a minimum of three names, at least one outsider, and do not rank them unless one person is vastly better than everyone else whose name you are submitting. I think it was probably done that way. And I had a very nice talk with the then president of the university who later became a close friend.

Ms. Born: Who was that?

Mr. Pitofsky: Father Healy. Tim Healy. And, to tell you the truth, his being the president of the university made my being dean of the law school the gratifying and enlarging experience that it was.

Ms. Born: Why was that?

Mr. Pitofsky: He was one of the most extraordinary people I've ever met. It was just fun to be with him. He also had very high standards and he was a great supporter of the law school. My view of deanships is, if the president of the university isn't prepared to back you

when he has doubts about what you're doing, the job isn't worth having, and he certainly backed the law school.

Ms. Born: Before we get into the details of being the dean of the law school, tell me about the role of executive vice president of the university and what that entailed, because this is unusual.

Mr. Pitofsky: It is. It involves one or two long meetings a week and it's a lot of reading before that meeting.

Ms. Born: Is that a long meeting with the president?

Mr. Pitofsky: The president, the provost, the head of the medical school, the chief financial officer, and the dean of students. There are probably about a dozen people. There's also another meeting and that only involves the provost, the head of the medical school and the head of the law school. So there are two meetings a week. Candidly, a lot of it is about money. It's about how you raise it, which foundations you approach, and how you spend it. There were other issues. We'll talk before the end of the day today about my role in settling the gay rights case, but that was perhaps the most memorable and the most substantial commitment of my time and energy to anything that I did as an EVP. There are constant reports about what the law school is doing and why they're doing it and so forth, so, as far as actually discussing issues on the main campus or very occasionally voting, it's usually about money one way or the other.

Ms. Born: What is the reason that Georgetown has this special role for the dean of the law school and the dean of the medical school too?

Mr. Pitofsky: I'm not sure. It goes back so far that people I've asked that question don't know. They don't know exactly what the reasons were. One factor is that all of the university is in the western part of the District of Columbia, and the law school is all by itself

over in the eastern part. So you would expect the dean to have a role at the university. You wouldn't expect the dean to be an executive vice president, except for the fact that it was a way of bringing the law school into the loop with the rest of the university.

Ms. Born: Is the dean of the medical school an executive vice president as well?

Mr. Pitofsky: Yes. There are three executive vice presidents, the provost, the head of the medical school who they call chancellor of the medical school, and dean of the law school.

Ms. Born: Back to your role as dean of the law school, what did you hope to accomplish, what did you think the needs were when you became dean?

Mr. Pitofsky: Let me answer it this way. The first thing that I did was I created a committee of perhaps **20** of what I thought were the best faculty members at the school, the most perceptive and the ones with the highest standards, to give me their views on what my priorities should be. The overwhelming priority was construction of a new library. The result was that five of my six years as dean, I was a real estate client. I didn't take the job to do that. But, they were absolutely right. The school was the largest in the United States and was in one building, where everyone was crammed together. So, if you could construct another building and move the library and some offices across the street, close the street down and put some grass between the two buildings, you would have a different atmosphere entirely. One of the things that I had said to the president when he offered me a deanship was that I don't want to sound as if I'm making non-negotiable demands, but I must tell you that the present system where all fund-raising on behalf of the law school is handled by the university is not common in the United States and **is** unacceptable. He said to me, "I've always wondered why your predecessors didn't make the same demand," and we got off to a fabulous start in that way. The library was a $25

million project that actually ended up being a little more, and we were raising $1 million a year. Another decision that I've always been grateful for is the president, against the advice of quite a number of his other colleagues, gave the law school the go ahead to construct this very ambitious library building before we had anything like the money necessary. But he was a great fund-raiser, and he said he would devote his energy, as well as mine and others in the law school, to raising money for the school. So there I was, I'd become the dean, I had all sorts of ideas about curriculum, students and so forth and, immediately, priority number one became raising the money and constructing a building.

Ms. Born: So how did you raise the money, obviously partly with the president's help?

Mr. Pitofsky: First of all, we took over our own fund-raising. Second, he and I jointly approached foundations and were very successful. Kresge gave us the largest grant they had ever given any school for a building. Third, the Williams family, Edward Bennett Williams, for whom the library is named, immediately pledged a substantial amount of money. It was nothing unusual about our fund-raising except we had such a good story to tell. Our case was very powerful. Here was a first rate law school, a student body that was getting better by leaps and bounds all stuffed into one building. Therefore, while I was apprehensive about how I would feel about fund-raising, I've never raised a nickel in my life, I was so convinced of the legitimacy of our claims, especially on foundation money, that I thrived on the fund-raising. I keep mentioning foundations because they're going to give their money away, anyway. It's just a question of who they're going to endow. And we were very successful in persuading the foundations of the need to expand this particular facility.

Ms. Born: Do you remember what proportion of your money came from

foundations?

Mr. Pitofsky: I don't. It's probably less than half, but it was far more than we budgeted when we started. There were individual benefactors, who were persuaded that their old school was going in the right direction and they were prepared to support it.

Ms. Born: Did you already have the land?

Mr. Pitofsky: We had all of the land except one building and the man would not sell out. So the president of the university sent me to visit him in his home and said don't come back without that land. I kept raising the price and raising the price, the man's wife kept saying what in the world are you doing, accept the offer, but he wouldn't do it. He had a grievance against the Catholic Church, and it wasn't about money. It was about his hostility to the university. And then, the irony of it all, I think this has been made public before, is he and his family got into some tax trouble, and they ended up selling us that property for substantially less than I had offered that evening at his home.

Ms. Born: So did that difficulty with him delay the building?

Mr. Pitofsky: No, we were going to build around him. It was going to be awkward. There would be a silly enclave at the side of the library, but we were going forward, that was clear. And maybe he didn't realize that. He may have felt that he could hold up the entire parade. But, anyway, there was already a substantial hole in the ground before we ever obtained that last piece of land.

Ms. Born: And did you work with the architects, the builders and all that?

Mr. Pitofsky: Hartman and Cox were the architects. They were younger men but of increasing prominence. The construction manager was a group from Baltimore and they were outstanding. In fact the university still uses them constantly, and yes, absolutely, I learned more

about buildings and pipes and electrical connections than I ever knew before.

Ms. Born: And so this project took five years about?

Mr. Pitofsky: Yes. From the time the president said to his group, we're going to go ahead with this, until the inauguration when Justice Brennan and Joe Califano spoke, that was just about five years.

Ms. Born: Has it improved the law school?

Mr. Pitofsky: It made an immediate difference, but it was only a launching pad for my successor Judy Areen to go on with the construction program. We had already bought the land and she then managed to raise the money and built a very attractive dormitory and now, we're just finishing two more buildings. So Georgetown which possibly had the least impressive physical plant in 1970, now as far as urban schools are concerned is probably as good as any. Quite a change, and it has changed the life of the school immensely.

Ms. Born: What did this project do to your other goals and aspirations for your deanship?

Mr. Pitofsky: I still tried to do many of the things that I had in mind. I think a law school should buzz with the excitement. There should be visiting scholars, holding work in progress discussions, almost every week. The faculty should be meeting in brown bag sessions, to discuss what they're doing virtually every week. I'm not the most ardent fan of clinical education but I fall very much on the side of being in favor of it, and we added a few clinics during my tenure. We revised some aspects of the curriculum. We began to enlarge the faculty, now that we had some room. The faculty was less than fifty when I assumed deanship—I think it was 48 or 49. It's now about a 100, and I would say that 15 or 20 of those additional faculty members were hired during my deanship. We cut back on the number of hours that teachers had

to spend in the classroom. We put an emphasis on scholarship. I did something that I'm not sure was entirely popular, but I went to a merit system of salary adjustments and then put quite a heavy emphasis on scholarship. In terms of time, EVP responsibilities, traveling around the country, fund-raising, addressing construction issues of the school had to be 60 or 70 percent of what I did.

Ms. Born: How did you recruit new faculty and visiting scholars?

Mr. Pitofsky: We were much more aggressive in reaching out to other schools and much more aggressive in inviting the faculty who knew first rate scholars in their field to be in touch with that person and say, we have an endowed lectureship, we have the opportunity for you to visit the school for a week. These were all in place before I took over the deanship, and I just added to the opportunity of people to come to the school and to add spice to the academic life of the law school and it worked very well. Actually, Judy Areen has outstripped me in this regard. So it's really a place that's buzzing at all times now.

Ms. Born: Well you laid the foundation.

Mr. Pitofsky: We got it started. Actually Dave McCarthy, my predecessor, had started it but it was at a relatively low level.

Ms. Born: What changes in the curriculum?

(End of Tape 1, Side A)

Mr. Pitofsky: Curriculum changes were not very substantial during my tenure as dean. There had been curriculum changes but they happened after I was dean, I think the main difference was our energy and ability in inviting younger first rate faculty to come to Georgetown. Now, we had a great advantage in that Washington had become **a** preferred place to both study and teach law. There were people who came to Georgetown, who perhaps

wouldn't have even dreamed of it, a generation earlier. We've always had the most brilliant lawyers and judges who come to teach as adjuncts at Georgetown, but we didn't let them know that that was a possibility as much as we should have. When we invited Judges Harry Edwards and Larry Silberman and others, they agreed to teach a course for us. So, it was in the quality of both the younger faculty and the adjunct faculty that I think changes were made.

Ms. Born: Did you in any way put more emphasis on interdisciplinary work or teaching?

Mr. Pitofsky: That wasn't a special goal of mine. There already were some interdisciplinary programs and degrees. Once again, you have to face the fact that the law school is ten miles away from the university, and so it's very difficult to run some of these interdisciplinary programs. We do a little more now than we did then, but it's not a school like Harvard, Yale, Columbia and to a lesser extent NYU that can easily construct interdisciplinary programs and make them work. We have a great geographic disadvantage.

Ms. Born: Did you do any teaching while you were a dean?

Mr. Pitofsky: I did. Not the first year.

Ms. Born: Where did you find the time?

Mr. Pitofsky: I'll tell you how I did it. I taught antitrust at nine o'clock on Monday morning and I was usually finished by eleven. (And another two hours on a non-Monday every other week.) We cut it back to a three credit course and I taught antitrust on the theory that I really didn't have to prepare all that much for those classes. I just felt that a dean who doesn't teach—welcomes the students the day they arrive and presides over their graduation—it's very possible that the overwhelming majority of the students will never know who you are. You're in a nice corner office on the top floor and you're not a part of the

academic life of the school. So, it really wasn't very difficult, my responsibilities were over by eleven o'clock on Monday morning. But I thought that was the right thing to do. One of the candidates for deanship today teaches a full academic schedule. I don't know how in the world he can do that. That seems beyond me.

Ms. Born: But at least this gave you some interaction with the students. Was this the main interaction you had as dean with the students?

Mr. Pitofsky: Yes. There were always student committees complaining about this and that. They certainly were complaining a great deal about the physical plant, when I first took over the deanship, and the level of safety in that part of the city. I don't think that's an issue any longer, now that all these upscale hotels are in that part of town. But the students did not give me a hard time. This was not the late 1960s. And I can't remember a single matter in which there was a lingering tension between the senior officers of the law school and the students during that period. They were amazing in their willingness to suffer inconvenience while we built that library. We didn't just build the library; we redid the main building and the noise and the dust made teaching very difficult. But the students knew which direction we were going, and they supported it.

Ms. Born: Did you do anything to address their safety concerns?

Mr. Pitofsky: We did. We doubled or tripled the number of guards in the area. We developed a bus system that would take the students to the subway station. We gave them all sorts of warnings about not walking around that area after nightfall. And there were some terrible episodes including one young man who was killed. I must say that was as difficult an experience as I've ever been thorough. Mostly someone was struck and their purse was snatched. No one else was seriously injured that I can recall except this one young man who I

didn't know but I later learned was just an extraordinary person: generous, thoughtful, headed for a career in public interest law.

Ms. Born: It's hard to lose anybody but particularly hard to lose him, it sounds like. What was your relationship with the faculty and your main interactions with them?

Mr. Pitofsky: We got along reasonably well. The business about salaries depending on productivity created some tension between me and a few faculty members who were retired in place. I just felt very strongly before and since, that part of the role the dean must play is to reward the active, constructive, productive, members of the faculty and that means curtailing the rewards of others. There were at least a half dozen people on that faculty who had been hired 30 years earlier, when Georgetown was a regional school preparing young people to take the bar. And I was directed by the president of the university to negotiate very generous deals that would allow them to retire. I must say all six of them behaved so well. They knew it wasn't their kind of school any longer and we worked that out. That allowed us six slots to go out and hire six really first rate young people. So, in general, I thought the faculty did not give me a hard time. Who could be opposed to raising money to build a library? And everybody knew that was the main thing I was doing.

Ms. Born: It sounds like a lot of your role was making use of your skills as a negotiator.

Mr. Pitofsky: That certainly was true when we get to this gay rights episode.

Ms. Born: Tell me about the gay rights episode. This was part of your role as executive vice president, wasn't it?

Mr. Pitofsky: Quite an experience, one of the most memorable that I can recall. In the late '70s, the law school had made a decision that it would not subsidize gay and lesbian

organizations on the law school campus because their goal is inconsistent with Catholic precepts. We're talking about small subsidies of perhaps $125 a year. The students, not unexpectedly, took the law school to court, to the D.C. court system not the federal court system, and sued for violation of the D.C. human rights statute. That case kicked around in the courts for seven or eight years. First the university would win, then it would be reversed and remanded. Then the students would win and that would be appealed and then remanded. But the last decision came out in favor of the students. There were at least three or four opinions. It was a close call, but the next step was to take the case to the Supreme Court. That's where we were, and the president of the university called me in one day and said, "I want you to go out and bring back to the board of the university the best settlement that you can negotiate. I don't want to leave either side, committed Catholics or gays and lesbians, humiliated. I want a compromise." That's what I did for a day or more every week for the next six months. The present president of the university was Tim Healy's administrative assistant, and he joined me for these discussions.

Ms. Born: What was his name?

Mr. Pitofsky: Jack de Gioia. The gays were represented by Williams & Connelly, Vince Fuller, one of the best lawyers in Washington and two other junior attorneys from that firm. There were two groups of gays and the second was represented by Rick Gross—a partner at the Wald firm and one of the toughest negotiators I've ever met in my life. The three groups would meet at least once a week and hammer out the details of what a compromise would be. We gave away early that the university would provide the subsidy. That goes without saying. But then there were questions about what the students would do. Would they be allowed a newspaper that proselytizes a gay and lesbian way of life? Some threatened they would use the facilities of the university to conduct a black mass, something that goes back to the Middle Ages

and is a form of devil worship. There were all sorts of speech and behavior issues—could they run a parade through the middle of the main campus? Could they celebrate certain days that were important to them? When we were finished, we came back with a settlement that must have been 50 pages and the president took it to his board for what I thought was one of the most eloquent debates I've ever participated in. I spoke briefly and a lawyer named John Kirby really carried the ball for settling the case. The issue was, do you go to the Supreme Court or do you take this deal.

Ms. Born: Was John Kirby a lawyer for the university?

Mr. Pitofsky: He was a partner at Mudge, Rose in New York. And very active.

Ms. Born: Was he on the board?

Mr. Pitofsky: He had been on the board, but by the time of the debate I think he had stepped down. You're talking about some of the best lawyers that I've ever dealt with. The board consisted of about 30 people, 30 to 35. Six of them were priests. They all voted to settle the case. But there were many Catholics on the board who felt very strongly about this in the most understandable way. One person who I respect enormously said these are our children, do not think that we are hostile to them, but this is our religion and we are committed to support the precepts of our religion. Before this meeting, we had authorized a clerical investigation of the Catholic Church's treatment of gay and lesbian people starting about the 12th or 13th century, and it concluded that gay thoughts were not a sin, were not a violation of God's rule. It's only acting on them that was. To make a wonderful story a little shorter, the vote was 18 to 17 to accept the settlement. And I remember still who the deciding votes were. Joe Califano was a deciding vote. He spoke at the end. He was on the board and he said, "I've sat in the White House for years and I've never heard anything quite like this debate." I asked the dean of

students ten years later, was there any part of that settlement that didn't work and became a bone of contention, and he said no, no one has ever challenged the terms of that settlement. It made me very happy.

Ms. Born: One of the things that I was going to ask you about was your relationship with the president of the university and your relationship with the board.

Mr. Pitofsky: My close relationship was with the president, and I think I can fairly say we became good friends. I admired him enormously. It was beyond professional—we talked books, plays, he was a poet, he taught poetry and wrote poetry. He was very close to Bill Clinton so he knew a lot of politics. My wife Sally enjoyed being a dean's wife immensely. She socialized more regularly and comfortably than I did, and she and the president of the university got along. So it was a good relationship. **As** far as the board was concerned, I knew individuals but, except on extraordinary occasions like the gay rights matter, I never said a word at board meetings. I sat and listened.

Ms. Born: Did you enjoy being dean?

Mr. Pitofsky: Yes, but I have to admit that I also enjoyed stepping down. I am very glad that I was dean. The university relationship was extraordinary. I stayed an extra year to finish the library and to preside over its inauguration.

Ms. Born: So, it was a total of six years?

Mr. Pitofsky: **A** total of six. I didn't want another five-year term. I have no regrets for having done that, although, the truth of the matter is, I didn't write a word during those six years and as I've said to many other people, it's not just that you stop writing, you stop reading. There's all sorts of new scholarship that emerges in your field. **A** deanship is an 11-month a year job. But I still think that committed academics should do it. I don't think they

should stay as I think Dean Griswold did at Harvard for over 20 years. Judy Areen, my successor, was very generous in having stayed 15. Because she was ready to step down five years ago.

Ms. Born: So there was no difficulty in making your decision to step down? You really wanted to and stayed on an extra year, basically?

Mr. Pitofsky: Most deans stay one long term. It's exceptional when they take a second term or a third term. Judy might be the longest serving dean in the country right now.

Ms. Born: Tell me about the mechanics of your stepping down and the choosing of your successor? Of Judy.

Mr. Pitofsky: I announced in September as I recall that I would step down as dean and then I was probably kept at arm's length in the selection of my successor more than almost anyone else. I never doubted there were good candidates who were available to step into the job, and I didn't think it was right, especially because I had such a close relationship to the president of the university, that I should not be involved in the selection. When it's all over at the end, you put your two cents in, but I was not active in the selection of the possible candidates or the selection of the committee that chose the candidates. Judy's done the same thing this time around.

Ms. Born: It avoids the appearance of trying to continue your role.

Mr. Pitofsky: Exactly.

Ms. Born: Were there other activities you had while you were dean? Outside of the university?

Mr. Pitofsky: One activity that I came a little bit to regret is I accepted, against my better judgment, an appointment to the council of the Antitrust Section of the ABA. I should

have been smarter than that. There is no way I could attend all those meetings or stay up and read all those reports. I confess that I came around to the view that I hadn't done an adequate job in that role. I felt badly about it. Did I do anything else while I was dean? Not much.

Ms. Born: Tell me about the Georgetown Study of Private Antitrust Litigation and the board of the Craig Corporation,

Mr. Pitofsky: Okay. The Georgetown study was initiated while I was dean, but two other people wrote it. Some prominent lawyers in the city, especially Joe Sims who's at Jones Day, felt that there was a lot of heat underlying different views of private antitrust treble-damage litigation. They were people who were opposed to mandatory treble damages. But there was very little reliable data on any of these subjects. Sims and his colleagues raised a very substantial amount of money, hired an economist, hired two lawyers and looked at the records of treble-damage litigation throughout the country to examine the state of affairs. For example, there was a theory that judges were reluctant to dismiss antitrust cases on a motion to dismiss or summary judgment and the result was that, if you brought one of these cases, the only way for the defendant to get rid of it was to pay some kind of blackmail settlement. This study showed that it was absolutely not true. It may have been true 20 or 25 years ago because of an opinion that Justice Douglas wrote saying you ought to dismiss antitrust cases during motion practice very cautiously. But the fact of the matter was judges were dismissing antitrust cases left and right. It was not a blackmail factory. There were many other issues the study addressed. We published it. I still see it cited regularly as a source. Craig Corporation was very interesting. Jim Cotter was a student who had attended Georgetown University and its law school with absolutely no money. I think he may have played football for the university, but he was on scholarship, and he was on scholarship at the law school and working nights for the Internal

Revenue Service. He is the classic case of a poor kid who graduated from law school. He came out of the law school, worked for a while for the IRS, then went off into business for himself, and became a very successful entrepreneur. We became friends. I'm sure I was trying to raise money from him. I visited him in California. He eventually contributed a million dollars to name a room in the library. But the main point is we got along very well and he asked me to join the board of his corporation, which was at that time a conglomerate. Now it's almost entirely a movie company. I only did it out of loyalty to the university, and it was a wonderful experience for me. Most lawyers never see a corporation from the inside. They see the issues after they have been framed, as opposed to being on the board of a corporation and participating in the initiation of programs and framing of issues. So I learned a lot. The problem was that, since it was a conglomerate, he was invested in all sorts of things, many of which were very prosperous. But he took over control of a savings and loan and that was the time when people's careers were being destroyed simply by knowing Keating, much less being on the board of an S&L. I said to him, life's too short. First of all, I don't understand the economics of a savings and loan company, unlike your other companies, and I just can't bring myself to be responsible for decisions relating to the savings and loan business. He tried to argue me out of it, but he was very generous, and I stepped away. But I'd been on that board for eight or ten years. I learned a lot.

Ms. Born: So you stayed on the board even after your deanship?

Mr. Pitofsky: I don't think I went on the board until more or less in the middle or the end of my deanship.

Ms. Born: Is there anything else we should discuss about your deanship or about the executive vice presidency of Georgetown?

Mr. Pitofsky: I don't think so. Another major project that I was asked to do was to sell the hospital, because the hospital was an economic drag on the whole university. I spent quite a bit of time, and I thought I had the hospital sold, but the deal collapsed and the university is still struggling to get out from under this extremely unfortunate economic relationship. The hospital's budget is larger than the university's budget. As the president said, "When the hospital sneezes, we get pneumonia." It's well known now that the university, over the last half dozen years, has probably averaged $15 million a year in red ink because of the hospital. That's almost the entire financial problem of that university.

Ms. Born: I thought they had sold it.

Mr. Pitofsky: We had sold it, but there were strings attached. And the university is still responsible economically for some aspects of the hospital. I regard that as a failure. I wasn't the only one out there trying to sell the hospital. But it's too bad that we didn't succeed. I don't recall any other major matter, and the Craig Corporation Board and the hospital were minor compared to the constant responsibility for fund-raising. We ended up with a building and we were a million dollars short. And the Williams' family came to our rescue. It was the opposite of being risk averse to start this construction with no history of fund-raising. The only thing we had was the property on which the SEC stands today, which is a great piece of land and a constant annual source of revenue. So actually we were raising more than a million a year: we were raising three million a year because of that land rent. But there was no endowment for the law school and a very modest annual income, one of the smallest in America, at that time.

Ms. Born: In your fund-raising efforts, did you need to travel a lot? Did you visit with a lot of alumni as well as foundations?

Mr. Pitofsky: In the first year I traveled an enormous amount, because I felt people

had the right to see the new dean. After that, I came up with a strategy, which I think was successful, and that is I asked five senior members of my faculty, Father Drinan and Sam Dash are two that I recall, whether they would be willing in my place to handle some of these alumni and fund-raising relationships. For them, it was two trips a year; for me, it was 20 trips a year. And they agreed, I had the right people and they were extremely successful.

(End of Tape)

Oral History of Robert Pitofsky
Fifth Interview
March 10,2004

Ms. Born: This is the fifth interview of Robert Pitofsky for the Oral History Project of the Historical Society of the District of Columbia Circuit. It is being taken on March 10,2004, in a conference room at Arnold & Porter, 555 12th Street NW, Washington DC 20004. I inadvertently recorded over the first part of the interview, and therefore Bob has dictated a description of his activities during the period immediately following his deanship at Georgetown Law Center. That description follows:

After completing my service as dean at Georgetown—a six-year tour of duty—I was rewarded with a year-long sabbatical. During the first half of that year, I was a scholar at the Rockefeller Institutes villa in Bellagio, Italy. It was a five-week stay and I managed to complete most of an article on measurement of market power—later published in the *Columbia Law Review*. We then spent several months traveling in Italy, then Egypt, and finally France. Upon my return, I had arranged for a brief stay as a scholar at the Brookings Institute.

Mr. Pitofsky: I found Brookings to be one of the more interesting discussion groups in Washington, and luncheon with colleagues, especially colleagues who are not in my field, never failed to be interesting. I was very thankful for them for providing me on very short notice a place to work. The following year I went back to teaching and then I must admit I took another sabbatical. The first sabbatical was compensation for having been dean. The second sabbatical was compensation for the fact that I had been an academic for 25 years and I had never taken a sabbatical. I visited different places but I had never taken a year off.

Ms. Born: What did you do then?

Mr. Pitofsky: That coincided with the publication of a completely new edition of the casebook. The timing was right. Much had changed in the '80s, especially with the influence of formal economic analysis on antitrust, and so that was a major revision. I was not just updating the cases, and we really transformed the book considerably. I've always had the responsibility of writing the teachers' manual which is in some ways more time consuming than writing the book and I once again took on that role.

Ms. Born: So you just stayed here in Washington working on that?

Mr. Pitofsky: I think I worked out of the Arnold & Porter office for the most part. I'm sure we did some modest traveling. I remember during that stretch I wrote a paper on American antitrust laws for a Japanese audience and I spent a week or two traveling around Japan. The main project was the case book, but I had other modest pieces of scholarly work that I attended to during that year.

Ms. Born: When you stepped down from the deanship, did you return as of counsel for Arnold & Porter? Had you been of counsel during the deanship?

Mr. Pitofsky: Actually, as a formal matter, I had continued of counsel at Arnold & Porter even when I was dean. Now the fact is I wasn't in the law office very often and didn't put in nearly the hours that I committed before and after, but I was successful during that period—probably the most successful period of my entire career in attracting new clients. So that was my major role in my years as dean. People around the firm didn't see me very much.

Ms. Born: What about in your sabbatical years?

Mr. Pitofsky: No, I completely cut myself off from practice. Certainly in the first year, I completely cut myself off when I was in Italy and Egypt and France. I don't think I even phoned in. When I was at Brookings I probably had some very modest projects to do but the

firm was extremely generous, both while I was dean and after I was dean, in trimming their expectations of what I would do to my availability.

Ms. Born: Was there anything else of interest or note that you did during this period? We will get to your role in the transition team.

Mr. Pitofsky: That was the main additional activity aside from teaching. I had met then candidate Clinton at one of these Renaissance sessions in Hilton Head, South Carolina. We had talked briefly about antitrust. I think I said earlier he was very unusual as the President of the United States because he had taught antitrust at the University of Arkansas and used our casebook. After it became clear that he was going to be nominated, I became very active in writing papers addressing various issues in the campaign. And, of course, after he was elected I became very active in the transition process.

Ms. Born: What role did you play in the transition process?

Mr. Pitofsky: Oddly, I was given the job, not of examining the Federal Trade Commission and offering a blueprint for progress, but rather examining the Department of Justice and specifically the Antitrust Division of the Department of Justice and offering a blueprint for the future. It's supposed to be very confidential what you say and who works on it, but I think I can say my deputy in that process was Merrick Garland who was quite an extraordinary young lawyer and a great deputy to have.

Ms. Born: And is now on the D.C. Circuit Court of Appeals. During the transition, who else was working on the Justice Department transition team?

Mr. Pitofsky: I am not comfortable with this, because I think the idea when you take this job is to treat who you work with and what you say as utterly confidential. But certainly there were many people who I knew well, who were in that building working day and

night on the transition.

Ms. Born: Was it very intense?

Mr. Pitofsky: It was intense; it was good-natured. People were extremely enthusiastic about the prospect of a Democratic President and a person like Clinton having the job. People felt, and it turned out to be true, that major appointees to the Clinton administration took the transition reports rather seriously. I had been on transitions earlier, but I don't think anybody ever read the reports that we wrote.

Ms. Born: What earlier transitions are you referring to?

Mr. Pitofsky: Well, I had been on the transition group for President Carter when he was elected. That one was on the Federal Trade Commission. We wrote a report. I don't think it was as good as the report that we wrote in the '90s. I never saw any evidence that it was taken seriously, whereas the report that we wrote for the Department of Justice and the report that I know others wrote for the Federal Trade Commission were taken as absolute blueprints of what they ought to do and what order they ought to do it in and what weight they should give to different projects and so forth. It was what a transition process really should be.

Ms. Born: Did you get to know the President or the First Lady at all? Did you have much interaction?

Mr. Pitofsky: Not then. I had met them at the Renaissance sessions but I didn't know them well and they were not present at all during the workings of the transition process.

Ms. Born: Did you have hopes for a political appointment?

Mr. Pitofsky: I did. I was set on the Assistant Attorney General for Antitrust, and I think I had much support, but in the end, I finished second to a wonderful selection, and she is one of the people who I know took that transition report very seriously.

Ms. Born: Anne Bingaman. So, you returned to teaching at that point?

Mr. Pitofsky: I returned to teaching. The President reportedly said very kindly, look, I'm saving this fellow for the Federal Trade Commission. So that was encouraging. The problem was that there were five commissioners and no imminent departure so there was no chance that I could begin to serve in that administration for the first year or two.

Ms. Born: And when did the opportunity present itself?

Mr. Pitofsky: In **1994,** the former Chairman and then Commissioner of the FTC Cal Collier resigned in order to take a position in the private sector and that opened up a spot. I had serious competition from an outstanding person, but after a while it became clear that the President was going to go in my direction.

Ms. Born: Before we go into this I should have asked you about the Defense Science Board Task Force on Antitrust Aspects of the Defense Industry.

Mr. Pitofsky: That was one of the most interesting sideline projects that I've ever been involved in. It came up while I was in Japan. To my surprise I received a call from Jamie Gorelick who was then general counsel in the Department of Defense, saying that DOD is confused about what its responsibilities are under the antitrust laws. There was a great deal of pressure to consolidate the defense industry and improve its efficiency. DOD had been in court several times on proposed mergers. The decisions by the judges were not paragons of clarity. She said DOD is thinking of appointing a blue ribbon group that in formal terms would report to the Defense Science Board but would really report to the Secretary and the Under Secretary of Defense to explain whether or not antitrust enforcement against transactions in the defense industry is different than antitrust enforcement if you are talking about underarm deodorant and hair spray. And we'd like you to be chair. I said I had thought about this a great deal and I

believe there is much to be analyzed and said on the subject and I would be glad to engage in this project. Little did I know that it would be almost full-time for about six months.

Ms. Born: Was this during your sabbatical?

Mr. Pitofsky: No, it must have been after the transition because Jamie was already at the Department of Defense. It would have been '93 perhaps even early **'94** and it was an extraordinary group of people. I remember Bernard Schwartz who was the president of Loral was on the commission. Bob Litan who was in the Department of Justice. Jan McDavid who is a prominent lawyer in Washington. Again I was very fortunate—my deputy was a young woman who worked for Jamie Gorelick by the name of Amy Jeffress, who was in the same category as Merrick Garland. And the shock to me was after six months of debating, at times when I just couldn't see how this group could ever come out with a single position, we did it and voted our report out unanimously.

Ms. Born: What did the report say?

Mr. Pitofsky: Boiled down to essentials it is that national security is not strictly a matter of economics. And therefore, there are likely to be transactions — for example, a merger of two submarine companies or a patent license involving a high-tech weapon—which could be questionable under conventional antitrust laws but should be and would be allowed if the Department of Defense could make the case that this contributed significantly to national defense. We also urged the Department of Defense to speak with one voice because some of the problems they had in earlier cases arose because someone from the Air Force would say one thing and someone from the Navy would say the other, and the judge would throw up his hands and say, how am I supposed to decide whether this really contributes to national defense. They agreed , and to my knowledge, they have carried out on that pledge ever since.

Ms. Born: Was the report made public?

Mr. Pitofsky: It was made public, yes. I remember I was on television explaining it as was Jamie Gorelick and John Deutsch. Maybe I'm kidding myself because I'm not objective, but I think it was well received because what it said was antitrust still counts. Don't think what we are saying is that the antitrust laws don't apply to you—the defense industry. What we are saying is that you must adjust the way they apply. It's not going to do any good to say to a soldier with a defective weapon in combat, well, but we saved ten percent on the production of that weapon. It's just that price and output don't apply in the same way when you are talking about national security.

Ms. Born: Back to the issue of your selection as Chair of the Federal Trade Commission, how do you think you were chosen? Obviously, the earlier comment that the President was saving you for the FTC may have indicated an early decision—at least an early pre-disposition.

Mr. Pitofsky: I was an obvious candidate. It might not have taken so long but Charles Burson who had been Attorney General for the State of Tennessee and was assistant to Vice President Gore just happened to be my opponent. Charles Burson—in any other circumstances, I would have been for him because he would have been absolutely outstanding. He had support and I had support. Who knows how these things are finally decided. The President did have me meet with Bob Rubin and Laura Tyson and others in the White House, and eventually it was decided that Burson would continue as the Vice President's Chief of Staff and I would go to the Federal Trade Commission. I don't think there was another candidate.

Ms. Born: And so you were nominated. How did the confirmation process go?

Mr. Pitofsky: The process took quite a bit of time. In recent years, all

appointments to the regulatory agencies have been slow going. Mine, from nomination to confirmation, took about six months. That's not as bad as FTC Commissioner Tom Leary who took 18 months but it's not as quick as some other people who were confirmed. I had my hearing before the committee; it went very well. In fact I believe the committee voted unanimously that I was qualified but then the nomination just sat.

Ms. Born: Which Senate committee is in charge of the FTC?

Mr. Pitofsky: Commerce Committee has oversight. Judiciary has oversight of the Department of Justice. And for some reason it just sat, and I couldn't get a vote from the full Senate, and I didn't know why. I tried all sorts of different ways to find out what the stumbling block was, and I never could find out. Eventually I came to understand that two, perhaps three Senators recalled the fact that I had testified in the nomination of Robert Bork to the Supreme Court. I always thought my testimony was extremely mild and there was much praise in my testimony as well as criticism, but I did say in the end that he had a history of not giving the fullest weight to congressional will in a matter if he thought Congress had made a mistake. And I think several Senators remembered that, and I am not sure the goal was ever to block my nomination but it certainly was to delay it.

Ms. Born: But eventually it happened?

Mr. Pitofsky: Eventually it happened with the great help of some Democratic Senators on the Commerce Committee. I think I must have been nominated in the fall of '94 and I didn't take office until April of '95.

Ms. Born: What factors went in to your decision to accept the nomination?

Mr. Pitofsky: The idea of doing public service was for me a no-brainer. I was very enthusiastic about the Clinton administration and what their goals were and the people that they

had brought into government. It was just a question of which job I might be lucky enough to be offered. There were several feelers between my losing out to Anne Bingaman and my receiving a Federal Trade Commission offer. I was interested in several of them but not as interested as being Chairman of the Federal Trade Commission.

(End of tape, side **A.)**

Mr, Pitofsky: I believed, just as I had written 25 years earlier, that the Federal Trade Commission was an agency of immense potential that had not realized on that potential at times because of a failure of leadership.

Ms. Born: What was the state of the FTC when you assumed the Chair as opposed to 25 years earlier?

Mr. Pitofsky: The state was relatively good because my immediate predecessor was an outstanding chair, Janet Steiger. She was a Republican. She'd been nominated by the first President Bush. She had attracted good people and had stabilized the agency. Prior to that during the Reagan years there were times when the chair and maybe one or two of the commissioners really didn't believe fully in the mission of the Federal Trade Commission. That was, I think, especially true of Dan Oliver and to a lesser extent of Jim Miller. The result was a brain drain, a disinclination of young people to go to the Federal Trade Commission where, after all, the leadership wasn't enthusiastic about its mission. Janet Steiger must have taken over in '89and she turned that around. She made it clear that she thought the Federal Trade Commission had a great deal to accomplish, that she was not cowed or intimidated by powerful interests in the private sector. She was willing to listen to original and innovative proposals. And in general she was one of the fine chairs of that agency. So when I took over things were in reasonably good shape.

Ms. Born: Was she still on the commission?

Mr. Pitofsky: She stayed. That's an interesting point because I needed her vote. When I came on there were two Democrats, two Republicans and one independent. It was very difficult for me to obtain the vote of one of the Republicans and the independent. And of course, everything at the commission depends on being able to count to three. So Christine Varney and I came to the commission virtually at the same time, and our ally in all the controversial cases was Janet Steiger. Now, as you would appreciate, most cases are unanimous or near unanimous. They are not controversial. But Janet was an immense asset in terms of substance. Also politically we adopted a technique of the two of us visiting Congress jointly for anything we had to say, so that we defended our budget together, we defended initiatives together, we spoke to individual Senators who were concerned about what we were doing together. It was a team project in my first years there and it worked extremely well.

Ms. Born: Was that because it demonstrated the bipartisan nature of the position?

Mr. Pitofsky: It was also true that Janet Steiger enjoyed enormous respect on the Hill. So we were a very successful pair. In fact, I think we were able to obtain modest budget increases in years when everyone else's budget was being cut. Or if we were cut, it was not as much as others.

Ms. Born: Tell me about who the other commissioners were at that point.

Mr. Pitofsky: Christine Varney was a young lawyer from Washington who had been extremely active in the Clinton campaign. In fact, she had lived in Little Rock for a year and I think she was secretary of the campaign—I am not sure I have the right title. She was extremely energetic and capable and very much committed to that part of our work that affected

the high-tech part of the economy. She knew computers, she knew telemarketing, she knew software, and she wanted to take a leadership position in that area, and I encouraged her to do so. The independent was Mary Askanaga who had been at the commission for perhaps 20 years and had been a commissioner for perhaps 12 years or more.

Ms. Born: She was an employee before then?

Mr. Pitofsky: Yes. She had been in the general counsel's office—first the San Francisco regional office and then the general counsel's office. And she was not just independent in name only. She was independent-independent. It was very difficult to predict her vote because she wouldn't tell you until the last minute which way she was going. And while I enjoyed her support on many important projects, I also lost her support on many important projects. The other Republican was Ross Steiger who had been at the commission as a commissioner for almost a full term. He had come from the White House Personnel Office. He had many connections in the Republican establishment. He was a very reasonable person, but his instincts were more conservative than Commissioner Varney, Commissioner Steiger and myself. The result was that when you were talking about cigarette regulation or major mergers or challenging a company like Intel, it was very rare that we were unanimous. And anything that was innovative in terms of antitrust laws, and I hasten to say, and I have written to this effect, we didn't do all that much innovative in terms of the rules of the road. Most of our innovation was on remedies, but whenever we tried to do anything innovative on remedies, it was a fight to get the third vote.

Ms. Born: What were your goals when you became chair?

Mr. Pitofsky: They were several and they grow out of my experience as a critic of the FTC in 1969. First of all, I put tremendous emphasis on attracting senior staff, and while in

one sense it was frustrating that I had to wait six months to be confirmed, in another sense, it gave me an opportunity to do a wide search for senior staff. Luckily the two bureau directors were Bill Baer of Arnold & Porter and Jodie Bernstein—and they probably were—myself included because I was once a bureau director—the best two bureau directors that agency has ever seen. Jodie is a bureaucratic genius. I have never seen anything like her ability to work through a complicated bureaucratic problem. And Bill has a combination of street smarts and substantive ability.

Ms. Born: Did you bring them in?

Mr. Pitofsky: Yes. They came with me on day one. There were people already at the commission who I came to realize were great assets: Susan DeSanti, who is chief of policy planning and a very thoughtful person, a person who thinks long term, and I managed to persuade her to stay. The general counsel was Steve Calkins who, of course, was very familiar with the Federal Trade Commission because he had been the reporter on the second Kirkpatrick report. And then I spent a long time trying to select the head of the bureau of economics. Traditionally the economists and the lawyers were at each others' throats at that agency, and they did not coordinate and cooperate. By and large the economists were constantly critical of what the lawyers were proposing. I eventually found someone who I knew only slightly, named Jonathan Baker, who was both a lawyer and an economist. We talked long hours about my principal concern that he bridge this gap between lawyers and economists, and I think he was as successful as anyone who has ever had that job. He was brilliant at it, and he changed the role of economists. They weren't just thinkers; they weren't just big picture analysts. They became hands-on supporters of the lawyers in the cases that we brought, whereas in the past the commission would tend to hire prominent lawyers to help on their cases as expert witnesses.

And we did that too, and we were very fortunate with the people who were willing to testify for us.

Ms. Born: Lawyers or economists?

Mr. Pitofsky: Economists. I never hired an outside lawyer to supplement our work the way Joel Klein hired David Boies to handle the *Microsoft* case. Maybe I was right. Maybe I was wrong. I wanted to educate a generation of competent lawyers, and I thought bringing in outsiders was the wrong way to do that. So that's senior staff. Junior staff—we were extremely active in reaching out to the law schools and to young people at law firms for exceptional people, and since there was the greatest merger wave in the history of the country going on, and much interest in what consumer protection could do about unwelcome phone calls, spam, deception and unfairness in the sale of computers, and so forth, it became quite an attractive place for young people. Beyond staff I had an idea, and in fact I announced it during my Senate Commerce Committee confirmation. I said that I knew, when the Federal Trade Commission was created in 1914, the idea was not to simply have a second enforcement agency. President Wilson and Brandeis, his advisor, had in mind an agency that would do reports, studies, hold seminars on cutting edge economic issues. That theme had been quite successful in the history of the FTC. It had led, for example, to investigations of the securities market that eventually produced the Securities and Exchange Commission. That theme had been lost over the years—or almost entirely lost. I announced even before I took office that we would have very extensive hearings on the impact of global competition and high-tech innovation on the American capital market. And we did under the leadership of Susan DeSanti.

Ms. Born: Tell me about those hearings and what the results of them were.

Mr. Pitofsky: They went on for almost six months, I think. And the result was a

report filled with data, but also with recommendations, concluding that the nature of competition in the world was changing, that there had been a vast increase in exports and imports, that the parts of our economy that were growing most rapidly and that we cared about the most tended to be the high-tech sector of the economy, that as far as consumer protection was concerned, the old concerns of pyramid frauds and marketing fraud, false advertising were still there but those matters now were introduced through new techniques. For example, we discovered many frauds in which the telephone call would be placed to the United States target. And then the call would be routed from Canada to Maldova to some place in Africa and back to the U.S. The caller would then be charged international phone rates. And it was totally fraudulent. When we sought to enforce the law, we found that there were treaties between the United States and Maldova or Canada and Maldova that made it almost impossible for us to achieve enforcement. On the substantive side, pyramid frauds as you recall are frauds in which one person invites two people to contribute, and then two invite four, and on and on. Well, just imagine what you can do with a fraud like that with a computer. We found that pyramid frauds were rife throughout the economy. Of all the issues that we addressed in the global competition hearing, the one that had the most impact and that made the most difference had to do with whether there ought to be an efficiency defense to mergers that were marginally illegal. We had very extensive hearings on that. There were many points of view offered but in the end the commission, I think unanimously, voted to amend the Department of Justice-FTC merger guidelines to clarify and expand an efficiency defense for mergers. Easier said than done. We then spent six months or more negotiating the language of that defense. But it's interesting. I was on a program just last week at the Federal Trade Commission discussing that defense. No one at the session now takes the position that there shouldn't be an efficiency defense. The whole quarrel is how broad it

ought to be. All we were trying to do is wedge that issue into the guidelines so that we could get started asking people to tell us what they thought was the reason for the merger.

Ms. Born: Why did it take so long to draft the language relating to the defense?

Mr. Pitofsky: There were many people—some people at the FTC and many people at the Department of Justice—who thought it was a bad idea. They thought that once there was an efficiency defense good lawyers would dream up efficiency claims. They would take discovery that will go on for months and in the end it would be impossible to overcome. That was a legitimate concern, but it's turned out not to be true. Many companies in court have offered efficiency defenses, but the defense itself is rather narrowly described in the guidelines. The judges have followed the narrow description, and so far no court has concluded that this would be **an** illegal transaction but for the efficiencies. The efficiencies have been rejected as superficial, lacking substantial evidence, not necessary, and the same efficiencies could have been achieved without a merger, points like that. I have come to learn that there are many examples of prosecutorial discretion where the agency would have brought a case except it became persuaded that there were substantial efficiencies. I testified to that and Tim Muris has said the same.

Ms. Born: So that you think is the biggest impact so far of the defense?

Mr. Pitofsky: Oh yes, absolutely. The fact is if there is a really strong efficiency defense and the merger itself is not to monopoly or near monopoly, the agency is just not going to bring that case. And they haven't. The one case in which a very strong efficiency defense nevertheless did not prevent the FTC from suing was Beech-Nut/Heinz baby foods. I never denied there was a real efficiency there. But it was a merger from three to two, there were high entry barriers, neither company was failing, and number one had 60 percent or more of the

market. We just didn't think the efficiency defense is enough to overcome that kind of concentration.

Ms. Born: Were there other studies and reports that were done during your tenure on other issues?

Mr. Pitofsky: Many. I wish I could remember them all. Jodie and the consumer protection people were exceptionally active. There were a series of hearings and reports on privacy. That was probably one of the most extensive commitments of time and effort. There were hearings on sales of alcohol to teenagers. And on predatory lending. There were extensive hearings on what was called "B to B" transactions, business to business on computer.

Ms. Born: Bob, you said that the hearings involved globalization of competition, and what were the implications of that development?

Mr. Pitofsky: Let me take a step back. In one way the role of the Chairman and the Commissioners of the Federal Trade Commission and of the head of the Antitrust Division changed radically with respect to international coordination and cooperation. I remember when I was a Bureau Director at the FTC Miles Kirkpatrick once in a while would go over to the OECD meetings in Paris and when he returned we'd ask what happened. And he said little if anything. It was at most show-and-tell by different countries about what they were doing, and the show may have represented rather well drafted statutes on the books, but there was very little enforcement in Europe and much less in East Europe, Russia, China, Asia and Australia. By the 1990s something approaching 100 countries had antitrust codes. That would be the end of the 1990s. And many of them were very serious about enforcement efforts. And it wasn't just cartel behavior. That would be the obvious sort of target for a foreign antitrust or competition agency. There was occasional enforcement against exclusive dealing, price discrimination, dominant

firm behavior and so forth. One result of all this is if the Chairman of the Federal Trade Commission wanted to, he or she could be on the road to a foreign country twice a month. There were that many conferences. There were also treaty obligations. The United States had treaty obligations with the EU, Canada, Japan and Korea. The result was that you almost had to be in each of those countries once every two years and sometimes once every year.

Ms. Born: What kind of treaty obligations?

Mr. Pitofsky: Essentially agreements that the parties would meet, discuss cases of common interest, discuss possible procedural reforms, and assign to specific people in different agencies coordination on a particular project. The reason for that is that there are so many cases—mainly mergers and joint ventures, but it goes beyond that—where the consequences of the transaction don't exhaust themselves in the United States, don't exhaust themselves in Europe, but really have an impact in 10,12, 15 different countries. And unless you can coordinate your investigation, one, it's unfair to the parties to have 15 different people investigating, and two, you're going to get in each other's way. So part of it is coordination. There's also the matter of avoiding inconsistent remedies, and it's surprising how often that comes up. One country will say you must do X, and the other country will say you cannot do X. That's unacceptable. Finally, there was considerable enthusiasm outside the United States for a global code so that the law in all of the OECD countries, for example, would be the same. Joel Klein and I were never enthusiastic about that. We always felt that countries were at such different levels of development that an antitrust principle that might be appropriate for Uruguay or New Zealand wouldn't be appropriate for Canada, Europe, or the United States. However, we did come around to the view that there is one area where every self-respecting competition code should have a provision, and that is cartels: price fixing, market division, output control and so

forth. So we proposed—actually it was the Federal Trade Commission that took the lead—that the OECD and eventually the Inter-American Council would adopt the position which mandated that in cartel matters, different countries would cooperate with each other in exchanging evidence that was not privileged, exchanging theories of the case and cooperating on a remedy. There was a terrible struggle in the OECD. Many countries have a tradition of independence—such as Switzerland and Sweden—and the idea of their signing on to something like this was not congenial to them. But we had meeting after meeting and modified the language I'm sure many times over. And eventually I thought one of the great successes of that period in the OECD was the adoption of a principle of antagonism toward cartels and cooperation and coordination. We then carried that agreement to Panama City where we met with as I recall all but one of the Latin American countries, and they adopted it in about 24 hours. So you do have on the cartel front remarkable international cooperation. There continues to be agitation to expand the success on the cartel front to dominant firm behavior, joint ventures, exclusive dealing and so forth. I truly believe that there will come a time when we will be able to add to the cartel provisions, but we're just not there. And the idea of having the same merger rules in Israel, Brazil, the United States and Korea is just not in the cards.

Ms. Born: Is that because the legal structures are different and at different levels of development? Is it because the economic needs of the countries are different?

Mr. Pitofsky: It's mainly the latter. But the administrative differences are also significant. Suppose someone were to say a merger of two non-failing firms to one is absolutely a violation of international law. A very small economy would say, we don't have enough business in our country to support two companies and they certainly are not efficient enough to export, so it makes sense for us to allow a merger of two to one or three to one or something like

that. Our definition of a failing company is different than yours. Our definition of an efficiency defense—most countries don't have an efficiency defense—is different than yours. A common code proposal is now on the agenda of the WTO. I think there's been an agreement that nothing will be brought to a vote for at least a year or two. I think it's worthy of discussion, but I can't see a uniform code. I can see a uniform commitment to transparency so that private sector companies doing business in Ireland know exactly what the law is there. There are other things that I've called soft convergence that are doable. One is something called positive comity. And that is, if most of the transaction affects the commerce of a particular country and a small part of it affects the second country, the second country could say to the first, why don't you take the lead in this investigation? Just keep us informed. Those are steps that are possible, but a uniform merger code just doesn't make sense. Although there are people including my valued colleague Eleanor Fox and others who are more cosmopolitan in their attitude toward these issues and willing to entertain more ambitious proposals.

(End of tape, side B)

Ms. Born: How much of your time was involved in the international effort, and what kind of staffing did you have?

Mr. Pitofsky: I tried to keep control of my own time because if you stay away from the office for a week and come back, it takes three weeks to catch up, and there is no way to do that over the Internet or telephone. It's just not possible, so I probably averaged three or four international trips per year. I also had the good fortune of having a colleague, Joel Klein, who was equally involved in these treaty obligations—the treaties always cited both agencies—and we agreed at an early point that, as much as we enjoyed each other's company, it was not necessary that we both go to every meeting. That's pretty much the way that we

handled it. In six years, I was in Japan three or four times, Korea two or three times, Europe at least a dozen times, probably more—because I did think that the meetings between the law enforcement people in Brussels and the meetings with me and my staff were essential. There were major, real, discrete issues that needed to be resolved. This was far from show and tell. As far as staff was concerned, the commission already had what I would call a "skeleton" force doing international coordination, but it hadn't received financial or commission support to the extent that I thought it deserved. Eventually the two people who headed that staff were first Deborah Valentine, a mid-career lawyer from O'Melveny who was an extraordinarily talented person and then, when she was promoted to general counsel, Randy Triteel who had been a European partner in one of the major New York firms. If I attended four meetings and conferences abroad, they must have attended a dozen each year, maybe more. That's the tip of the iceberg. The real change lies in the fact that virtually every day someone in the Federal Trade Commission would be on the phone with someone either in Canada or Brussels or Tokyo or Seoul or Australia working out a coordinated response to a mutual problem. That is an entire departure. When I was a commissioner in the early '80s, we had one case that had major international implications. My guess is that of the 4,500 mergers per year that we saw at the height of the merger wave in the '90s, a quarter to a third were transactions that had international implications. So it was day-in-day-out coordination and cooperation, and that's just the antitrust side. Cross- border fraud was the fashionable approach to fraud during those periods. The lottery would be in Australia, the money would be in the Cayman Islands, the actual fraud would be mailed from South Africa—literally. Tracing down the responsible party and then imposing a remedy was impossible without the cooperation of the country where the fraud was initiated. And frankly some countries weren't enthusiastic about enforcing laws covering white-collar

crime against Americans emanating from their country. But we had some considerable success and that's an area where Jodie Bernstein had her international unit on the consumer protection side. I would have to be honest and say that we were often frustrated because these people were so clever in the way they set up their transactions on the consumer side. On the antitrust side, I would say we were successful virtually all the time because we had such extensive cooperation with foreign countries. One of the most famous international antitrust cases occurred before I got to the Federal Trade Commission and that had to do with an alleged international diamonds conspiracy. I am told that the reason the American government lost that case is they could not get access to the DeBeers witnesses and documents. Now, I don't know if that would happen today in light of the way in which we address international cartel behavior. I'm not sure about that, but I do know that people in the Justice Department feel that the lack of cooperation and coordination and DeBeers' very clever ways of staying within South Africa's borders cost them the ability to win that case. We were much more successful, especially in our merger enforcement program, because of cooperation.

Ms. Born: Were the treaties or other kinds of informal agreements between countries in part designed to exchange discovery-type information?

Mr. Pitofsky: Yes, very much so. Now some information is given under confidentiality restrictions, and we were extremely careful not to overstep so as not to undermine our whole effort, but assuming there was no privilege involved, no confidentiality involved, the exchange was total. The advantage that that gives an enforcement agency is enormous. It surprises me because Europe is so cautious procedurally in the way they enforce their competition codes. But they have something called the "dawn raid" in which law enforcement people show up at the company and start reviewing their files with no notice whatsoever.

Sometimes documents emerge in a situation like that which would be very difficult to obtain in conventional ways.

Oral History of Robert Pitofsky
Sixth Interview
March 30,2004

Ms. Born: This is the sixth interview of Robert Pitofsky for the Oral History Project of the Historical Society of the District of Columbia Circuit. It is being taken on March 30, 2004 in a conference room at Arnold & Porter, 555 Twelfth Street, N.W., Washington, D.C. 20004. Bob, when you became FTC chair, what was your attitude about the rulemaking role of the FTC?

Mr. Pitofsky: I thought of it as a very important decision about the direction for the agency. Much of the difficulty that the FTC encountered in the 1960s and '70s came about as a result of rulemaking. Rulemaking is efficient. Instead of bringing case after case, if a party violates the rule, you sue the party for that violation. The problem is that if you try to regulate a broad segment of an industry, you must address much detail about aspects of that industry and you organize the opposition. Everybody in that industry, those that are violating legal and ethical principles and those that are not, get together, hire lawyers and resist the rule. Also, if you issue enough rules, some of them are going to be wrong headed and then people are going to climb all over the agency for issuing that kind of rule. I think that one or two of the rules the commission issued in the '70s rank among some of the very best things that the commission has accomplished. The rule regulating marketing in the funeral industry and the rule addressing the way in which local optometrist organizations induced state legislatures to discriminate against the chains: those were outstanding rules. Other rules were not as well thought out.

Ms. Born: Did you do any rulemaking during your period as chair of the FTC?

Mr. Pitofsky: My two bureau directors, Bill Baer and Jodie Bernstein, and I came

to an early decision that we would either initiate no rules or very few rules and rather engage in case by case enforcement. It's more flexible, it's more focused, and in most sectors of the economy respectable companies when they find out what the law is as a result of a court decision, obey the law. You don't need a rule. Now, there were some rules that Congress directed us to undertake, and of course, we did that sort of rulemaking. But aside from rules that came to us from Congress, I can't think of a single rule that we initiated. There may have been some in the consumer protection privacy area but we went from a commission heavily involved in rulemaking especially on the consumer side, with much criticism as a result of those rules from Congress and the press, to an agency that did very little rulemaking. And I think it has paid off. My successor seems to be following the same strategy.

Ms. Born: What about the "do not call" issue?

Mr. Pitofsky: When I first heard reports of that proposal, I said, for goodness sake, why didn't I think of that? That's such a good idea, and it's a wonderful initiative by the commission. But then I was reminded that, just after I left the commission, Congress passed a statute that enabled the commission to get into the business of the "do not call" rule. I understand now there are more than fifty million people on the list, and it's growing very rapidly. I'm on the list, and it has improved my life immeasurably.

Ms. Born: Mine too. You had throughout your career been interested in remedies. What was your view of remedies while you were chair of the FTC and what was the FTC's take on remedies?

Mr. Pitofsky: I've written a short piece, published in the *Georgetown Law Review*, with the following thesis—that in the six plus years that I was at the commission, there was very little change with respect to the rules of the game: what's legal, what's illegal. I can come up

with a few instances in which new interpretations of the antitrust laws or consumer protection statutes were introduced, but very few, and they weren't exactly radical changes. But remedies changed enormously in the '90s. That was deliberate, both at the Department of Justice and the Federal Trade Commission. It was deliberate because we had a system for all too long where it paid to violate the law. Even if you were caught, and there's always a question of what percentage of people are detected in their behavior as opposed to those that get away with it, the violators end up paying a combination of fines, penalties, even treble damages, that is less than they took in as a result of their illegal activity. Also, in many areas, the penalty doesn't include interest. So by the time you have illegally extracted ten dollars from consumers, you end up paying three or four dollars back. We wanted to change that. Anne Bingaman and Joel Klein at the Department of Justice moved in the direction of much more stringent fines and penalties including a few fines that were in the $500 million or more category. I believe total criminal fines for antitrust violations increased by a factor of about 10 in the period between 1990 and 2000. The Federal Trade Commission has no criminal enforcement authority. It was an issue of finding a way to extract the illegal gains from the person found to have violated the law and return it to the target of the violation. One of the principal initiatives in that area was disgorgement. We didn't invent disgorgement—there were one or two cases that sought disgorgement previously at the FTC, many cases in the SEC—but we certainly gave it a more prominent role where you had exceptionally bad behavior—and the Mylan case is the leading example—where anyone would have known in advance that this was improper behavior. This is not someone stumbling in an arcane or uncertain area of the law.

Ms. Born: Why don't you describe the Mylan case?

Mr. Pitofsky: Mylan was a pharmaceutical company manufacturing an

antidepressant and other types of drug therapies. It managed to enter into contracts with the only sources of the raw materials for those particular products, thereby denying competitors the ability to manufacture the product. It then raised the price an extraordinary amount. I think the price may have been roughly ten or fifteen dollars per hundred pills before they entered into these contracts, and they raised the price to over three hundred dollars. To a large extent, it was a kind of pharmaceutical where you take it on a regular basis, and many people on fixed income were the victims. I never in my years at the FTC received the kind of pathetic letters that I received from people who were complaining about the pricing of these products. We said, it's not enough to stop doing it, it's not enough to pay the Treasury a fine. We want you to pay back to the victims the amount of money that was taken from them when the price went from roughly $10.00 to $350.00. And since it's a pharmaceutical issued by prescription, we know who those people are. The company claimed the remedy was unprecedented—it was almost unprecedented, but not quite—and unfair. But in the end, the court backed the FTC completely, and as far as I know that money has been paid back. The organization and management of the payment can get quite complicated, but we had an excellent judge, Judge Thomas Hogan of the D.C. District Court, and we were joined by many state AGs. I think there must have been twenty or more state AGs participating in the case and in the distribution of the monies. I believe it worked successfully.

Ms. Born: Were there a number of other cases where disgorgement was ordered?

Mr. Pitofsky: I don't know if the cases are finished yet, but there have been other cases in which disgorgement was sought. The Antitrust Section of the American Bar Association was opposed to this disgorgement remedy. Admittedly, it should be used cautiously

and carefully. It's not a common everyday remedy. You have to know who the victims are, you have to make sure there is a feasible means of compensation. It should involve an area of the law where the law was clear and so forth. But there are disgorgement cases that are in the works right now.

Ms. Born: Any other particular developments on remedies?

Mr. Pitofsky: Jodie Bernstein on the consumer side was very original in thinking about remedies—not just punishment for past behavior, but structuring behavior in the future. There were some innovative remedies. There were also some very large fines. As I recall, Citicorp paid a fine of over $100 million for what is called predatory lending by one of its subsidiaries. Citicorp bought a subsidiary that engaged in this terrible practice of seeking out the most innocent of possible borrowers and essentially lending more money than they could possibly pay back, where the lender had knowledge the borrowers couldn't do it. And then you flip them. You foreclose on that house and then you do the same thing to the next person and the next person. One of the worst set of stories I heard is that these marketers would follow hurricanes across the South and they would come across a house where the roof had blown off and they would offer a loan on the spot, sometimes with unconscionable conditions in it, and then they would be back a year later to foreclose on the house. Some very rough stuff. Parallel to disgorgement is the idea of restitution. It's a very similar set of approaches, and the commission did more work with restitution in that period than previously. On the antitrust side, again speaking of remedies, I was very concerned about the rising tide of concentration in the media. It seemed to me that we were on a path where six or eight or nine conglomerates would end up owning a large share of TV networks, affiliates, radio, even newspapers and cable. Some of those cases were very difficult to deal with under the antitrust laws because they weren't

horizontal mergers, they weren't even vertical mergers, they tended to be conglomerate. And those are very difficult theories to pursue successfully in court. But I did feel, especially when there was a vertical aspect to the transaction, that the least we could do was to mandate access in the future so that, for example, if a large programmer acquires a large cable company, other rival cable companies have access to the programs and other programmers would have access to the cable outlet. That was the essence of the settlement in Time Warner/Turner and it was the essence of the settlement in the AOL/Time Warner.

Ms. Born: Tell me about the merger wave of the 1990s and how it affected the FTC and your activities?

Mr. Pitofsky: I believe it was the largest merger wave in the history of the country. There had been a merger wave between 1895 and 1902, when the economy was much smaller, and therefore, those earlier mergers may have accounted for a larger percentage of the gross domestic product. But this merger wave in the 1990s dwarfed that in terms of the assets that were acquired and exchanged.

Ms. Born: What caused the merger wave?

Mr. Pitofsky: Many books have been written on the subject, but I'm not sure I'm persuaded by any of them. One theory that I've advanced is that it was a consequence of the grossly inflated stock market. Unlike previous decades, many of these mergers were stock for assets, and many of the CEOs of the acquiring companies took the approach that we know our stock is inflated, it's not worth that much; therefore, let's use our stock to buy something real, like assets. There are many instances in which that sort of thing occurred. Globalization of trade also led to mergers. You would have a powerful Japanese company and a powerful American company who would join forces; the combined company would be more effective in world

competition. The enormous increase of the significance of high-tech and intellectual property meant for the best of reasons that companies needed partners with complementary technologies in order to get the most out of what they knew. In fact, most mergers are probably a good idea from the consumer's point of view. But it's the five percent or less that are not where the government must step in. The other thing that was different about the '90s was it wasn't a stock market manipulation funny-money kind of thing, the sort of thing you saw in the 1980s with junk bonds. These were real industrial companies, and they were joining forces. The result of so many of these mergers being horizontal — joining direct rivals and therefore dangerous to the competitive process, and the consequence of the sheer volume of it meant that for six years two thirds of our antitrust resources were devoted to nothing but investigating and then clearing or challenging mergers. There's never been a situation like that at the Federal Trade Commission. And I regretted it to some extent because I thought there were other things worth doing, but the merger review system has deadlines built into it. We really had no choice but to devote those resources to it.

Ms. Born: So, it took an enormous amount of the FTC antitrust resources away from other issues. What were the major cases during the time you were there involving mergers?

Mr. Pitofsky: Before turning to specific cases, I should mention one significant change in overall government enforcement against mergers. In 1997, the Department of Justice and the FTC joined forces in amending the Merger Guidelines to clarify and emphasize the availability of an efficiency defense. The defense was intended to be narrow — the efficiencies had to be substantial, could not be achieved in some less anticompetitive way, likely to be passed on to consumers, and could not justify merger to monopoly or near monopoly — but they could in

a close case be the difference between legality and illegality. No court has yet relied on an efficiency defense to change the result of a decision, but I know (and my successor has confirmed) that some complaints were never filed because strong efficiency considerations influenced the result.

Now let me turn to several major merger cases. First, there was a series of mergers in the oil industry. It's odd that we would have so much activity in that area because, when this concentration of oil companies began, the oil industry was a rather deconcentrated market. There were over fifteen major sellers. So when the first pair came in to the Federal Trade Commission and said they were thinking of merging and the overlaps are slight and we'll sell off this refinery and that refinery, there would be no way to challenge that. Then came the second, then came the third, then came the fourth. I still believe you take the world as you find it and the fact that the commission let three through earlier doesn't mean that you don't challenge the fourth. The truth is we became tougher and tougher on oil mergers, but by the time we were finished, there weren't 15 major oil companies in the world, there were about twelve. It's a different world today. I don't think we fully blocked any merger in the oil industry, but we certainly insisted on restructuring virtually every one of them. In terms of impact on the law, I would say that the Staples case and the Beechnut/Heinz case were the most important. Those are two cases we won. Before we finish let me not fail to tell you about the cases we lost. In Staples, the previous 20 years had seen the enormous growth of stationery super stores to the point where three chains dominated the country. That doesn't mean there weren't many mom and pop stationery stores around, but they just found it very difficult to compete with Staples, Office **Max,** and Office Depot. But numbers one and two proposed to merge, arguing that the market should include all stores, not just super stores, and arguing that there were very

substantial efficiencies to the transaction, and finally arguing that their history has been to lower prices, so that, if the government let this merger go through, there would be even lower prices. It was a very close call at the commission level, but a majority of the commission decided to challenge the transaction. An excellent staff of lawyers and a super economist from Princeton, Professor Ashenfeld, assisted our efforts.

Ms. Born: Where was this tried?

Mr. Pitofsky: Tried right here in Washington, D.C., and the judge happened to be Thomas Hogan again.

Ms. Born: In the federal district court?

Mr. Pitofsky: Right. We were able to convince the judge to visit Staples, Office Depot, and other stores in the area. And unlike other occasions in antitrust enforcement, where the judge takes the lawyers from both sides on a site visit, he just got in his car one Saturday and drove around, and his conclusion was that it approached being absurd to think of Staples as in the same market with these tiny stores that sell fancy stationery. On the efficiencies claim, he allowed it as a relevant factor even though the Supreme Court has never concluded that efficiencies can be a defense to an otherwise illegal merger. But the Department of Justice and FTC had changed our old guidelines to incorporate an efficiency defense, and he accepted it. But he concluded as many others did that the claimed efficiencies were vastly exaggerated. When the lawyers reported to the board on the transaction, the efficiencies were one 1X. When the board voted it out, the statements said the efficiencies were 2X. By the time they were being investigated, the claimed efficiencies were **4X.** By the time we were in court, the efficiencies were 8X. It was called the Pinocchio effect. The judge saw right through it. Let me tell you an interesting sidelight about that case, one of the most interesting pieces of evidence I can ever

recall. The way these super stores advertise is they take full page ads with perhaps smaller boxes which incorporate maybe thirty-two different products, and they say, sale on typewriter ribbon $21.50, that sort of thing. This man, whose name I don't recall, lived in one city in Florida and worked some 80 miles away in another city. In the city where he lived, there were three super stores, all three of the major players were present, and in the city where he worked, only one was present. He sent us the full page ads from the newspapers in these two cities, and all you had to do was look at the ads to see that the prices in the city with only one store were something like 15 or 20 percent higher than the prices in the other city. It was the clearest demonstration of the effect of monopoly power that one could imagine. Now, I thought the ads were very persuasive, although the judge never cited it in his opinion. But it certainly had a great deal of influence on me. I thought this case was important because it was one of the very first cases in which a judge took an efficiency defense to heart and examined it carefully and closely. It was a case in which both sides used regression analysis. Judge Posner has since written that Staples is the case in which, from an economic point of view, antitrust came of age. And that's where this professor from Princeton was so good. We weren't going to allow ourselves to be outgunned by an expert witness from the private sector. We had an expert witness who was at least as good.

Ms. Born: Was the Staples' case decision appealed to the court of appeals?

Mr. Pitofsky: No, the deal collapsed after Judge Hogan's opinion.

Ms. Born: Was there then a settlement or did Staples and Office Depot just not merge?

Mr. Pitofsky: They just did not merge, and the three major stores are still out there competing quite vigorously and as far as I know they are doing pretty well.

Ms. Born: Tell me about Beechnut.

Mr. Pitofsky: Beechnut/Heinz was very unusual in this sense—the dominant firm in the baby food business is Gerber. It has over 60 percent of the market, Beechnut has maybe **14** percent Heinz has maybe 12 percent. They are distant second and third. They made the plausible argument that, given a firm of such dominant market power as Gerber, we ought to allow a merger between the other two in order to let them compete more effectively against Gerber. They also said that they tended to be in different parts of the country, although they agreed there was some overlap. But what the market really was like is that virtually every store that sold baby food sold Gerber, and then there would be a vigorous competition to see who would be the number two baby food on the rack because almost no outlet carried all three, a few stores but not very many. One of the companies had a plant that was very run down and inefficient.

The other company had a plant that was more up-to-date but had unutilized capacity. To put it simply, it was really one of the strongest efficiency claims that one could make. Neither company was failing. They weren't making a lot of money, but they weren't failing, and the barriers to entry into this market were extremely high. No one had entered the baby food market in the United States in 30, 40, 50 years, including foreign companies. I don't know why some good foreign company wouldn't come into the United States and take on Beechnut or Heinz, maybe not Gerber. It was a very sound efficiency defense, but the antitrust laws have been on the books for 110 years, and we have never allowed a merger of three to two when neither of the two combining companies was failing and there were high entry barriers. It would have been a total departure. In that case we lost in the trial court.

Ms. Born: Was that tried in D.C.?

Mr. Pitofsky: Tried in D.C. Jim Robertson was the trial judge. One can see why he came out the way he did, especially on the efficiency ruling.

Ms. Born: **So** he gave judgment for the defendants because of the efficiency defense?

Mr. Pitofsky: There were other aspects of his opinion that I didn't agree with, but I was sympathetic with his treatment of the efficiency issue. And then we appealed it to the court of appeals. Debra Valentine, our then general counsel, argued it, and a unanimous court of appeals reversed and blocked the merger. It was a hard case, because I have some sympathy with the numbers 2 and **3** fighting a company like Gerber. But the solution is to put new fresh money into number 2 and number 3, not to allow them to merge and eliminate whatever competition existed between the two.

Ms. Born: At least between them if not with Gerber.

Mr. Pitofsky: Gerber's history is remarkable. To retain the market share at its level for so long is most unusual. I think our record on merger enforcement was something like 12 or 14 wins and 2 losses. The two losses were both hospital mergers, and I shake my head over those cases time and again because in each instance it was a merger of two to one or maybe of four to three in cities in which next nearest hospital was 50, 60, **80** miles away. But I believe I understand what happened there. These are nonprofit hospitals. Important members of the community are on the board, and the instinct of local judges is what business is it of the antitrust law enforcement people in Washington coming here, to say, Pine Bluffs, Missouri and telling us how we should structure our hospitals.

Ms. Born: So those were tried in the local communities in the federal district court?

Mr. Pitofsky: Exactly.

Ms. Born: Do you want to talk in more detail about mergers like AOL/Time Warner or any of the particular oil industry mergers?

Mr. Pitofsky: I sound somewhat defensive about AOL/Time Warner. I spent a year considering various theories to challenge that transaction because the companies were so enormous. But the problem is Time Warner is a powerhouse in programming, but it held less than 30 percent of any market that it was in—Time Magazine, Time Network, Warner Studios and so forth. So if you look upstream at the programming aspect, they are in antitrust terms in safe harbors. Recent cases have said, if a firm does not have over 30 percent, then a vertical challenge just doesn't apply. Downstream you do have Warner Cable which is, I think, number two in the country, and of course you have AOL, which at that time dwarfed competitors. Some of the competitors have done better since then, partly because our order has required that they be treated in a different way—so that Earthlink and Microsoft are now significant competitors of AOL. But we finally decided that the major issue of whether or not Time Warner upstream—a strong programmer and a powerful cable company—would be permitted to merge with a powerful Internet provider wasn't reachable under current antitrust law as fairly interpreted. On the other hand, there were smaller dimensions of the case such as the fact that Time Warner owned Road Runner, a broad band Internet distributor. AOL was obviously the most powerful potential entrant into that field. Time Warner had a very significant financial interest in AT&T Cable and then it owned its own cable company, so its market share arguably was not 25 percent it was 50 percent or something like that. We also had the most formidable group of American business people ready to testify in that case—do anything, they would say, just block that merger. We decided that we would require restructuring, which was largely access related.

Earthlink could not be denied programming materials, AOL had to allow additional Internet service providers to have access to their materials and so on. I think it's worked reasonably well although I said at the time it would be five years before we have any idea whether or not this set of restrictions is going to do any good. Meanwhile, within six months of our concluding that case, the stock market pulled the plug on AOL. I still hear from people saying, "Why didn't you block that merger? It cost me a fortune."

Ms. Born: Any of the particular oil company mergers—Mobil/Exxon, for example—that you want to talk about?

Mr. Pitofsky: Exxon/Mobil is as simple as it gets. They just don't compete very much in markets in the United States. They compete in discovery, transportation, extraction, some refining, but except on the East coast and California, Exxon is in one part of the country and Mobil is in another. So we required the sale of about 2,500 stations as I recall. And they leaped at that opportunity and went ahead and merged. I believe Exxon and Mobil merging is not a good idea for the national welfare, but its not an antitrust question. BP/Arco, we actually went to court on that one, because in my view those two companies do compete in California where gasoline prices are the highest in the United States. There was a legitimate argument that oil refining and distribution is a world market, not a local market. I don't believe that is true, certainly not true in California where the gasoline is specially designed. Finally Sir John Browne, the head of BP, came to the United States and said, I may not agree with you, but we'll give you what you want. So the deal went through.

Ms. Born: Which was some sale of facilities?

Mr. Pitofsky: There's always going to be a refinery here or there that overlaps. In BP/Arco the problem had to do with overlapping rights in Alaska where each of them were

major producers. They each had a share of the Alaska pipeline, and they each used that to sell in the United States. We insisted that one or the other company sell off its production facilities in Alaska, and we rejected the argument that it's a world market. They were always willing to sell off this piece and that piece in checkerboard fashion, but they weren't willing to sell off the entire holding. We were ready to try that case. I believe to this day that we would have won that case. We should talk a little bit about oil pricing because it's become now and will continue to be such a major issue in this country. Several times we were directed by Congress to investigate the phenomenon of price spikes, which usually happens in California but occasionally in other parts of the country. The most extreme example was in the Midwest—Chicago and surrounding areas—where prices went well over $2.00 as I recall. We were asked whether there was collusion. We never found collusion. We did find documentary evidence that one oil company deliberately withheld supply on the theory that it could only drive prices up and then they'd sell it at the higher price. I'm not sure that's a violation in the antitrust law. I certainly think its price gouging, and we disclosed all of that to Congress. I tried to persuade the Department of Energy and people in Congress that there's a different problem here than people have been looking at. I don't think its really collusion in any sense. I think oil refining is one of the only industries I'm aware of, if not the only one in the United States, that year round operates at 92 percent to **94** percent of capacity and during the driving season operates at **98** percent of capacity. The result is that all you need is one refinery fire, or one miscalculation of how to design summer oil, or one underestimate of how much heating oil will be used in the winter, or one barge to sink in the Mississippi, and you have more demand than there is supply, and the prices go through the ceiling. I can say right now with confidence that something like that will happen every summer. There hasn't been a new refinery constructed in this country in

something like 15 years, and almost 100 small ones have been closed down. I don't know if I'm really blaming the oil companies. I think the government regulators should find a way, if necessary to subsidize, but certainly to encourage the construction of refineries in the United States. They haven't done it.

Ms. Born: Are there no new refineries because the investment is so tremendous?

Mr. Pitofsky: I don't think so. That's not the argument that the oil industry makes. The oil industry blames it on the EPA—they say the regulations are so heavy handed and so difficult to deal with, and on the fact—and I think it is a fact—that communities rise up when they hear refineries are going to be built in their back yard, and they block it. But when you compare oil prices today even discounted by inflation to oil prices 15-20 years ago, there's got to be enough profit to build a refinery and make some money. But we just haven't done it. So as to our report to Congress, I don't think the situation is any better now than it was then.

Ms. Born: Congress never acted on the report, or did they?

Mr. Pitofsky: The one company in the Chicago area, Marathon, that on the record showed that it had price gouged took a bit of a beating in terms of the public reaction. But no, there has been no action as far as I know. No energy task force has recommended construction of additional refineries. And this business about the communities won't allow it—I understand that's not true in Texas and Louisiana. They will allow it.

Ms. Born: They would welcome the jobs.

Mr. Pitofsky: That's right. It's a serious problem that has not been addressed in this country. Its more serious here than it is in Europe. And one of these days somebody **is** going to make a big fuss about it.

Ms. Born: Tell me about vertical price fixing of CDs.

Mr. Pitofsky: **A** little background here. The rule against minimum resale price maintenance has been on the books since 1911—extremely controversial, conservatives hate it. They managed to get the Supreme Court to eliminate the rule against maximum resale price maintenance, but they never have been able to vacate or eliminate the so-called Dr. Miles rule describing minimum price fixing as illegal per se. The way they handle it is when the Republicans are in charge of antitrust enforcement they just don't bring vertical price fixing cases. They don't bring any vertical distribution cases. I've always believed they are wrong about this. I think their explanations for minimum resale price maintenance do not hold up. So we brought half a dozen of these type of cases at the beginning of my tenure. Then this case came along in which the record companies—I think there are six of them—found that their distributors were engaged in a fierce price war. Target and other stores had driven the average price of a CD down from about $15 to less than $10. The record companies then introduced a program which wasn't really minimum resale price maintenance. It was more indirect. The program controlled the way the signs read in a store, the way labels were put on the compact disks. We decided that the combination of restrictions amounted to resale price maintenance, but it wasn't the usual type, so we did not try to bring this as a per se case, We brought a rule of reason case. We showed power, purpose, effect, absence of good business reasons and so forth and won that case. We entered a cease and desist order, but the real punishment came when class actions were filed by purchasers of CDs which extracted enormous amounts of money from the record companies.

Ms. Born: Where was your case brought—here in the District?

Mr. Pitofsky: If I'm not mistaken, the record companies settled the case with an

order before we actually filed in court. It was the biggest resale maintenance case since the case against Levi jeans. It was probably bigger than that. This was not some small scale instance of resale price maintenance.

Ms. Born: What about the California dentist case?

Mr. Pitofsky: Not my favorite case. It was initiated before I arrived as Chairman but I supported it. It was a rule of the California Dental Association that members of the association were not allowed to advertise low prices or superior quality. The commission found that that constituted an agreement not to advertise low prices and was a form of price fixing. The Ninth Circuit affirmed our view although on a less restrictive theory then we had advocated. Then to my surprise the Supreme Court took cert. on the case. They took cert. on the issue of whether or not the FTC had authority to regulate a nonprofit organization like a dental association. The Supreme Court found our way, nine nothing, a totally insignificant issue that had been settled four or five times before. Then when the court moved on to the merits in the case, they decided 5 to 4, not that we were wrong, but that the Ninth Circuit had been inadequate in the way it explained its decision. Justice Souter in one the strangest lines in a Supreme Court case I've ever seen in effect said, "Now Ninth Circuit, if you had written the kind of opinion that Justice Breyer wrote in dissent, we wouldn't be sending this case back to you. But we are." The case was remanded to the Ninth Circuit, and the court said: we've taken another look at the record and we reverse ourselves entirely; we are not sending it back to the Federal Trade commission, we are simply dismissing the case. Meanwhile, the industry had dropped the rule we had challenged. On the one hand you can say consumers are better off, but on the other hand it made some law both in the Supreme Court and the Ninth Circuit that I know is going to create mischief in the future. It was just a series of errors. I wrote the opinion for the commission. I

could have written a better opinion. But I thought frankly that the facts were very strong in our favor. For example, one of the issues in the case was whether or not there were any actual effects in the marketplace from the association's rule, and it turned out that 99 percent of the dentists followed the rule. If they deviated from the rule and for example put an ad out saying, for soldiers ten percent off, and then they received a letter of complaint from the dental association, every one of them caved in and withdrew their ad. Now if that's not actual effect in the marketplace, I don't know what else you have to prove. But I didn't get into the effects side of the case as deeply as I perhaps should have.

Ms. Born: So this was a case that came up through the commission and then was appealed to the Ninth Circuit?

Mr. Pitofsky: Right.

Ms. Born: Did you have many cases that were tried internally in the commission during your term?

Mr. Pitofsky: Far fewer than before and fewer than are occurring today. We were reduced to just two administrative law judges during my period. I don't believe these complicated merger cases belong in the administrative process. I believe they should be heard before a district judge.

Ms. Born: Why?

Mr. Pitofsky: First of all, there's the remedy in court of preliminary injunction which is not possible to obtain in the administrative process, so it clears the matter much more quickly. Second, I'm not sure that through the years the ALJs have been of a quality equal to the average district court judge. These are very complicated, economically-oriented cases. ***So*** I think the cases get a better airing in court. On the consumer side, there is no reason why you

wouldn't bring more cases into the administrative process, but the fact is very, very few companies who are challenged by the Federal Trade Commission for consumer fraud have any interest in litigating. The conversation immediately turns to, well, what do you want us to do to end this case. So there were few cases. There was an interesting advertising case involving analgesics that was tried before an administrative law judge while I was there. I don't mean the two ALJs don't have enough to do, but its nothing like it was when I first came to the commission as a bureau director, when there were probably 12 or 15 ALJs busy all the time, and there were two or three arguments a month before the full commission. Its nothing like that now.

Ms. Born: Is this a testament on the consumer side to the effectiveness of the commission in choosing cases and prosecuting them that they tend to settle?

Mr. Pitofsky: I give the praise to the staff, to the Bureau Director and the senior staff. They were outstanding, Jodie, Teresa Schwartz, others. There were so many targets out there to bring cases claiming consumer deception—not interestingly in national advertising which was the active area of litigation when I first came to Washington. National advertising is regulated through a self-regulatory scheme that works. Today, it's this fraud on the Internet, it's invasion of privacy, it's 800-number calls that are so out of bounds that when the commission challenges the companies fold.

Ms. Born: Fraud on the Internet must have been a new issue during your tenure because use of the Internet burgeoned during that period.

Mr. Pitofsky: Absolutely. Just monitoring the Internet was an enormous challenge. What are you going to do? How many websites can a person check? We would have monitoring days, we would have people checking, we would receive in the mail all sorts of

complaints about what had happened when consumers tried to buy something through an Internet connection. But it was very difficult to keep up with the levels of fraud. The Internet, I once said, was like the Wild West, it was as if nobody was watching until the commission became very active.

Ms. Born: Nobody was watching (laughter) the first few years. Bob, is there more that you would like to say about the commission's approach to Internet fraud, how you organized that? I know that you held web surfing days for other federal agencies as well, which was very helpful.

Mr. Pitofsky: A substantial portion of our consumer protection resources were devoted to Internet fraud. My recollection is the first such Internet fraud case was brought in late 1994 and by September 1999 the agency had brought 100 such cases. Beyond just law enforcement, the agency was very active in workshops and hearings—both to educate consumers about the dangers of doing business on the Internet and sellers about appropriate rules. We recognized throughout that the Internet was a vast new marketplace that could provide great benefits to consumers and to the competitive system. The idea was to protect consumers without undermining the growth of electronic commerce. A special dimension of commission activities related to concerns about on-line privacy. After holding six public forums, and researching and writing four reports on the subject, the commission became a credible source of information about on-line commerce. Also in 1998, the commission recommended legislation to protect the privacy of children on-line and Congress enacted the Children's On-Line Privacy Protection Act. I should add that Tim Muris, my successor as Chairman, and his commissioners and staff have continued and indeed expanded commission enforcement activities and fact surveys about on-line commerce.

Ms. Born: The Microsoft case was transferred to the Justice Department. Did that transfer occur before you were at the FTC?

Mr. Pitofsky: It did.

Ms. Born: Did the FTC have any participation in the case while you were at the commission, and if not, tell me your views about the *Microsoft* case in any event.

Mr. Pitofsky: The history is very unusual. The commission opened the investigation. But one of the five commissioners had some stock investment and therefore recused himself earlier. The other four investigated over a long period. It came to the commission and was sent back to the staff, came to the commission and back to the staff for something like three years. Finally, they deadlocked two to two. Senator Metzenbaum, who was the head of the Antitrust Subcommittee of the Judiciary Committee, intervened and arranged to have the case transferred from the Federal Trade Commission to the Department of Justice. That's happened about twice in 100 years. Ironically, the case the commission couldn't decide, the Justice Department brought in no time at all. Microsoft folded and entered into a consent order. Sometime later—I think in less than a year—the Department of Justice began to believe that Microsoft was violating the consent order. In the course of that investigation it was decided that Antitrust Division would take on Microsoft in many different aspects of its business, but primarily the way it used its dominant position with Windows in order to tie-in other applications and specifically the way it used Windows to win its fight with Netscape over the browser. Joel Klein and I met often and discussed many cases, but we didn't talk all that much about Microsoft. I felt it was his case and I should stay out of it. If I had a contribution to make, it was probably that, when it came to my attention that Joel was thinking of bringing in an experienced outside lawyer to litigate the case, I suggested David Boies who did take on the case

and did a superb job. My views on the case? I thought the Justice Department won left and right and center. Microsoft was found to have violated the antitrust laws in 10, 11, 12 different ways. And then came the election. Joel left, Charles Brown took his place, and I thought the settlement with Microsoft left something to be desired. It was a target of a great deal of criticism, but I'm not sure I know enough about the details of these issues to come down strongly one way or the other.

Ms. Born: How did you know David Boies?

Mr. Pitofsky: David Boies, after he graduated from Yale and was an associate at Cravath, was looking for something to keep him busy, as being an associate at Cravath wasn't enough for him, so he took my course on regulated industries at NYU. He was so good in the classroom that at the end of the course I invited him to come and teach with me the following year—this was a seminar—and he did. We became friends, we lived in the same building, and I knew him quite well. He was—probably still is—the best student I've ever had.

Ms. Born: Was he still at Cravath when he handled the *Microsoft* case or had he left and gone out on its own?

Mr. Pitofsky: I'm not sure. I think he had gone out. He worked for Senator Kennedy for a while. Then did he go back to Cravath or start his own firm? I don't recall. I think he was on his own.

Ms. Born: While you were at the FTC, did you deal with the applicability of the antitrust laws to acquisitions of intellectual property?

Mr. Pitofsky: I am very interested in that field and in fact after I left the commission I taught a seminar on the subject. There are two lines of authority in this country, not reconciled and not reviewed by the Supreme Court. One line of authority says that, where

the source of a sellers' market power is intellectual property, it has a much greater range of permissible action including using your intellectual property to gain advantage in other markets. That's the ***Xerox*** case in the Federal Circuit. There's another line of authority that says intellectual property presumptively gives you some advantages, but that presumption can be overcome if the intellectual property claim is a pretext, if the anticompetitive effect is enormous, and so forth, That's the ***Koduk*** case in the Ninth Circuit. The difference between the two is that the court in *Kodak* was willing to look at subjective evidence, whereas the court in the Federal Circuit simply says subjective evidence is irrelevant to an issue like this. I remember in the waning days of the Clinton administration's term, I tried to induce the Solicitor General's Office to ask for cert. on the Federal Circuit decision. There was too much going on and too many other important cases pending at the time, and I just lost that argument. The result is that I don't think people can confidently advise clients about the limits of rights based on intellectual property. Certainly the Federal Circuit case would overrule some very conventional antitrust law about patent misuse and tie-in sales.

Ms. Born: Tell me about the *Intel* case.

Mr. Pitofsky: Very unusual case of a disarming simplicity. Intel would deny it, but I think fairly clearly it has a monopoly position with respect to the microchip, the so called brains of the computer. It made arrangements with a dozen of its largest customer OEMs (original equipment manufacturers), companies like Dell and Compaq, that it would make available to them advance trade secrets and samples with respect to each new generation of microchip. Intel changes these designs often. It would make available samples, instructions and so forth. The truth of the matter is, if an OEM does not have access to the samples and the know how, it will be six months behind the curve, and if you're six months behind the curve in

that business, you're out of it. Intel found itself in intellectual property disputes with three companies. Two were customers and potential competitors; the other was an actual competitor. They tried to work it out. Intel was really rather generous with some of the offers it made to settle the controversy, for example, by saying look, you say this patent is yours, we say it's ours, why don't we cross license each other? The companies were not willing to do that. In three instances the companies either sued Intel or threatened to sue, and Intel promptly cut them off from the advance information and the samples on the theory that we don't have to do business with someone that sues them. There's not much case law on this, but what there is says, if you're a small company and someone sues you and you refuse to continue to do business with them, fine, let them do business with the other 80 or 90 percent. But when you're a monopolist and you refuse to do business, you take all of the air out of the room, and that's not justified. Is that clearly the law? No. Do I think it's the right answer? Yes. Intel wanted desperately not to be thought of as the equivalent of Microsoft, as being a rough and tough company that took advantage of its rivals. We couldn't settle the case, and we sued. I remember a meeting in my office in which Andy Grove, the CEO of Intel, came and defended his side of the argument more adroitly than any businessman I've ever known. He's brilliant and charming. I remember he said we try so hard to stay on the right side of the line, and I said someone drew the line in the wrong place. This was a meeting that must have included 20 lawyers. Usually the business people sit quietly and speak when they are spoken to, but Grove took over this meeting. I said to him I am very influenced by a line by Lord Koch in the 16th century, 15th century, in which somebody asked Lord Koch, why do you favor the rule of law? It was right at the point where England was moving from feudalism into the industrial age and toward democracy. Lord Koch said, if you leave matters of dispute to self-regulation, the strong will prevail over the weak

everytime. And that's my attitude toward Intel. We pay judges, we build courthouses, we hold legal proceedings. I have no idea whether Intel was right or the three challengers were right about that patent. I believe that should be settled in court and not by a monopolist dominating its rival. And that's where we left it. I think Bill Baer and the present chair of Arnold & Porter Mike Sohn had very extensive negotiations with the current CEO, then general counsel. We were able to come up with a very complicated settlement that was described by Intel as a win-win. Intel got what they wanted, and they said we got what we wanted. I think that was largely true. We wanted to make it clear that a monopolist cannot cut off a rival or customer simply because they sue you. Their position was, suppose someone sues us and tries to get an injunction against us using our intellectual property. They are suing us to put us out of business, and you're saying we have to keep doing business with them. I thought that was a fair point, and there is a paragraph in the settlement that provides that the plaintiff can have any remedy available, damages, accounting, fines, and so on. But if the plaintiff seeks a preliminary or permanent injunction, then the monopolist doesn't have to deal with that company. Then there are all sorts of other provisions about when you can cut someone off and when you can't cut someone off. My impression is it's worked fairly well. I should say that the Federal Circuit took on one of those three cases and found for Intel and against Integraph. So at least one court thinks we got it wrong. But I'm pretty comfortable with the Intel settlement.

Ms. Born: When was that? And why was Mike Sohn involved?

Mr. Pitofsky: It would have been around 1999, maybe 2000, toward the end of my stay. Mike may not have been involved in our decision to sue. I think he was brought in to see if there was a way to settle the case.

Ms. Born: Wasn't there an investigation about violent entertainment material

during your tenure?

Mr. Pitofsky: Yes, that was an extraordinary experience. We did not initiate the project. That came from the White House. It was one of the only instances I can recall where the White House asked us to look into something. The something was reports that had to do with motion pictures, music and video games. All three had labels, although the music labels were not very informative. Motion pictures was the matter most people cared about most. There was an R rating, which means someone under 17 can't be admitted without being accompanied by an adult. There's an X rating that says people under 17 can't be admitted at all. There's a PG rating, which is parental guidance strongly suggested. We received reports that the ratings were not being enforced and that many motion picture theaters, especially in big cities, not in small towns where the manager at the movie theater thinks of himself as part of the community, were admitting many young people to R-rated movies with no identification check whatsoever. There were also reports that movie companies knew that was going on and were designing the movies to appeal to an underage audience. There were documents that indicated they were having focus groups on R-rated movies—does this part of the movie appeal and does that part of the movie appeal—using 9 and 10 year olds as the focus group. So we issued a very substantial report describing what was being done, and we made recommendations about how these rules could be better enforced. I have always felt that Hollywood was the most sympathetic with the idea that a real rating system served their interest. Others have said, and I agree, music is least sympathetic. They see themselves as a slightly outlaw crowd. In any event they resent government censorship and regulation. Video games I thought came around pretty well though some of the recent publicity we have seen just in the last two or three weeks suggests that some of these video games are really extremely violent and not properly labeled. For the most part, I thought that the

investigation was a constructive thing to do, and in a follow-up investigation after I left—I think at least a year or so later—we found that things had improved. As I said when I first took on this assignment, you don't want the Federal Trade Commission to be the national thought controller. You don't want censorship in this area, but you want parents to be in control of the situation. If you tell parents a film is PG-13 and it's really extremely violent, that's not fair and not right. I do think violence in media contributes to a certain coarseness and violence in our society so it's not as if this is insignificant or irrelevant. The problem is to come up with a solution that's not worse than the disease. I don't see anything wrong with 15-year-old kids seeing *Saving Private Ryan*, but I want that decision to be made by their parents, assuming their parents are paying attention. We did a survey, and we found that parents pay far more attention to this issue, and to the ratings, than most people give them credit for.

Ms. Born: So the results were basically to make the report public so that the public was aware of what was going on and voluntary actions by the industries?

Mr. Pitofsky: And we thought it would be useful to have more informative ratings. Why should it just be R; why can't it be an R for the following reasons? Why does it have to be a tiny little letter in the corner of the ad; why can't it be in big print? Why can't there be a sign explaining what R and PG really mean? All of those things are going on today in movie theaters if you look around. I can't say there's been that much progress on music and video games, but as far as Hollywood goes, one or two studios were resistant and resentful, but the overwhelming majority in Hollywood, led by Jack Valenti who had initiated this rating system, were as cooperative as anyone could ask. It doesn't change the world, but at the margin I thought it was a very useful thing to do.

Ms. Born: What other significant initiatives did the consumer side of the FTC

do while you were there?

Mr. Pitofsky: One that's the most significant by far had to do with invasions of privacy. The direct marketers and other private sector people always said they too were opposed to invasions to privacy, collecting data and selling it to other people without your knowledge or awareness. The question is whether you do it by self-regulation, as the advertising crowd have done, or government regulation or some combination of the two. The majority of the commission, myself included, thought it was premature to ask for legislation. Commissioner Sheila Anthony was always outspoken about wanting regulation. We did several studies finding that invasions of privacy were fairly widespread. We filed several reports with Congress dealing with various issues. The main issue is whether or not people are allowed to use information they extract from the marketing process unless you opt out or only if you opt in. The sentiment is fairly divided on this. Industry of course is very much against seeking permission. About halfway through my term, I came around to the view that self-regulation was not working and I think at least one other commissioner experienced the same change of view so we joined Sheila Anthony and recommended regulation. But it hasn't happened so far. I understand the case against government regulation. On the other hand, I'm very concerned that there is a lot of talk about self-regulation but so far it hasn't really happened. Even after the election of President Bush, privacy was a real issue in the Congress because there are individuals in both the Senate and the House who feel very strongly on this issue and they don't let it die. But after 9/11 nobody paid attention to it. Privacy intersects with efforts by the FBI and others to guard against terrorism. Now you have a whole new set of issues that complicate that picture. I believe that eventually there will **be** a moderate statute protecting against invasions of privacy unless consented to by the consumer, but it's not imminent.

Ms. Born: Other things are higher on the priority list right now.

Mr. Pitofsky: Even among the most ardent advocates of protecting privacy. And it's interesting how it crosses the political spectrum. William Safire, the columnist in the *New York Times* is very conservative. Nevertheless, he is probably one of the most eloquent people in talking about the threat to the welfare of the citizens of the country because of invasions of privacy. And that's true in the House and the Senate as well. It's going to be awhile before that issue surfaces again, and my successor has adopted a wait and see attitude. He doesn't seek a leadership position on this. I've never denied that the people who don't want legislation have some pretty good arguments on their side. It's a close call.

Oral History of Robert Pitofsky
Seventh Interview
May 20,2004

Ms. Born: This is the seventh interview of Robert Pitofsky for the Oral History Project of the Historical Society of the District of Columbia Circuit. It is being taken on May 20,2004 in a conference room at Arnold & Porter, 555 12th Street, NW, Washington, D.C. 20004. First we're going to talk about some of the things that were done in consumer protection during your tenure as FTC chair. Tell me about the campaign against predatory lending.

Mr. Pitofsky: If I may, let me put the consumer protection effort into a broader context. When I left the FTC as a commissioner in 1982, the consumer protection side of the agency was quite active, but it was active in examining frauds that had been around for a long time: flimsy aluminum siding on houses, pyramid frauds, false advertising and false marketing of various kinds in newspapers and magazines. The frauds were not much different than in the 1970s or even earlier. Beginning in 1980, what you saw was a technological revolution. There was the growth of the Internet. There was the immense growth of credit cards and credit transactions. There was a flourishing business in gathering information about people and selling it in a way that invaded privacy. It was a different world. I think Congress was vaguely aware of the changes that had occurred, but the staff of the Federal Trade Commission was a little bit slow in responding. Fortunately, the Bureau Director during my tenure as Chair was a woman I mentioned before, Jodie Bernstein, and she was one of the greatest managers that I've ever encountered. She saw which way the wind was blowing. She hired young people with technical backgrounds, or she reached out and brought them in laterally. She developed good relationships with the Food and Drug Administration, the FCC, and other agencies, and by dint

of extraordinary leadership—I hope this isn't an exaggeration, I don't think it is—made the Federal Trade Commission the principal consumer protection agency in the high-tech sector of the economy. Now you asked about predatory lending. I mentioned it earlier but let me elaborate. It's often a despicable form of lending in which the lender finds the most vulnerable borrowers—people who haven't a clue about the small print in contracts and what's an unconscionable clause. And they certainly have never heard of flipping. Flipping is a technique where you lend people on the basis of their property more money than they can repay on an annual basis, and you have reason to know they can't repay it. So a year or two later you foreclose on their house, or in one case they actually foreclosed on a church. They take it through a legal proceeding, regain ownership, and then they sell it to somebody else with a loan that they know the next person can't repay. It goes on and on. Most of the people who do this kind of predatory lending are rather small fly-by-night operations, They are the same sort of people who sold aluminum siding and sold encyclopedias door-to-door 20 years ago. But the difference is that they discount the paper that they obtain upstream to the major New York bankers. And one of the great problems that we had was whether or not we simply look for a remedy from the fly-by-night scoundrels, or we try to move upstream to the sources of their money. To get upstream to the sources of their money meant a trial that would go on for months and would be buried in paper. But we decided to do it. In one case we settled with Citicorp for over $100 million as I recall. Another case, Capital Credit, may still be going on for all I know. It was extremely complicated, and they were dug in about not paying a penalty.

Ms. Born: So the way the commission approached this was by identifjmg individual cases and suing.

Mr. Pitofsky: Yes. There was no rulemaking. There was a thought at one point

that the Department of the Treasury, under the leadership of Larry Summers, would try to develop some rules in this area. The FTC worked with Treasury, and we came up with some rules, some of which may have constituted overreaching, and we ended up getting nothing. Familiar pattern in legislation in Washington.

Ms. Born: Would these have been Treasury rules or actually Congressional legislation?

Mr. Pitofsky: No, they would have been Treasury rules.

Ms. Born: Another issue that you've mentioned is the case against the Joe Camel advertising program.

Mr. Pitofsky: The investigation had actually been initiated by the commission before I arrived and was advocated by my predecessor, Janet Steiger. But after long investigation, it turned out one commissioner was recused (I guess he must have owned Reynolds stock) and the other four could not reach a decision—they split two verses two on the Joe Camel campaign, which as you recall used a cartoon camel as the identifying trademark speaker for the brand in selling the product. And it just sat there for several years. I should say that the staff also was divided on whether or not the commission had sufficient evidence to persuade a court. There wasn't anything deceptive about the Joe Camel advertising campaign. It would have to be "unfair," using a cartoon character to sell cigarettes to people who were too young to legally buy cigarettes. But Jodie decided this was a case worth bringing and initiated the investigation all over again. I don't think it's improper for me to disclose that, had we litigated the case, we would have submitted evidence that Reynolds was considering five or **six** ad campaigns at the time they selected Joe Camel. And one of the professionals—1 don't think it was an employee of Reynolds, it was probably an employee of the advertising agency put down

on paper, roughly speaking, that the good news was that the Joe Camel campaign was the most effective of any of the five or six, and the bad news was that it was most effective with an underage audience. In my view when you have a document like that you're just not going to lose the case. Reynolds delayed and delayed, but then they finally came to the conclusion that they would be better off abandoning the campaign. We only asked them to abandon the campaign; I don't remember if we ever asked for a fine. We were making law in uncharted terrain. We did persuade the company to cancel the campaign.

Ms. Born: Tell me about the initiatives that the commission had against Internet fraud.

Mr. Pitofsky: The frauds on the Internet were some of the most outrageous I've ever seen. They were blatant, they were gross, they were indefensible. The problem was to catch the people who were doing it, because often they were clever enough to locate in foreign countries. I don't know if we achieved a successful result in half our cases because of the difficulty of getting cooperation abroad.

Ms. Born: Did the FTC's arrangements with foreign countries to share information extend to consumer fraud or were they just in the antitrust area?

Mr. Pitofsky: Excellent question. Almost entirely on the antitrust side. Somehow people forgot there was consumer protection, and while we had some sort of arrangement with Canada and maybe one other country, we had very, very few. The present commission, my successors, have picked up on that in a very constructive way. Chairman Tim Muris has delegated this work to one of the commissioners, Moselle Thompson, and my impression is they've done very good work over the last few years in bringing international consumer protection coordination closer to the level of coordination that applies to antitrust.

Ms. Born: Tell me about the challenges to invasions of privacy, including the FTC's role and Congress' consideration of the issue.

Ms. Born: We haven't talked about the 800-number issue where companies were required to have 800 numbers, and yet they didn't have to actually have staff personing the phones.

Mr. Pitofsky: Right. That wasn't something we did. Congress mandated that certain kinds of companies have 800-numbers so consumers could check the status of some financial transaction. The companies interpreted the law to mean yes, we have to have an 800-number, but we didn't have to hire enough people to answer the phones. There was a sector of the industry where there only were three companies, and all three companies took the same position. I think they caved about five minutes after we called the issue of inadequate personnel to their attention.

Ms. Born: Were there any procedural improvements in the administrative adjudicative process while you were there?

Mr. Pitofsky: There was one major change that I can't even say originated with us. One of the criticisms of the commission prior to my arrival—and a rare criticism of Janet Steiger because she was so successful in the chair—was that the review process between the staffer on the front line and the commission was so complicated, so rife with delay, there were so many levels of review, that not only did things not get done, but the staff lawyer got discouraged about having to wait so long. I wouldn't be surprised if between the Bureau Director and the staffer there were at least three different levels of review, maybe more. So Congress directed in one of the budget messages just before I took office that we curtail intermediate level review. But now comes Jodie Bernstein, this extraordinary manager, and she changed it all around. She said the

staffer's memo should go directly to her. If she thinks it needs a little more work, she gives it to somebody. That somebody gives it right back to her. Three levels of review were eliminated as a result of that approach. The morale of the staff skyrocketed, efficiency improved, and the number of cases we were able to handle improved. It was as simple and important a reform as one can imagine.

Ms. Born: Was it just that bureaucracy had accumulated over the years?

Mr. Pitofsky: One of the problems was that some of the commissioners became nitpickers, and they would see memos that had the smallest flaw or deletion, and they would bounce it back to the staff. The staff became cowed by that kind of behavior and tried as hard as they could to eliminate absolutely any problem with respect to the memo that went to the commission. The result was inordinate delay.

Ms. Born: You've discussed this to some extent already, but tell me what your relationship with the other commissioners was. As chair, obviously you had certain extra and unique functions among the commissioners.

Mr. Pitofsky: I think I got along on a personal level with every one of our commissioners, including one or two that were to the left of me and certainly one that was to the right of me, but our personal relationships are excellent. I made it a responsibility of mine to visit every commissioner almost every week—to leave my office, go to their office, chat about this or that, including what's coming up in the following week or two. Sometimes if you're traveling you can't do it every week, but I tried very hard. It was quite interesting. When I arrived, there were two Democrats, two Republicans, and a rather conservative independent. So in a way, I didn't have a working majority. But my predecessor, Janet Steiger (a Republican), was liberal, especially on consumer protection but also on antitrust, so that I had a working

majority with Christine Varney (a Democrat), myself and Janet Steiger. Many of the early cases that we brought involved three to two votes. Then when Janet retired, she was replaced by Sheila Anthony (a Democrat), and once again I usually had a working majority.

Ms. Born: How about the senior staff? You obviously had a direct working relationship with each of them, and you've talked about Bill Baer and Jodie Bernstein. You mentioned Deborah Valentine. But is there more you would like to say about them?

Mr. Pitofsky: First of all Bill Baer and Jodie Bernstein were the best two bureau directors the FTC has ever employed. They not only knew the substance as well as anyone in the building, but they were great managers and street smart. They went out of their way to bring deputies in—either promote from within or they brought in laterally people from Washington who wanted to be part of this particular commission. Teresa Schwartz was assistant dean at George Washington Law School. When she first called, I said, "Teresa, this is a problem. You are qualified to be a bureau director." She already had major positions at the Federal Trade Commission, had written in the consumer protection field, and was a brilliant woman. She said, "Well, I'll come over and work for Jodie," which she did. Bill had similar people. Rich Parker came over to work for Bill as a deputy. Molly Boast came to work with this group. They were both successful partners in major law firms. So there was no lack of talent at the senior level, and at the intake level, we were very successful in persuading young people out of clerkships or in law firms for a year or two, or even directly out of law school, to spend a few years at the Federal Trade Commission. Maybe I'm not objective, but it was a first-rate regulatory staff.

Mr. Pitofsky: What we may have lacked was people with technical backgrounds—lawyers who also had a degree in computer engineering, lawyers who also had a degree in biotechnology. We really had to reach out to other agencies in Washington when we

found ourselves involved in major cases in those areas. But there is no solution. **A** lawyer who has a background in biotechnology staying at a regulatory agency for ten years is a very exceptional situation.

Ms. Born: You've already talked about your relationship with Joel Klein and the Justice Department. Tell me about your relationship with the White House during those years.

Mr. Pitofsky: I thought the Clinton administration generally took a more hands-off approach to antitrust than any other White House in my lifetime. Indeed it reached the point where at times I would say to someone, why am I not being invited to this meeting? You are talking about merger policy at the Federal Trade Commission or regulation of privacy. It would take a little bit of doing in order to become part of that process. I knew President Clinton but I think I met with him no more than twice in six and a half years. I knew some of the people who were on the National Security Council, people like Dan Tarullo and Gene Sperling. It was really because I already knew some of these people that I managed to have some interplay with the President's office and the Vice President's office. But it was very modest and nothing like the interplay that I know went on 30 and 40 years earlier.

Ms. Born: Were there other federal agencies that you had a lot of contact with other than the Justice Department? You mentioned Treasury.

Mr. Pitofsky: That was an exception and very unusual. Our responsibilities don't intersect very often. The two agencies that I would single out are the Federal Communications Commission and the Securities and Exchange Commission. I knew the chair of each agency before I went into government. With respect to the FCC, there were quite a number of mergers,

joint ventures, exclusive dealing contracts in the media area. And the way things have developed, by and large, the FCC will stand back and allow either the Antitrust Division or more rarely the FTC to work through its process, because both agencies have vastly more discovery authority then the FCC. Then the FCC commissioners will decide whether they are satisfied with the remedy or whether in the public interest, because their standards are much broader than ours, they decide to seek more of a remedy. As a result, our staff kept their staff informed regularly. On a few occasions, not many, I would actually meet with the chair of the FCC, Bill Kennard. That was an exceptionally cordial and constructive relationship. **As** to the SEC, there are all these rules relating to credit reporting companies, credit companies and banks. I knew Arthur Levitt, so we had some interplay there, but it wasn't all that much. At a different level Jodie Bernstein had many rules that were issued jointly with FDA. She was in contact with FDA on a constant basis, first on cigarettes and then on other products, but I really wasn't much involved in that. If you compare the Federal Trade Commission in late '90sto the Federal Trade Commission of the 1970s, it was radically different in the extent to which the commission reached out to other agencies and other agencies reached out to the FTC.

Ms. Born: Did you feel that the FTC was quite independent during this period? From your description it certainly sounds like it was.

Mr. Pitofsky: The commission certainly was independent of the White House. Eventually, the Vice President placed me on his Reinventing Government Committee. That assignment had me at the White House on a regular basis, and therefore I would find out a little more about what was going on. But the White House never drew us into something that they were doing, with the exception of our investigation of the movie-music-video games rating systems. That was their idea and we were the administrator of that idea. Were we independent

of Congress? Not really, but we are not supposed to be. Before a case is brought, any Congressperson has the right, almost the obligation, to represent their constituents, and they are not shy about it. Also, there's constant oversight and constant budgetary pressure. So any Chairman—this is true of Janet Steiger before me and it's true of Tim Muris now—spends a good deal of time speaking to members of Congress and their staffs, and I think that's as it should be. The Federal Trade Commission is an arm of the Congress. And that's the way it should be.

Ms. Born: Did you frequently testify before Congress?

Mr. Pitofsky: My memory is a little unreliable on something like this, but when Congress was in session, my guess is once or twice a month. It's not the formal testimony where I think important matters are addressed. It's meeting with the head of your appropriations committee or subcommittee. It's meeting with the head of your oversight committee and discussing perhaps somebody's complaint about what you are doing or not doing. The formal testimony would run in spurts, but it would probably amount to once or twice a month, if Congress was in session. I had very good legislative affairs representatives. Lorraine Miller who is enormously well connected in Washington would see to it that I didn't just sit in my office and wait for people to call me, but she would make sure that I reached out to visit them. And that certainly paid off. Another thing that paid off (I was talking about it recently at a memorial service for Janet Steiger): for a year or two we would go up and testify jointly—previous Republican chair and current Democratic chair—or we would visit powerful legislators together. I tell you it left them a little surprised when the two of us would show up and argue in favor of a particular program. It worked brilliantly because she was very popular on the Hill. Her husband had been a Congressman. It was a great double team. It was one of

the best things I ever thought of.

Ms. Born: Tell me what happened internally. Did the staff grow in number during your tenure? Did it stay about the same? Were there any special administrative issues or problems during your term?

Mr. Pitofsky: The staff stayed about the same. It was about 900,950. At one point 20 years earlier, it had been about 1800, and then in the Reagan years it was cut very substantially. But that really doesn't tell the story because when the staff was 1,800 so many of that number were secretaries, did filing work, were messengers, and those people, not all but a substantial number of those people, were replaced when they retired, by lawyers or economists.

Ms. Born: And computers.

Mr. Pitofsky: And computers. So that the effective force of 900 was closer to the old 1800. Also, frankly—I testified to this—when there were 1800 on the staff, there were too many people. They didn't have enough to do. Whereas with the 900, we never lacked things to do especially because of the merger wave.

Ms. Born: That's very important for morale and for the efficiency of an agency.

Mr. Pitofsky: Now after I left, largely because of this brilliant stroke of introducing the Do Not Call List, the agency has grown a little bit. It's probably a 1,000 or 1,100 now.

Ms. Born: As needed to administer the new rule?

Mr. Pitofsky: That plus international relations. There are things that the agency does now that weren't on the horizon at all 30 years ago. But receiving complaints and distributing them to the right agency, the Do Not Call List, identity theft—the new functions are largely on the consumer side and Congress has usually been more supportive of consumer

protection than antitrust.

Ms. Born: What was done by the agency during your tenure on identify theft? I assume again this was in Jodie's area.

Mr. Pitofsky: Yes, it was a very simple reform. Suppose you are making a phone call in Grand Central Station, New York, and someone with binoculars stands up on the next floor and reads your credit card number.

Ms. Born: That's very funny, that happened to me in New York at Penn Station.

Mr. Pitofsky: I was the victim of identity theft myself. But I was given very prompt attention by my credit card company. The problem for most people is you might lose your wallet with many credit cards or you don't know which credit card is being used and you start making phone call after phone call to remedy the situation, and it's very irritating. All Jodie did was to institute a system whereby you made one call to the Federal Trade Commission and you said my name is such and such, these are the numbers of my cards, and the Federal Trade Commission took over from there and notified the credit card companies to cancel the cards. It's a very simple reform, but it made a big difference. A much more ambitious program was to create a repository of all fraud enforcement by the states, different parts of the federal government, and several foreign countries, computerize it all and make it available so that if a fraud de jour is beginning to emerge—maybe a lottery based on horse races in Australia, a fraud we actually dealt with—you'll see it earlier by having this repository. That was a major effort that was fully and separately funded by Congress.

Ms. Born: That's fascinating because it's not merely that there are fads in fraud, but it's also often the very same people may be going to fad to fad. The same people that

were doing currency futures frauds were doing other kinds of pyramid schemes.

Mr. Pitofsky: Absolutely. You have to be as high-tech as the people who are engaging in the fraud, and while the FTC surely wasn't perfect, it was a lot better when Jodie was involved. Not just Jodie, she had other people who were just superb on this kind of issue.

Ms. Born: What was your view of the courts during that time and how they dealt with FTC cases and issues?

Mr. Pitofsky: Again let me start off and put it in a broader context. I thought in the '80sone of the mistakes was to deal the courts out of the game. Agencies like the FTC (it's also true of the FCC) either dropped most of its cases or settled. Few cases went to court. Certainly in the merger area the review became totally bureaucratic. My position was there's nothing wrong with losing a case here and there if you think the settlement is not adequate. There was a widespread sense that the FTC was all too often willing to settle for half a loaf. So we went to court more often than some of the commissions of the '80s. We took bigger cases to court; they weren't small potatoes cases. The same is true of Joel Klein at the Department of Justice. We took our chances on litigating, and I think our record speaks for itself—14 merger cases litigated by the FTC and we won 12. On non-merger cases, we lost one case in the Supreme Court that was initiated before I came. Maybe I should have done a better job afterwards. But I think we won almost every other case. I thought bringing the courts into the process gave the commission more stature. The people in the private sector couldn't just say, the foolish people at the commission think this is against the law, but we don't want to litigate it; it's blackmail but we'll cave in. They didn't cave. In the overwhelming majority of instances they lost the case.

Ms. Born: Those court decisions probably had a lot of credibility not merely with the litigants, but with industry in general.

Mr. Pitofsky: I also think that antitrust in general became more middle of the road between 1969 and 1995. Whereas the courts would review a record from the FTC with skepticism, I think they were willing to cut the agency some slack and were willing to deal on the merits of our cases. Also, we found that we had some excellent litigators and they got better as they went along. We only lost two merger cases, and those were both hospital merger cases, so as I said earlier they are quite special.

Ms. Born: Tell me what your take on the quality of practitioners comings before the FTC is.

Mr. Pitofsky: That's interesting; I hadn't thought about that. When I was a bureau director, the range of ability of people who came before the FTC varied widely. There were great law firms in Washington, Covington and Arnold & Porter, and then there were boutiques who specialized in advertising or price discrimination cases, and they were not the world's best lawyers. By the '90s, most of the cases we were bringing were against much larger companies. Most of those companies were represented by top level firms and attorneys. I think the quality of advocacy improved, but I wouldn't say it was night and day.

Ms. Born: Looking back on your time at the commission as chair, what do you think your greatest accomplishments were?

Mr. Pitofsky: We've talked about some of them. One was the staff. The agency couldn't function in the '60s and '70s with the staff it had. Phil Elman has now done an oral history in which he describes how life was in the '60s. It was nothing like that in the '90s. Because we were active, it was a place that attracted very able people from great law firms, great universities. I think the decision to move from rulemaking to case-by-case litigation was important and that's the way the agency should run. I mentioned two other things. One is

recognizing that the Federal Trade Commission is not just a law enforcement agency; that's not what its originators had in mind. They wanted the commission to do studies, reports, hold hearings, seminars, give materials to Congress, and we reinstalled that tradition with considerable success. Another thing we did—and I have to tell you my successor, Tim Muris, has done a better job on this than we did—is post facto review. It's not enough to bring a case and win it. You ought to go back five years later and see if it was worth winning. And he's done a terrific job on that. I think those are the main things. My predecessor restored good relationships with the states. I didn't have to do that; it was there for me. Good relationships on the Hill; I didn't have to do that. I think the things I mentioned were the main changes. I guess I would add—how can I forget, it's my common theme—that antitrust suffered by bouncing from the far left to the far right for 30 or 40 years. The '90s and the first five years of the 21st century have been characterized by a real effort to find a middle ground for antitrust that's economically sophisticated but not totally economic in its approach, that discontinues initiatives that the Warren Court may have allowed but probably weren't a good idea at the time. Time will tell, but certainly if you take the three administrations, Bush I, Clinton, Bush 11, the antitrust approach is really very similar. There are things we quarrel about but nothing like 30 years ago. And then it was bringing consumer protection into the high-tech world. There is no other agency in Washington that has anything like the resources and the authority of the Federal Trade Commission on the consumer side.

Ms. Born: Quite a lot of good accomplishments.

Mr. Pitofsky: When I left I was very pleased to have done it, of course, and I thought for the most part it worked out pretty well.

Ms. Born: Tell me about your decision to leave, Bob.

Mr. Pitofsky: It was just a matter of a few months. My term would have ended in September of 2001. George Bush had been elected. The tendency at an agency, when the new President is elected and everybody knows the chair is on his way out, is to be dead in the water. So I did write a letter to the White House saying, I have to leave in 2001, but I give you my commitment that, on the day my successor is appointed and confirmed, you will have my resignation. That turned out to be mid-April 2001, so I left four or five months early. And that allowed a seamless transition between me and Chairman Muris. I think that's the better way to do it then to hang on and create a gap between Republican and Democratic administrations.

Ms. Born: Did you give transitional assistance to Tim Muris to ease him into the job?

Mr. Pitofsky: Tim had been at the FTC almost as many times as I have. I was there four times; this was his fourth time. I didn't have to tell him very much about the agency. Also, I knew him well, and we had met on a regular basis during my entire term. I'm sure that the staff did for him what they did for me. They put together briefing books for his confirmation hearing so that he would know what our budget was like and things like that. It wasn't all that much to do for someone who knew the agency from the inside just about as well as I did.

Ms. Born: So what did you decide to do when you were thinking about leaving?

Mr. Pitofsky: I knew I would go back to teaching, and since we are Washingtonians now there wasn't much of an issue there. I told the school very early in the game I'd be back. I thought about different law firms. I actually cut my list down to five. I talked to four others, but in the end it was too attractive not to come back with old friends at Arnold & Porter. The firm made me a very generous offer, and that was the end of it. I didn't spend much time or agonize very long over which law firm, especially since I knew I was

primarily going to be a teacher anyway. I took four months off. I was quite tired. I knew we had another edition of the casebook coming up, so I kind of flipped the pages, but essentially I stayed at home. I read all of those books that I hadn't had time to read. It was a lovely three months. I didn't start at Georgetown or the firm until September 1st, even though I left the government in April. I think Sally and I took one brief trip abroad, and of course we spent a few weeks at Cape Cod.

Ms. Born: What did you teach when you started teaching again?

Mr. Pitofsky: I went back to my same courses. I teach constitutional law to first year students. And I teach the basic antitrust class and then I always try to teach different seminars. I'd become intrigued in my last year at the commission with the issue of antitrust and intellectual property. So I told the students we are all going to learn this together. Next year I'm going to teach at Columbia, and I'm going to teach antitrust and intellectual property again.

Ms. Born: As a visiting professor.

Mr. Pitofsky: Yes, just one semester.

Ms. Born: What was your caseload here at the firm like? Did you find that your practice changed from having been chair of the FTC?

Mr. Pitofsky: It did. Before I left for the FTC, I was extremely busy here—busier than I should have been. Once I came back here, all of my clients had gravitated to other people in the firm. It was slow going, and only now I'm beginning to get busy the way I was several years ago. I did take on—and I think maybe it wasn't the wisest thing—a new "career" as an expert witness. There must have been six or eight different cases in which, for one side or another, I was the expert witness—on consumer protection usually, maybe antitrust or European law, or explaining American law to Europeans. It was very time-consuming. I ended up doing

far more than I really wanted to, and some of it wasn't as interesting as it might have been.

Ms. Born: Are you still doing that?

Mr. Pitofsky: I stopped taking anything new in the expert witness line. I have to finish three or four of the commitments, but I won't do that anymore. It's like practice has always been—some of the things I do are truly fascinating and I enjoy them tremendously, some of the other things are same old-same old. This firm has always been very understanding of the fact that I'm primarily a teacher. I won't cancel classes for client meetings, and I'm rarely here at the firm before 4:30 in the afternoon. From that point of view, I don't know if I could ever have found a firm in the entire country that fitted me better than Arnold & Porter.

Ms. Born: Tell me about what else you have been were doing. How did you get chosen to be the head of the dean's search?

Mr. Pitofsky: I'm older than most of the people on the faculty, I had been dean, but the main reason is one of my closer friends is the present president of the university, and he asked me to do it. There was just no way I could say no. If I'd known what a burden it was about to be, I might have tried to think of an excuse, but I did it. Everyone else was elected by the faculty.

Ms. Born: All the rest of the committee?

Mr. Pitofsky: All the rest of the committee. Two other people were chosen by the president: the head of the nursing school and the provost of the university. Then seven people were elected by the faculty, and as I just told them over a toast earlier this week, it was one of the best committees I've ever had anything to do with. My faculty was very shrewd as to elect those seven people.

Ms. Born: Were they all faculty? Was there a student representative?

Mr. Pitofsky: There was one student.

Ms. Born: Was there an alumni representative?

Mr. Pitofsky: One alum. So I guess there must have been 11 or 12 people in the group. They worked hard, they listened to each other, they were always relevant to the subject, there was a certain passion about getting it right. And they would not let well enough alone. They just kept the due diligence efforts on and on. To our surprise we had more qualified candidates than we ever thought we would. I think half a dozen people could have easily been dean in the school. That's what stretched the search out so long—it was getting six or seven down to one.

Ms. Born: How long did the process take?

Mr. Pitofsky: Thirteen months.

Ms. Born: How much of your time was devoted to it?

Mr. Pitofsky: It wasn't bad at the beginning, but in the last two months, when we were trying to cut from five to one, the committee's take was that certain of these phone calls had to be made by the chair of the committee, and I was on the phone a great amount of time.

Ms. Born: This was investigating, talking to people who knew them?

Mr. Pitofsky: The candidates were very close. Everyone of them had so much to be said for him or her. And everyone of them had somebody who was saying, "Oh what a disaster." So you really had to make all of these calls to see what was going on there. But I think we came out with the right person, and I'm just glad its over.

Ms. Born: Did the president of the university want you to give him more than one name?

Mr. Pitofsky: Yes. The understanding was not less than three names, with at least

one outsider. In other years that's been a real problem because there may not have been two insiders who were really qualified to be the dean and sometimes no outsider wants the job. We certainly didn't have that problem. It was really very pleasing to see how many people at other first-rate schools thought being the dean of Georgetown at this time was a good idea.

Ms. Born: Is that due to the stature and reputation of the school?

Mr. Pitofsky: Its two very practical things. All the building is finished. Judy Areen did that. If the dean tries to build anything else, he will be lynched. And she put the school in good financial shape. So your job is to come in and address the quality, the academic program, and many people who may not want to be dean under most circumstances would be dean under those circumstances. I wish that had been my role when I was dean instead of raising the money to build a library.

Ms. Born: This new dean will get to do the fun stuff.

Mr. Pitofsky: I think so. We'll see how it plays out. You never know, but Alex Aleinikoff does have an instinct for the quality of academic life. And that's what he's going to be asked to do.

Ms. Born: You must feel relieved to have that behind you at this point.

Mr. Pitofsky: Everything else backed up. I fell behind in preparing for class, I fell behind at the law firm.

Ms. Born: That's understandable. It just took an enormous amount of time.

Mr. Pitofsky: Maybe I'm too compulsive.

Ms Born: Bob, you got the Miles W. Kirkpatrick Award. Tell me about that.

Mr. Pitofsky: It was a great honor—a really personal and gratifying honor for me. I regard the turning point in the history of the FTC as the Kirkpatrick Report which I had a hand

in writing, and as a result I became a life-long friend of Miles and so much of my career has involved being a Bureau Director and Commissioner and then Chairman of the Federal Trade Commission. So to receive that particular award was very pleasing.

Ms. Born: And well deserved. Where do you go from here?

Mr. Pitofsky: I'm not sure. I am thinking about it these days. I'm a little down about the last year or so – I don't think I care to work this hard, and we haven't even talked about the fifth edition of the casebook. In fact, one of my partners is a judge and the other is a commissioner at the SEC so a lot of what I regard as the detail work fell to me. I am going to think over the next six months or so about curtailing my commitments to some extent, but one thing that has not turned sour or false or empty for me is teaching a class. I can't say I have the same enthusiasm for scholarly debate as I once did. I still enjoy law practice very much. Sally and I are talking about ways in which I can cut back. The fact that I'm going to visit my old law school next spring and teach antitrust where I learned antitrust has a certain charm to it.

Ms. Born: Yes, indeed. How has teaching changed in the course of your career? How has law school changed?

Mr. Pitofsky: To be honest about it, teaching in the second and third year of an urban law school has become more difficult. I think that the students were more engaged, more active, and more prepared 30 years ago then they are today. After all this is Washington, so many of these students are externs or they are working on the Hill or they are working part-time for a law firm—perhaps because they need the money because they are so deeply in debt. The Socratic method is the minority rather than the majority style of teaching. The people who are teaching seem to become better and better. There must be ten applicants for every law school teaching job in the top law schools. I suppose with respect to teaching generally, not me, but

teaching generally, it's become more theoretical and interdisciplinary than it was. I will admit economic analysis is more a part of my course, but I certainly don't try to be an amateur philosopher as some teachers would do. Young people coming into teaching both write and teach in a highly theoretical way, and veterans like me still think you are supposed to learn what the courts had to say rather than some academic kind of thing. In those senses it is a bit different, certainly different than the law school I went to which was Columbia in the '50s. It was totally pragmatic. Unless you signed up for jurisprudence, no one was going to talk pure theory in your presence at Columbia Law School.

Ms. Born: Do you think the schools are doing the job they should in preparing the students?

Mr. Pitofsky: I think they have OD'd on theory. I think in general opening the window to interdisciplinary thinking and adding to the curriculum not only the thoughts of judges but of scholars and even political figures is a good idea. But I think that in some courses that pendulum has swung too far. But that is what always happens in revolutions. It is better now than it was then, and I think it will get back to a more centrist point of view. I remember there was a tenure fight over an individual and the worst criticism people could mount was that this person only writes about Supreme Court decisions and why they were decided that way.

Ms. Born: Why would a professor do that?

Mr. Pitofsky: That's why I said, "Are you thinking of reconsidering my tenure?" But that was not some outlier speaking, that is a large percentage of many faculties.

Ms. Born: Harry Edwards has some interesting comments on this subject.

Mr. Pitofsky: He is the best on putting the spotlight on this issue, and I try to give copies of his articles to my colleagues.

Ms. Born: Do you want to comment on how law firms have changed?

Mr. Pitofsky: Oh, I wasn't prepared for that but I have certainly note the change in size of these firms which has a social and professional aspect to it. Dewey Ballantine I think employed 100 lawyers when I joined that firm in 1957. Arnold & Porter in 1974 had perhaps 110; now we are talking about 800. I don't know ten percent of the people in this building. Second, I will say what many other people have said—that there is increased emphasis on the bottom line and that billable hours have achieved a prominence in the value structure that wasn't true then. Now maybe it's unavoidable, but it certainly wasn't true when I started practicing law. It's hard to complain in a building like this and surroundings like this, but I think that, if I were not an academic and if I were starting out and my goal was to practice law, I would try to associate with a small law firm. Now, that's not easy to do. Students often come to me with incredibly fine records and ask me what small law firm in Washington I would recommend, but there aren't many of them around.

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BIOGRAPHICAL INFORMATION

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2001 – Present	Professor of Law, Georgetown University Law Center; Of Counsel, Arnold & Porter
1995 – 2001	Chairman, Federal Trade Commission
May 1981 – June 1983, and July 1989 – 1995	Professor of Law, Georgetown University Law Center; Of Counsel, Arnold & Porter
July 1983 – June 1989	Dean and Executive Vice President for Law Center Affairs, Georgetown University Law Center
July 1978 – April 1981	Commissioner, Federal Trade Commission
1973 – 1978	Professor of Law, Georgetown University Law Center; Of Counsel, Arnold & Porter
1970 – 1973	Director, Bureau of Consumer Protection, Federal Trade Commission
1963 – 1970	Professor Law, New York University School of Law
1957 – 1963	Attorney, Dewey, Ballantine, Bushby, Palmer and Wood, New York City
1956 – 1957	Attorney, Department of Justice, Washington, D.C.

EDUCATION

New York University, B.A., 1951; Phi Beta Kappa, Honors in English and History.

Columbia Law School, LL. B., 1954; Columbia Law Review.

OTHER ACADEMIC EXPERIENCE

Guest Scholar, Brookings Institution, 1989 - 1990.

Resident Scholar, Rockefeller Study and Conference Center, Bellagio, Italy, 1990.

Visiting Professor of Law, Harvard Law School, 1975 – 1976.

Faculty Member, Salzburg Seminar in American Studies, Salzburg, Austria, 1975.

HONORS

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Selected by Time Magazine as one of ten outstanding mid-career law professors, 1977.

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PROFESSIONAL ACTIVITIES

Commission Counsel to the American Bar Association, Commission to Study the FTC (Report issued Sept. 15,1969).

Chairman, Committee on Consumer Protection, Antitrust Section of the American Bar Association (1970 – 1972).

Chairman of the Board of Directors, Institute for Public Interest Representation, Georgetown University Law Center (1973 – 1978).

Member of the Board of Directors, Society of American Law Teachers (1973 – 1977).

Member of the Task Force on Regulatory Reform, U.S. Senate Government Operations Committee (1975 – 1977).

Member of the Council, Administrative Conference (Presidential Appointment) (1980 – 1981).

Chairman of the Antitrust Section, AALS (1971 – 1972 and 1982 – 1983).

Member of the Board of Advisers, Columbia University Center for Law and Economic Studies (1975 – 1995).

Chairman of the National Institutes, Antitrust Section of the ABA (1982 – 1983).

Member of the Board of Governors, District of Columbia Bar Association (1981 – 1984).

Chairman of the Advisory Board, Georgetown Study of Private Antitrust Litigation (1984 – 1985).

Member of the Council, Antitrust Section of the ABA (1986 - 1989).

Member of the Board of Directors, Craig Corporation (1986 – 1992).

Member of the Special Committee on Gender Bias in the Courts, District of Columbia Bar Association (1987 – 1990).

Member of the Committee on the FTC, Antitrust Section of the ABA (1988 – 1989).

Chair, Clinton Administration Transition Team Reporting on Antitrust Division of the Department of Justice, Jan. 1993.

Chair, Defense Science Board Task Force on Antitrust Aspects of Defense Industry Downsizing, March 1994.

Member, Washington Advisory Committee to Lawyers Committee on International Human Rights (1992 – 1995).

Member, American Law Institute (1983 - Present).

Fellow, American Academy of Arts and Sciences (2000 – Present).

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Born: San Francisco, California
August 27, 1940

Education: San Francisco public schools;
A.B. Stanford University 1961;
J.D. Stanford Law School 1964.

Academic Honors, Awards, Etc.:

Stars of the Bar Honoree, Women's Bar Association of the District of Columbia, 2002;
Woman of Genius Award, Trinity College, 2000;
Outstanding Public Interest Advocate of the Year, National Association of Public Interest Law, 1994;
Allies for Justice Award, National Lesbian & Gay Lawyers Association, 1993;
Honoree, National Legal Aid and Defender Association, 1992;
Honoree, National Women's Law Center, 1986;
Woman Lawyer of the Year Award, Women's Bar Association of the District of Columbia, 1981;
President, Stanford Law Review, 1963-1964;
Outstanding Senior Award, Stanford Law School, 1964;
Order of the Coif, 1964.

Admitted to Practice: District of Columbia, 1966.

Employment:

Law Clerk, Judge Henry W. Edgerton, U.S. Court of Appeals for the District of Columbia Circuit, 1964-1965;
Legal Researcher, Harvard Law School, 1967-1968;
Lecturer at Law, Columbus School of Law, Catholic University of America, 1972-1974 (teaching Women and the Law);
Adjunct Professor, Georgetown University Law Center, 1972-1973 (teaching Women and the Law);
Chairperson, U.S. Commodity Futures Trading Commission, 1996-1999;
Associate and then Partner, Arnold & Porter, Washington, D.C., 1965-1967, 1968-1996, 1999-2002.

Affiliations:

American Bar Association
- House of Delegates, State Delegate for the District of Columbia, 1994-;
- Commission on Women in the Profession, 2000-2003;
- Council of the Fund for Justice and Education (formerly Resource Development Council), Chair, 1993-1996;
- Board of Governors, 1990-1993, Program Committee, Chair, 1992-1993;
- Consortium on Legal Services and the Public, Chair, 1987-1990;
- Standing Committee on Federal Judiciary, D.C. Circuit Member 1977-1980, Chair, 1980-1983;
- Section of Individual Rights & Responsibilities, Chair, 1977-1978;
- Women's Caucus, Founding Member;

American Bar Foundation, Board of Directors, 1989-1999,
- Executive Committee, 1993-1999, Secretary, 1997-1999;

District of Columbia Bar
- Secretary, 1975-1976;
- Board of Governors, 1976-1979;
- Study Committee on Gender Bias in the Courts, Chair, 1988-1991;

National Women's Law Center, Board of Directors, 1981-, Chair, 1981-1996,2003-;
American Law Institute;
President's Working Group on Financial Markets, 1996-1999;
International Organization of Securities Commissions,
- Technical Committee, 1996-1999;

Small Agency Heads, 1997-1999;
Center for Law & Social Policy, Board of Trustees, 1977-1996;
Lawyer's Committee for Civil Rights Under Law,
- Board of Trustees, 1978-1993, Board of Directors, 1993-1996;

Washington Lawyers' Committee for Civil Rights and Urban Affairs,
- Board of Directors, 1992-1996;

Historical Society of the District of Columbia Circuit,
- Board of Directors, 1990-1996;

Consortium for the National Equal Justice Library,
- Board of Directors, 1992-1996;

Southwestern Legal Foundation, Board of Trustees, 1993-1996;
Washington Legal Clinic for the Homeless, Inc.,
- Board of Directors, 1993-1996;

Stanford Law School, Board of Visitors, Chair, 1987;
American Judicature Society, Board of Directors, 1984-1988;
Women's Bar Foundation, Board of Directors, 1981-1986;
National Legal Aid and Defenders Association,
- Board of Directors, 1972-1979;

National Partnership for Women and Families (formerly, Women's Legal Defense Fund), Founding Member.