RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY

NEW BRUNSWICK

AN INTERVIEW WITH FRANK ASKIN

FOR THE

RUTGERS ORAL HISTORY ARCHIVES

INTERVIEW CONDUCTED BY

SHAUN ILLINGWORTH

WEST ORANGE, NEW JERSEY
FEBRUARY 23, 2015

TRANSCRIPT BY

JESSE BRADDELL

Shaun Illingworth: This begins the second interview session with Professor Frank Askin on February 23, 2015 in West Orange, New Jersey with Shaun Illingworth. Thank you very much for having me here again. To begin, I wanted to ask your impressions or your memories of different events in the ACLU's history. Last time we spoke about how you became involved on the national level with the ACLU and it was centered on the Dr. Spock case I believe. [Editor's Note: Dr. Benjamin Spock was made famous by his 1946 book, *Baby and Child Care*. In 1968, he was convicted for assisting others to avoid the draft. However, the guilty conviction was overturned in a federal court of appeals in 1969 due to lack of evidence against him.]

Frank Askin: That's correct.

SI: Yes. That was a time when the ACLU was changing and also becoming even more nationally prominent--

FA: That is correct.

SI: --with the Vietnam anti-war movement and so on. You mentioned last time, that culminating and the move to impeach Richard Nixon, which the ACLU was very vocal about, but that was a controversy within the ACLU. [Editor's Note: Richard Nixon resigned from the presidency on August 8, 1974 after the House of Representatives passed the first step of the impeachment process due to his involvement in the Watergate Scandal.]

FA: Was very controversial, yes.

SI: Can you take me through what you recall at the time in the meetings that you were a part of?

FA: Well, you're making me think back somewhat, forty some years now. I know that Ira Glasser, who was then the Executive Director, took a very active role in pushing for the impeachment of Nixon. There was a lot of opposition within the organization. This was considered a rather radical move for the ACLU, which generally stays out of politics. The ACLU has no politics. So to really challenge the legitimacy of a president became a very controversial issue within the organization. The same thing happened a couple years later when we got involved in Supreme Court nominations … for years the ACLU stayed away from ever attacking or getting involved in judicial nominations. It was considered inappropriate. Finally, when Rehnquist was nominated we did jump into the issue. [Editor's Note: President Richard Nixon appointed William Rehnquist to the Supreme Court in 1971. In 1989, President Ronald Reagan then promoted him to Chief Justice. He remained in the post until he died in 2005. He was known for his conservative, or right wing, rulings.] I'm trying to …

SI: Was it Rehnquist or Bork? [Editor's Note: In 1987, President Ronald Reagan nominated federal judge Robert Bork for the Supreme Court. The Senate in a 58 to 42 vote did not approve him due to his conservative views.]

FA: Well, wait a minute. Maybe we didn't get involved with him. It was I guess the Bork nomination, which really drove us into the issue, which I took a leading role in that. It so happened, at that moment, in the summer of 1987, I almost had a duel role. I was on leave from the law school as special counsel to Congressman John Conyers, who was Chair of the House Judiciary Committee and was also Chair of the Congressional Black Caucus. [Editor's Note: John Conyers is currently a Representative for Michigan's 13th District. He has held the seat

since 1965.] In the summer of '87, working for Conyers, we got deeply involved in opposing the Bork nomination. At the same time, as general counsel of the ACLU and feeling very strongly on the issue, I pushed a move within the ACLU to change its policy on not getting involved in Supreme Court nominations. We had a very bitter fight over that and my position prevailed. So the ACLU also got involved in opposing Bork, which is a very unusual move for the ACLU. In some ways, I think it's my major accomplishment in my life to have played such a key role in keeping Bork off the Supreme Court because he'd have been a disaster. Instead, we got Kennedy who while somewhat conservative and certainly not the ideological conservative that Bork was. So I think it was an extremely important fact that we kept Robert Bork off the Supreme Court. Otherwise, abortion would probably be illegal among other things in this country now. So, I've always been very proud of the role, the dual role I played, both working with Conyers in Congress and pushing the issue in the ACLU.

SI: So going back to the impeachment issue with Richard Nixon, this was ten years or more before Bork.

FA: Right. That's correct.

SI: What do you remember about the board's debates over whether or not to support a call for his impeachment?

FA: Yes, I mean it's pretty vague in my mind I must tell you. I'm not mistaken, I think the key event was that the ACLU biennial conference in 1972. Every two years the ACLU had a biennial conference. It was an expansion beyond the National Board. You have leaders from all over the country, each affiliate would send from three to seven delegates, maybe four or five hundred people, and they could debate very important policy issues and could overturn the National Board if they wanted to. I believe it was the '72 biennial, which voted to join the Nixon impeachment movement. That really triggered the whole thing. Actually, the National Board could have over--there was a way to overrule. It was a complicated process. The National Board could have voted to overrule the biennial and then it would have to go back to another referendum among the whole organization, but my recollection is the National Board went along with the biennial resolution, but it was very controversial. The ACLU, particularly in those days, was sort of divided between some very … were then called the activists and the traditionalists. The traditionalists had a very narrow view of the role of the ACLU and didn't like change. The activists were always expanding the notion of civil liberties into new areas of activity, largely pushed by the Southern California affiliate. Among other things, poverty--equal rights for poor people. That was considered a no-no by the traditionalists on the National Board. Why should the ACLU get involved in economic policy? But for the activists, this was a very important social issue of equality and equal protection. So for many years, that issue was fought out over, many a different event about our policy towards poverty. In fact, the ACLU has always had something we called uniformity without--what's the term we used? Diversity without uniformity. Affiliates could have separate polices from the national organization and often it did. Southern California affiliate had a very detailed policy about fighting economic injustice and they could do so. They had the right to do so. Before that, the National Board … with an overwhelming super majority could forbid an affiliate to do that, but that never happened. Although the affiliate could not, for example, take a case to the US Supreme Court in opposition to a national policy, but they could have their own local policies within the state. I think it was

called, "Without unity, without conformity," something like that we had. We had a slogan like that.

SI: We can put a note in the transcript. So, at that time, you were on the National Board?

FA: Yes, I was on the National Board starting in 1969. That's when the whole Spock thing blew up. Starting in '76, I became one of the general counsel. I don't if I mentioned that before. I stepped down this year as general counsel. I'm now general counsel emeritus. So I no longer have an active role within the ACLU board.

SI: I did not know about you becoming emeritus, but you had mentioned last time that this was going to be your last time. So, when the biennial conference pushed to support the impeachment movement and you were on the National Board, do you remember those debates being bitter between maybe the activist wing and the traditionalist wing?

FA: Oh, yes. It was a pretty bitter debate. No question about that and I think a number of the traditionalists, I think, actually resigned from the organization around that time. The whole change in the ACLU really began around the Spock trial. Prior to that, the ACLU was run by a small, local group of New York based academics. Affiliates were allowed to have representatives to the National Board, but they had to pay their own way. So affiliate representatives never came. So it was a very small, maybe fifteen, sixteen members of the National Board, based in New York and they were the organization. As a result of the Spock trial, the policy was changed so that affiliate representatives would have their airfare paid to National Board meetings and that opened up the organization. That was really the transformation. The traditionalists were really set back by that.

SI: You mentioned that you had allies among the affiliates that were now reshaping the board.

FA: Oh, yes. No question.

SI: Particularly Southern California.

FA: Particularly Southern California. The state of Washington, I remember, was very active in that and I can't remember who all else, but it was quite a change in the organization.

SI: Okay. Well, moving from the impeachment movement, a little bit further to--well, actually, I want to jump quite a bit further because we talked about some of these issues last time related to the Vietnam War and your work with the postal cover cases. That was kind of a high point and then towards the end of the '70s you have the Skokie Controversy. What do you remember that? [Editor's Note: In 1978, the ACLU defended a neo-Nazi group that wanted to march through Skokie, Illinois. The ACLU defended the group because they believed the principles of free speech and the right to assembly were being violated. The group did not march in the town, but it held a rally in Chicago instead.]

FA: That was less of a controversy. Really, it was not a controversy. The National Board was totally almost a hundred percent in support of Skokie policies. There were some outsiders who were annoyed and you got some resignations from members of the organization, not from National Board members but the board itself was never--that was a never a divisive issue within the National Board.

SI: I think the Executive Director during much of that period was Aryeh Neier. [Editor's Note: Aryeh Neier was Executive Director of the ACLU from 1970 to 1978.]

FA: Aryeh stepped down almost at the beginning of my tenure on the National Board. I think it was around 1970. I think it was around '70 that Aryeh stepped down and Ira Glasser was elected as Executive Director. I know it was near the beginning of my tenure on the National Board when we had that debate. [Editor's Note: Ira Glasser was the Executive Director of the ACLU from 1978 to 2001.]

SI: Okay. I thought Aryeh Neier was there until just after Skokie.

FA: But Skokie is pre-impeachment. Am I wrong? Wait a minute.

SI: Well, what I am talking about is Skokie in '77 or '78, I believe.

FA: Maybe I'm wrong. Maybe Ira, when he was leading the impeachment fight was still the Executive Director in New York State. That may be what it was. No, Ira was leading that fight, but it may be that he was still the New York Director and not the National Director. Yes, that's quite possible.

SI: Well, I wanted to ask about your impressions of Aryeh Neier and what you thought of his efforts to move the ACLU forward.

FA: Well, I was still fairly new on the board. I never had that much dealings with Aryeh. I mean I was impressed with him. He was a very impressive guy. He seemed to be a good leader, but I did not really have all that involvement with him. In fact, what I'm trying to remember now, the first real--when I came on the board after Skokie, the first major battle within the board--again, this is sort of the traditionalists against the activists--had to do with our position on race, what was then called compensatory treatment. Did we talk about this before?

SI: No, is that affirmative action?

FA: Yes, affirmative action.

SI: No, we hinted at it.

FA: Because when I came on the board, the ACLU policy was basically color blindness. They did not believe in affirmative action. I was in a very unique position because I had just completed chairing a Rutgers Law School committee, which opened up our affirmative--which created an affirmative action program at Rutgers Law School. Starting in 1968, we had a very--the first law school in the country with a very firm position on bringing in minority students. I chaired the committee, which adopted that policy. I then came to the National Board and discovered that the Rutgers policy was considered wrong by the ACLU. I helped provoke a fight over that policy and this was now the 1970 biennial conference. I led a fight to amend the agenda to put affirmative action on the agenda. We had a big debate. I had support. One of my main supporters was Sheldon Ackley who was the New York affiliate representative and again, the Southern California people, and a bunch of others. [Editor's Note: Sheldon Ackley was a founding member and chairman of the New York ACLU. He died in 2008.] We amended the agenda of the 1970 biennial conference and passed a resolution in support of an affirmative

action program, which then had to go back to the National Board, because the National Board could overrule biennial resolutions. Over the next two years, we had very strong battles over what to do with the biennial conference on affirmative action. I was shocked by two of the leaders opposing me were Kenneth Clark and what's his name? [Editor's Note: Kenneth Clark was an African American social psychologist who was active in the Civil Rights Movement. His research was used in the *Brown v. Board of Education* Supreme Court case that ended school segregation.] Oh, the other major black leader. Kenneth Clark and I can't remember his name anymore. I was shocked that they were again--they thought it would stigmatize minorities to have these affirmative action programs. On my side however, was Robert Carter who later became the very famous federal district judge in New York, black federal judge and he was a strong supporter on my side. We battled that out for two years, back and forth between the biennial, the National Board. I think the National Board at one point overruled the biennial and then it went to national referendum and the referendum overruled the National Board. So it took a period of two to three years before we actually became a supporter of affirmative action and probably the leading predominantly white organization in the country that was leading the fight for affirmative action. So I've always felt very good about that because I really helped transform the ACLU on that issue, and ever since then, ACLU has been dominant in the field, supporting affirmative action.

SI: I was curious about the relationship between the biennial and the national because they do not have the biennial conferences anymore right?

FA: No, we've changed it.

SI: They did away with that.

FA: Now we have a leadership conference, but it has no policy-making authority anymore.

SI: Well, the National Board by this time is representative of the affiliates.

FA: We've just changed that also. It's mostly the affiliates.

SI: Today, I know it is going through other changes.

FA: We've reduced the number of at large members on the board.

SI: Yes. By this time I meant the late '60s when you were joining it and the early '70s. But the biennial conference was also representatives from the affiliates?

FA: Yes, yes. It was a portion by number of members that the state had. Every state had at least two delegates. Some states might have had as many as eight or nine delegates. It all depended on the membership of the affiliate, but there were always four or five hundred people at the biennial conferences.

SI: So would the differences between the National Board and the biennial conference arise out of the fact that there were a lot more affiliates at the biennial conference?

FA: Yes.

SI: Why would they have different policies?

FA: Yes, I mean all the National Board members were delegates, but then we had all these extra affiliate representatives there. So they were affiliate dominated.

SI: All right. So, in theory, were the biennial conferences there to give more of a voice to the affiliates?

FA: I can't even know when--the biennial conference started before I came on the board. It was in the bylaws and I'm not quite sure of the origins of that. It was at least the early '60s when they started the biennial conferences.

SI: So in a specific instance like affirmative action, would you as somebody trying to get that through, strategize that well I can't get as much done through the National Board so I will wait for the biennial conference where I will have more support?

FA: Oh, absolutely. Absolutely, and we sort of had a caucus going into the '70 biennial. The affirmative action caucus, how we were going to proceed. The first thing we did was we voted to amend the agenda.

SI: So, Aryeh Neier left I think in the late '70s.

FA: Okay.

SI: Then Ira Glasser replaced him.

FA: Yes.

SI: How involved was the National Board in that process of, you know, either searching for other candidates or approving Ira Glasser's appointment?

FA: I was very much involved. As I recall, Ira had an opponent. What's his name, from Southern California? The names are getting to elude me, but it came down to two. There was a search committee; came down to two candidates and Ira won pretty easily in the vote for--as Executive Director.

SI: Did you find him more amenable to what you were trying to do?

FA: Yes, Ira was more of the activist wing of the organization. Ira and I, over the years, had one fundamental disagreement and it continues now with me and Anthony Romero. [Editor's Note: Anthony Romero is the current Executive Director of the ACLU. He assumed the position in September 2001.] That has to do with campaign finance. Ira and Anthony have this notion that money is speech. ACLU initially was anti-total regulation. They wanted no regulation of campaign funding. *Buckley v. Valeo*, ACLU took the position, there should be no--not even constraints on donations to political candidates. [Editor's Note: *Buckley v. Valeo* was a Supreme Court decision on the Federal Election Campaign Act of 1971. The court approved and struck down different parts of the law.] They weren't totally open. I've been opposed to that policy for forty years. I continue to oppose it. We've made some changes over the years. We now, for example, do endorse restrictions on the amount of contributions to candidates. We still have some debate going on about Citizens United and independent expenditures and disclosure and there's still some issues that continue. [Editor's Note: Citizens United is a conservative organization that makes documentaries and supports political candidates.] The board's pretty

well split on this issue. Sometimes one side has the upper hand, sometimes the other side has the upper hand. It's probably the most divisive remaining issue within the organization. I've debated Ira on this question. I've debated Anthony on the question.

SI: I know today they have a lot of staff members who help with board relations. There's many avenues to facilitate communications between the national staff and the board. What was it like in the '70s, early '80s? How much contact did you have with the staff? How much, I guess, hand holding did they do?

FA: The organization was much smaller then. To Anthony's great credit, he's been an extraordinary fundraiser. He has really expanded the organization. Staff has grown exponentially. When I first became general counsel, general counsel played a pretty prominent role because the legal staff was pretty small. We had a lot more to do. Today, the legal staff is so large, I mean, there are at least three hundred lawyers between the national and the affiliates. There must be three hundred. So the role of general counsel's become very, almost insignificant, a very little role to play. Occasionally, if there's some kind of debate over what a policy really means or how it should be employed, whether we should go to the Supreme Court on a question. Yes, general counsel can make that decision but it's fairly minor. I mean, the days of Arthur Garfield Hays, he was general counsel. [Editor's Note: Arthur Garfield Hays was a civil liberties lawyer from Rochester, New York. He served as defense lawyer in the 1927 Sacco-Vanzetti Case and co-founded the American Civil Liberties Union.] He was also a leading lawyer for the organization. They only had a couple lawyers but. In fact, I think when I first joined the board, the national, there were--I think Mel Wolf and Eleanor Holmes Norton, I think were the only two lawyers on the national staff. [Editor's Note: Mel Wolf is a former director of the ACLU. Eleanor Holmes Norton is the congresswoman for the District of Columbia. She is serving her sixth term. She is also a tenured professor at Georgetown University.] That's my recollection. I mean, there's now--I don't know--forty, fifty, sixty. I don't know how many there are. So, it's been a huge increase in staff. So, the organization is becoming much more, I think, staff run and staff dominated than it was in the earlier days.

SI: So, in the earlier days, as general counsel, would you just take direction from the legal director?

FA: Yes, we worked with the legal director. We have regular monthly meetings.

SI: All right.

FA: I don't know if I mentioned this before, but my major accomplishment as general counsel was to establish an annual Supreme Court press briefing.

SI: Yes, you did talk about that.

FA: We talked about that.

SI: Yes.

FA: Ruth Ginsburg and I pushed that. [Editor's Note: Ruth Bader Ginsburg is a Supreme Court Justice. She was appointed by President Bill Clinton in 1993 and is still on the court. She taught at Rutgers Law School from 1963 to 1972. In the 1970s, she led the Women's Rights Project of

the ACLU and brought several cases of gender equality before the Supreme Court.] From '76 to '79, Ruth and I were two of the four general counsel and then she went on the bench. Carter appointed her to the bench I think in late '79. I pushed that issue that we ought to have this annual Supreme Court press briefing, which had become a major event, both for the ACLU and for the National Supreme Court press corps, but in those days it was very controversial. General counsel was split--"Oh, we'll wind up …" It was again like not opposing Supreme Court justices. "Oh, it will be--we'll wind up criticizing the Supreme Court. How can we do that? We have to appear before them. It would be unseemly for us to be criticizing the Supreme Court." So that was a major--it took me ten years to finally get general counsel to approve the idea.

SI: So at that time, in the '70s, was Mel Wolf the director?

FA: Yes. Mel, when I first came in, he was legal director and Mel got pushed out. I've never been--it was early in my time at the ACLU. I was never fully knowledgeable about what was going on behind the scenes and who was really pushing, but Mel got pushed out and that's--in fact, I think just about at that point, I became general counsel and we had to hire a new legal director. That's when we hired Bert Neuborne. [Editor's Note: Bert Neuborne is a civil liberties lawyer and New York University law professor. He served as the national legal director from 1981 to 1986.] I guess it was Bert. Yes, it was Bert Neuborne at the time. Yes.

SI: So, how was that done? What went into that kind of job search at that time?

FA: I don't know. We interviewed a few candidates. I think it was the general counsel that made the decision to hire Bert. I don't think it was a larger search committee. Several people applied for the job. I think it probably came down to Bert and Joel Gora, if I'm not mistaken. I think the two and then we hired Bert. [Editor's Note: Joel Gora is a Brooklyn Law School professor. He worked as an ACLU cooperating lawyer before joining the board of directors and serving as general counsel.]

SI: In making a decision like that, you obviously come from an activist background as you said. Does that play into your decision to support a candidate or is it just based on their resume?

FA: I think general resume and our feelings about who was a more effective leader be.

SI: Okay. So, given that you are working there as an unpaid volunteers essentially, how much--I guess what I am saying is it's different from a legal director who has a staff where they could order them. How much was it a mixture between what the legal director's agenda was and how much you can commit in your time, and how much the cases they wanted bring or work on?

FA: Yes, we were pretty much a sounding board for the legal director. He came to us with various issues and we talked them out. Over time we had less and less of a role to play. I mean we didn't decide whether the ACLU was going to file a lawsuit in a lower court or not. We never got involved in that. Although there might be a policy question. The legal director may say, "You know, we got this issue. Our policy is not terribly clear. What do you think? Should we file a suit?" So we might get into that kind of policy issue, whether we thought ACLU policy supported this particular lawsuit and if not, it might go back to the national board to change the policy.

SI: Does anything stand out from like the 1980s? I think you mentioned in your--I think I read in your memoir that as time went on, you became more involved in, I guess you would say state centric issues as opposed to national issues or your work took on more of a local role? Does anything stand out?

FA: Remember, starting in 1970, I started the constitutional litigation clinic at the law school. For about the first fifteen years, I mostly litigated in federal court. Bigger issues usually they grew out of New Jersey, not always, but most of them grew out of New Jersey, but I took them to federal court, partly because I grew up in an era of the Warren Court and I trusted the Warren Court and I thought the lower federal courts were good. [Editor's Note: Earl Warren was the governor of California from 1943 to 1953, until he was appointed as Chief Justice of the Supreme Court by President Eisenhower. He is known for his liberal and activist decisions. He supported the decision in *Brown v. Board of Education,* which desegregated schools. He retired in 1969 and died in 1974.] By early 1980s, I basically abandoned the federal courts. It was the Burger court. [Editor's Note: In 1969, Warren Burger was appointed as Chief Justice of the Supreme Court by President Richard Nixon. He made rulings supporting the *Miranda* decision and *Roe v. Wade* decision. He retired in 1986. He died in 1995.] Then the Rehnquist court and the federal courts were getting very conservative and I started doing almost everything in the state courts, which I thought New Jersey had very good state court system. [Editor's Note: President Richard Nixon appointed William Rehnquist to the Supreme Court in 1971. In 1989, President Ronald Reagan then promoted him to Chief Justice. He remained in the post until he died in 2005. He was known for his conservative, or right wing, rulings.]

I loved the New Jersey Supreme Court. Since then, I've barely been in federal court in the last twenty years or so. Almost thirty years I guess now. Since around '85.

SI: That's what I was thinking. I didn't mean to imply that your work does not have national implications, just that you were working in the state courts.

FA: Right. My own litigation was mostly in New Jersey.

SI: But at that time, from the mid '80s on, did you continue to be involved in national issues through the ACLU or did you mostly focus on--?

FA: Oh, no. I was on the National Board. I was involved in national issues. I was general counsel. So whatever national issues came up I was certainly involved in them, but in my own personal litigation, it was almost all New Jersey courts.

SI: I think the Bork issue was in the late 1980s?

FA: Bork was the summer of '87.

SI: '87, all right. So during the Reagan administration.

FA: That's when I was working for--what happened, I was working with John Conyers for the summer. School was out, I was working for Conyers for the summer and comes the end of August, I said to John--I said, "Well, I got to go back and teach." He says, "You can't leave now. We're in the middle of the Bork fight." So I called the dean. I said, "I need another six months, a leave of absence." And he said, "Okay."

SI: I know at that time there was a lot going on in terms of reorganization of relationship between national and the affiliates, and revenue sharing, that sort of thing. You were obviously aware of it or did you take an interest or active role in it?

FA: I never got deeply involved in that stuff, in the financial end of it. I think Ira sort of started the revenue sharing stuff, but Anthony really expanded it exponentially. Anthony did a terrific job of building the affiliate staff. In those days, if the affiliate had a single lawyer, it was a lot. Probably today almost every affiliate probably has at least two lawyers, maybe three, because Anthony really pushed expanding the affiliates. He did a terrific job at that. I have my own dispute with Anthony over campaign finance; we disagree, but I have to give him a lot of credit for what he did for building the organization. He's a great fundraiser.

SI: Now when the shift from Glasser to Romero was coming to the fore in 2001, were you involved in the decision to search for another candidate?

FA: I was on the search committee, but I don't want to discuss it because I don't want to discuss who the other candidates were. I don't think that was ever made public particularly, but Anthony was clearly the overwhelming choice of the search committee.

SI: Obviously, he was hired and then 9/11 happened right away. Can you recall your first board meeting or what communications were between the staff and the board during that period? Anything stand out?

FA: That's pretty vague in my mind at this point. I think it took Anthony a little while to get his feet on the ground and figure out a real strategy. I think we were a little slow at first and then he became more and more aggressive in trying to protect civil liberties from being overwhelmed by the concerns of national security.

SI: Well, I would like to go back and ask you some questions about the law school now.

FA: Sure.

SI: I was really interested that you graduated and then they offered you a job on the faculty. How did that come about?

FA: Well remember, I entered law school; I was thirty-one years old. I'd been a newspaper reporter. I was always covering local politics, local courts. So I came to law school and it was pretty easy for me, very frankly, competing with kids who were mostly a lot younger. They didn't have the experience I had with the real world of law and politics. I remember the first class I ever sat in at law school was civil procedure with Ruth Ginsberg. Both of us, it was our first year at Rutgers. She'd come as a teacher. I'd come as a student. Basically, the civil procedure class was a dialog between me and Ruth. The other students were usually lost or bored or whatever. I found it interesting. It was exciting. I had never really been a fulltime student since high school and I loved being a law student. It was a struggle since I had [to] also support a family. I'd leave law school at 5:45 and go over to the *Star-Ledger,* then work on the copy desk six nights a week. So it was a struggle, but I loved law school. The *Ledger* copy desk was a godsend because we worked from 6:00 to 9:30 and then we had nothing to do until the first edition came up at 11:15. So I'd do my homework. In fact, we'd sit around the copy [desk]. I would discuss my homework with the copy desk. So I felt, law school [was] not as much of a

challenge as most students did. So I had outstanding grades. I had never really planned to practice law. I was going to finish law school. I wanted to be a Supreme Court reporter for the *New York Times*, and I was going to go back to journalism. So I never applied for any law jobs in my senior year and the faculty started to say, "Well, why don't you teach?" "Well, all right, that sounds like a good idea. I'll try that out for a little while." They wound up appointing me.

SI: So there were a few years between when you were appointed and when you kind of found your home in the constitutional litigation center?

FA: Yes, for the first three or four years, just traditional teaching. I was teaching. Ruth Ginsburg and I were the two civil procedure teachers on the faculty. Ruth was my mentor and colleague. I taught labor law. I taught a couple other things, constitutional law. Arthur Kinoy who came to the faculty my second year as a student, did something called his constitutional litigation seminar. [Editor's Note: Arthur Kinoy was a Rutgers Law School professor from 1964 to 1992. He died in 2003.] In 1970, Arthur was taking a leave of absence and he asked me to take over the seminar and it was a time when people started talking about legal clinics. I said, "Well, I'd like to do the seminar as a clinic. We'll do real cases. The students, we'll have a law office." Will Heckel, the dean, was very supportive of the idea. [Editor's Note: C. Willard Heckel was the Dean of Rutgers Law School from 1963 to 1970, and then again in 1973 to 1974. He died in 1988.] He helped get us a grant from what was then called CLEPR, the Council of Legal Education for Professional Responsibility, which was funding law school clinics, mostly Ford Foundation money I think. So in '70, I set up the constitutional litigation clinic, hired an associate from the Center for Constitutional Rights, Bill Bender, as sort of the managing partner. We started the clinic and when Arthur came back the following year, he did not want to do a clinic. He said, he'll keep the seminar, you keep the clinic, and that's what happened. Occasionally, Arthur would actually do a case through the clinic. He did a couple--maybe *Powell v. McCormack*, I can't remember now. [Editor's Note: *Powell v. McCormack* was a 1969 Supreme Court case where Representative Adam Powell sued other members of the House of Representatives, including Speaker John McCormack, when they denied him his seat after being elected. He was denied his seat because of the many scandals he was involved in. He sued that he was unconstitutionally denied the seat and won the case.] Or the National Security wiretap case. So I was still close to Arthur, but I was running the clinic and he was doing his seminar.

SI: Let me just clarify, the postal coverage cases that we talked about last time, did you start those through the clinic?

FA: *Paton v. La Prade*, we're talking now?

SI: Yes.

FA: No, that was through the clinic.

SI: Through the clinic, okay.

FA: Remember, this is a follow up to my government surveillance cases. The first case on the clinic docket was called *Anderson v. Sills*. Arthur Sills was the Attorney General of New Jersey. [Editor's Note: Arthur J. Sills was the New Jersey Attorney General from 1962 to 1970. He died in 1982.] He had issued a memorandum to all local police and sheriff's offices to keep tabs on local political activists. This is the aftermath of the urban riots of '67 and '68, and he wanted

the state police to be prepared if there was going to be new urban disturbances. He asked them to send in reports on local political civil rights activists, anti-war activists. He … pacifists. I don't know why he was worried that pacifists were going to be violent and cause civil disorder, but they were sending in these notices. Now, I don't know how much of this you have read in my book. I was particularly interested in this because I had the FBI following me from the time I was seventeen years old and I was on the FBI security index for twenty years. When I came to law school and started learning Constitutional law and free speech, and chilling effect, I said, "Where did the FBI get the authority to keep files on me and follow me around? I never did anything wrong. I never committed any crime. All I did was engage in free speech. We did some sit-ins but there was never any violence." I said, "I think there's something wrong with this." So the first case I filed was this *Anderson v. Sills,* challenging the Sills' memorandum. Well, I did some forum shopping. I picked a very favorable free speech judge, Bob Matthews, sitting in the Hudson County Chancellery Division. He ordered the state police to burn their files. As a consequence, National ACLU asked me to take on *Tatum v. Laird,* challenging the army's domestic intelligence programs. It was basically was the same case as *Anderson v. Sills*. So I wound up arguing in the D.C. courts, *Tatum v. Laird*. That's of course, when I ran into William Rehnquist. We got thrown out in the district court. We won in the court of appeals, but Rehnquist got to the Supreme Court before I did. He had a robe on and he cast the deciding vote, five to four, that there was no justiciable controversy. So anyway, now I'm thrown out of court. He didn't say it was constitutional, what the army was doing, but we had no standing. Then comes *Paton v. La Prade*. *Tatum* was sort of a maxi case, challenging government surveillance on a mammoth scale. *Paton v. La Prade* was a mini case. She wrote a letter to the Socialist Workers Party and wound up being investigated because of a mail cover. So that's how I got into *Paton v. La Prade*. It was the follow up to what was really *Tatum v. Laird* and *Anderson v. Sills*. That of course, lasted five years and we won and we got a great decision from Judge Whipple and the government never appealed it. [Editor's Note: Lawrence Whipple was a federal judge in New Jersey from 1967 to 1983.] So that was the post office case.

SI: So, tell me a little bit about the law school faculty in the '60s and '70s.

FA: Yes.

SI: How would you characterize it?

FA: It was very political, very public policy oriented, but there were two wings of the faculty. I don't know. Sometimes they called it the Russian wing and the Chinese wing. It was sort of a left wing faculty, but the big dispute was over. It's almost like the ACLU traditionalists verses activists. The traditionalists wanted the law school to be just a think tank, an academic institution, a philosophy department. The activists wanted to take a more activist role. There were two big issues, which divided the two wings. One was affirmative action. The traditionalist wing says, "Oh, no minorities want to go to law school. Where are you going to get these students?" The other side said, "No, we're going to create a friendly atmosphere for minority students to apply. We're going to go out and recruit them and we're going to have a separate admissions program to bring in promising minority students and we prevailed on that. Then the second issue was clinics. The traditionalists [said], "Clinics? You're going to turn this into a trade school. We're not a trade school. We're an intellectual being, an intellectual atmosphere. We're not a trade school here." That was the second big issue. Again, our side prevailed. Now, the interesting thing of course was, it was a small--there was only nineteen

members of the faculty, I think, at that time. I think that was the number. The only non-political member of the faculty was Ruth Ginsburg, but she always lined up in favor of affirmative action and in favor of clinics. When push came to shove, she was always on our side, but that was the breakdown. It was pretty bitter. There was a lot of animosity between the two wings. David Haber would sit there and bang, "You're turning this place into a trade school." So, that's what happened. I loved the faculty because of their political activism, their interest. There were people like Saul Mendlovitz who was for world order and against nuclear proliferation. Arthur Kinoy came. He was a civil rights lawyer and Al Blumrosen; he was the Assistant Director of EEOC [Equal Employment Opportunity Commission] … Employment Opportunity. [Editor's Note: Alfred Blumrosen is Professor Emeritus of Rutgers Law School. He taught at the law school from 1955 to 2002.] So, I found it a very friendly atmosphere for my own sort of political leanings. So, that was the law school in those days.

SI: Now was each school kind of finding their own way in terms of affirmative action? I have interviewed other professors and staff members from Newark and they all talked about how after Conklin Hall and after other student takeovers, they had to respond and open up admissions, and that sort of thing. [Editor's Note: In February 1969, the Black Organization of Students (BOS) at Rutgers-Newark submitted demands pertaining to issues such as increased minority student enrollment and minority faculty hiring to Malcolm Talbott, Vice President of the Rutgers-Newark Campus (from 1963 to 1974). Early in the morning of February 24, 1969, nearly two dozen members of the BOS, declaring that their demands were ignored, took over Conklin Hall, the main classroom building, declaring it "Liberation Hall." The protest would last for over seventy-two hours until, on the morning of February 27th, Rutgers President Mason Gross agreed to the protestors' demands. The Rutgers-Newark faculty in a 95-40 vote, leading to the threat of more protests by the BOS, later rejected this agreement. In response, on March 14, 1969, the Rutgers Board of Governors instituted a new program designed to bring economically disadvantaged high school graduates into the state university on each of Rutgers' campuses.] Was any of that done in concert or was the law school pretty much just dealing with themselves?

FA: The law school was the vanguard. That was very clear.

SI: All right. So you adopt this policy.

FA: And Willard Heckel, the dean--a lot of that credit goes to Willard Heckel. I mean Willard was an extraordinary man. Among other things, he was the moderator of the Presbyterian Church of the United States, very religious man. He was the head of Johnson's War on Poverty in Newark, whatever they called it. He was the director of the Newark Poverty program--a very progressive human being. He was also gay, although, that was never a big issue. Everybody knew he was gay. He and Malcolm Talbott had lived together for many years, his associate dean. But Willard really deserved most of the credit for what was going on.

SI: So, you were on a committee that established this policy. Were you involved in implementation as well or was that handed off to other people?

FA: No, I was pretty much involved in implementation. For the first two years, I basically ran the admissions program for the MSP [Minority Student Program]. We interviewed all the applicants and chose them. I think it was me and Al Slocum. [Editor's Note: Alfred Slocum is a Professor of Law Emeritus at the Rutgers School of Law-Newark. He also served as Executive

Director of the Council on Legal Education Opportunity.] Al was a student before we started the MSP. He was one of the few black students at the law school. He came in in '67. An older student; he had been an engineer. He graduated, going up to Yale for a year, for a graduate degree and then came back. Pretty much I think we did most of the admissions work for the MSP, at least for two years.

SI: Was there any difficulty in finding applicants?

FA: No, not really. No, we had decided that the first year we would admit twenty. We had a goal of twenty. There was a big fight--"Where are we going to find twenty students?" Somebody proposed a resolution which passed as follows--any student who was in the top fifty percent--any minority student in the top fifty percent of an accredited college could be considered admissible if we couldn't find--to make sure we had twenty students and that was the compromise that got us over the first hurdle and that we would try to have a goal of twenty students the first year. After that we expanded it to try to get forty. At that time, we also order, we also increased the size of the student body so that we wouldn't be rejecting qualified white applicants as a result. We just expanded the size of the student body to make sure we could also try to find forty minority students. It didn't all work out because a lot of minority students were weaker. It's always been true. A lot of them did great.

SI: Was there any pressure from outside to take more students from Newark or the local area?

FA: Not that I recall.

SI: What about, in general, the law school's relationship with the city? Was there more of an effort to reach out to … your clinic, but were there other efforts to do legal work and provide those services for citizens?

FA: Well, first of all, Willard Heckel was dean, had a lot of contact with the city, especially after, you know, the Gibson Administration came in 1970. [Editor's Note: Kenneth Gibson was the first African American mayor of Newark. He was elected in 1970 and held the position until 1986.] Then at the same we set up the Constitution Litigation Clinic in 1970. We also established the Urban Legal Clinic. They basically worked with, you know, the local poverty community. So they were close to the legal--by this time there was legal services for the poor in Newark. In fact, Annamay Sheppard, who had been the Associate Director of the Newark Legal Services for the poor, came in as the Director of our Urban Legal Clinic in 1970.

SI: So over that time, you start bringing in minorities--

FA: By the way--I don't know if you want to--you could talk to Annamay if you want.

SI: Sure.

FA: She's very frail, but her mind is sharp. She's confined to a wheelchair. She's in her house in West Orange. She has a daughter who lives with her. Annamay, I guess she's eighty-eight. I don't know.

SI: Oh. She's very sharp. I'm sure she'd be happy to talk to you and her phone number is 973-736-3869.

SI: All right. Great. So there is obviously a push to bring minority students in. What about women, bringing more women students in? Was there the kind of concerted effort that was given on the minority issue or was it more piecemeal?

FA: I can't remember exactly how that all happened, but--because my wife's class was a class that came in in '67 and they only had five women students, but by the class of--then the MSP class came in in '68. Then the class that came in in '69, or '70, I'm not quite sure how it happened, but there was suddenly a burst of women coming in. I think it had to do with Willard Heckel and Malcolm Talbott. Talbott was sort of handling admissions. I think they suddenly did a lot of outreach to the feminist community and what we were getting was second career women coming in. The women students were much older than the men students, in the early '70s because they're all second career women. I don't precisely know how that push came about. Maybe Ruth Ginsburg had something to do with it. I'm not quite sure. But suddenly there was an influx of women students. Of course, they had a huge impact on Ruth Ginsburg. They needed a mentor and they turned Ruth into a feminist.

SI: Do you have any other impressions of working with Justice Ginsburg during that time?

FA: Oh sure. I mean, Ruth and I are still good friends. She was my mentor. We taught civil procedure together. As I say, starting in '76, we were two of the four ACLU general counsel. When she went to Sweden in '69 and came back with an au pair, she didn't know what to do with her old housekeeper who she was sponsoring. She was from Jamaica. She was sponsoring for immigration and my wife was now a student of hers and needed a housekeeper, so we got Ruth's housekeeper. She came to work for us. So, we've been close to Ruth over the years. She was supposed to marry my daughter to her then fiancé in her chambers, but fortunately the engagement didn't last.

SI: So you said at that time, the faculty was about nineteen or so?

FA: There were only about nineteen members as I recall.

SI: How did it grow over the next twenty years or so or did it pretty much stay the same?

FA: I'm not totally sure. If the student body was expanding--when I was a student then we had 450 students. Eventually we were up to eight hundred. So we had to have more faculty and then we start adding clinics. So we started hiring a lot of clinical faculty. Today, well, we have--some of full tenured teachers still teach in clinics, maybe three of us, but then there are another ten or eleven clinical professors today. So I guess the total faculty is maybe forty-eight, something like that, including fourteen or fifteen clinical teachers--no, not quite that much. It's probably thirty-five and maybe eleven, non-full tenure--maybe forty-six. I'm not exactly sure. Oh, then there's also the legal writing crew. That's another component. I don't even know how we count them. So it's certainly a much, much larger faculty. Of course, the question is now, are we going to be able to sustain that? Legal education is in desperate shape. I guess you're aware of that. Law schools are going to start closing. There's no question about that. Law school applications are down. It was like 100,000 applicants a year six years ago. We're down now to maybe 60,000. Tremendous drop off in applications. So, it's terrible. I mean we're down twenty percent enrollment. I don't know how long the budget can sustain this. Who

knows? I don't know. I don't see any indication it's going to get any better. There's no jobs. There are no jobs for graduating law students.

SI: Well, I know I would probably be here all day if I asked you about all the cases you have dealt with in the clinic, but what are some other ones that stand out in your memory? Of course people could look at your memoir as well.

FA: My favorite case is now going on, my Election Day registration case. If I can win this case in the state supreme court, it will be the capstone of my legal career. Right now, we just got a great opinion from the appellate division, which sounds like we win but they remanded it to the trial court, which had dismissed the case. The next move is now up to the trial court, what she's going to do. It's hard for me to see how she can do anything except reverse herself and give us judgment for the plaintiffs that we're entitled to have Election Day registration in New Jersey and then that starts back up the appellate process again. All I can do is hope and pray we can sustain this case and be the first--there are ten states which now have Election Day registration. I think it's twelve now. California, Connecticut, I think just joined. Anyway, that's all by legislation. We're trying to do it by litigation under the state constitution. So it would be a tremendous foot in the door. Hopefully, we get other states to follow. So that's a biggie. I really feel very good about that. Now, my other important cases, and basically I've really hardly ever lost a case in New Jersey Supreme Court. I love the New Jersey Supreme Court. My major cases now have to do with constitutional rights of residence in common interest communities such as this one. We are a private community, with a private governing board, which is … by state statute. We were condominium. There are planned unit developments. There are homeowners associations. There are property owners associations. They're privately governed. According to the United States Supreme Court, they're private property and residents have no constitutional rights, but in New Jersey they do have constitutional rights. It's the only state in the country that now has that because we established that. It started with my shopping mall case. That was in 1995. New Jersey Supreme Court ruled that our ubiquitous suburban shopping malls are public forum that have to allow free speech, distribution of literature. It's the only state in the country that really--California maybe still does it. They had an opinion, which they've been backtracking on, but basically New Jersey is now leading the way for shopping mall free speech. We extended that into these private communities. Now, I just in fact, one month ago won the most important decisions in this trilogy called *Dublirer v. 2000 Linwood Avenue Co-op in Fort Lee*, that residents of this high rise community--he wanted to run for the board and they wouldn't allow him to give out literature to his neighbors and speak to his neighbors. They said they had to. He had a right under the state constitution to do this. So now we've established this very significant principle of free speech and free elections in these private communities. Hopefully, some other states will maybe start picking this up--state courts, I don't know. We'll see, but right now we're the only one. Each semester, I have a team of students. We are inundated with issues dealing with these communities. We're basically the only lawyers in the state who will represent homeowners in these communities because the lawyers all represent the associations and the management firms. That's where the money is. It's a cottage industry. These are cash cows. In fact, if a resident wants to sue their board, they not only have to pay their own fees, they have to pay their prorated shares of the association's fees for their maintenance. I mean when I first sued Twin Rivers Community eight years ago, the residents were assessed $300,000 dollars for their attorney's fees for the association. So this has been a great--these have been great victories. We have now established this principle of constitutional rights for residents for

these communities and I just keep hoping that some other states will start following under the state constitution.

SI: Was Twin Rivers the first of those?

FA: Twin Rivers was the first of these cases. It's a question of whether I won or lost that case. If I ever lost a case in the Supreme Court, it could've been Twin Rivers, but it's a strange opinion and it really laid the groundwork for the later cases, which established the principle that we have constitutional rights. Twin Rivers, it's a strange opinion. I think it was four to three. What happened I believe was that the three dissenters, instead of filing a dissent, appended their dissenting opinion to the end of the majority opinion. So the majority opinion, this unanimous majority opinion is irreconcilable because the first half says residents have no rights. They signed away their rights when they signed the deed. The last half says, but of course they have constitutional rights when the appropriate case comes along. It makes no sense and we finally just cleared that all up with the latest opinion in Dublirer with Chief Justice Rabner making clear that the first half of Twin Rivers no longer exists. [Editor's Note: New Jersey Supreme Court Chief Justice Stuart Rabner has served on the court since 2007. Governor Jon Corzzine nominated him.] Then a couple other important cases I've established in the state supreme court have to do with actually the status of Rutgers Law School Clinics. Two cases, one we just won two years ago, which has to under the state's Open Public Records Act--when adversaries try to file to get clinic records at the law school under the [Open Public Records Act] they say, "Well, you're a state entity. [Editor's Note: The Open Public Records Act was passed in 2001.] You're under the Open Public Records Act." We won that case. The Supreme Court said, "No. Rutgers Law School clinics are--sure, they're part of the state university, but they're independent entities and they're no different than Seton Hall Law School clinics and they are not subject to the Open Public Records Act. They're a private law firm as far as we're concerned." So that was an important victory. One case I was disappointed in the State Supreme Court. I'm not quite sure what happened. The court didn't take the case. It was my challenge to disenfranchisement of felons on parole and probation. They were out in the community. They're allegedly rehabilitated but in New Jersey they still can't vote until they complete parole. I lost the case in the trial court. The appellate division affirmed that terrible opinion. It was just dead wrong. We went to the Supreme Court. The Supreme Court denied certification. I don't know why. In fact, after she retired as Chief Justice I had long conversation with Debbie Poritz about it and she said she couldn't remember the case. [Editor's Note: Deborah Poritz served as the Attorney General of New Jersey from 1994 to 1996. She was then appointed as Chief Justice of the State Supreme Court and served in the position from 1996 to 2006.] When I told her what the appellate division had done, she said, "Well, that's ridiculous. Everybody knows that's not the law in New Jersey." What they did, they followed a federal Supreme Court opinion, which said that to prove discrimination by a state entity you had to prove intentional discrimination, intentional. Nobody could prove the legislature intended to discriminate. We said you have to use a disparate impact test--the impact of the law, not the intent of the legislature. Poritz said, "Well everybody knows that don't follow *Washington v. Davis* in New Jersey." [Editor's Note: *Washington v. Davis* is a 1976 federal Supreme Court ruling that stated that laws that have a racially discriminatory effect, when not intended to, are constitutional.] I said, "Well, the appellate division didn't know that and you didn't overrule them." Meanwhile, I filed an appeal on that decision and the Inter-American Commission on Human Rights, which has been sitting for seven years, waiting on them to act on that, if ever. [Editor's Note: Created in 1959, the

Inter-American Commission on Human Rights is a branch of the Organization of American States. It oversees human rights violations in much of the Western Hemisphere.] We had a flurry of briefs at one point a couple years ago and then everything stopped again. So I keep hoping that maybe they're going to one of these days, take that case up. So that was a disappointment to me. Otherwise, New Jersey litigation we have been--in New Jersey courts we've been very, very fortunate.

SI: Well again, anybody reading this interview can also check out your memoir *Defending Rights.*

FA: Yes, that's right. That has everything up to about '95. After '95, it's not in there.

SI: Is there anything else that you would like to add to the recording?

FA: No, I don't think so. You've been pretty thorough. I'm amazed at how much you remember from the earlier interview.

SI: Yes, well I refreshed my memory. I have read the book and then we did the interview. So, a lot of it still stuck. All right. Thank you very much. I appreciate it.

FA: Okay, Shaun.

----------END OF TRANSCRIPT----------

Reviewed by Molly Graham 5/24/2015