

ORAL HISTORY OF MORTON HOLLANDER

Second Interview

August 9, 2007

This is the second interview of Morton Hollander as part of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Judith S. Feigin. The interview took place at Mr. Hollander's home in Northwest Washington on August 9, 2007.

Ms. Feigin: Mr. Hollander, when we left off last time, you had just been speaking with Professor Gellhorn, who was going to help you get a job with the Railroad Retirement Board. So I would like to pick up there.

Mr. Hollander: Okay. Actually, I think I may have misled you by saying that Gellhorn called Lester Schoene. What actually happened was Gellhorn, apparently after speaking with Schoene, got for me the names of his four assistant general counsels. I remember there was Joe Freehill and Joe Fanelli and Milt Kramer. And after speaking with them, they arranged for me to have an interview with Milt Kramer. It turns out that Milt Kramer lived a couple of blocks away from me in Brooklyn at one time (laughs) so I had a very good interview with him.

Ms. Feigin: When was this?

Mr. Hollander: It was in the spring of '41. I was trying to line up a job after I had no success at all getting into one of the large Gentile firms so I went down to Washington and saw Kramer. He apologized for my starting pay being \$1800 until I became a member of the bar which did not happen until October of '41.

Ms. Feigin: And then it went up to?

Mr. Hollander: \$2000

Ms. Feigin: Could you put that in context? Was that a good salary?

Mr. Hollander: The best firms in the district, the Cadwaladers and the other large firms, all were paying \$2600. That's why I started out with that. But I guess I considered it a good salary. Actually, it was enough for both of us. Ruth hadn't taken a paying job. She was actually working for the Greeting section of the White House, as a volunteer. If somebody turned seventy, or eighty or a hundred, she would send out a card with the president's signature and the president's wife's signature.

Ms. Feigin: Was it really their signatures?

Mr. Hollander: I think so.

Ms. Feigin: They actually signed them in those days?

Mr. Hollander: They used a machine for it, I'm sure.

Ms. Feigin: Since you came down with Ruth, were you married at that point?

Mr. Hollander: I got married in November of '41. The first time I came to Washington, I came alone, of course, to take the interview with Kramer.

Ms. Feigin: And then when did you start working?

Mr. Hollander: I started to work in August of that year. I graduated in May or June, I don't remember. And then I started working that summer.

Ms. Feigin: So you took the bar exam in the interim?

Mr. Hollander: I took the bar exam actually before I left Brooklyn. The New York State bar

exam.

Ms. Feigin: When you moved to Washington, where did you move to?

Mr. Hollander: Ruth was up in Brooklyn until November of '41. She got a job with a bank. When I came down alone, I roomed with Melvin Richter. He actually was working at the Railroad Retirement Board too. He was an attorney and he later came over to the Justice Department and he said I've got to move over there. He would speak to Paul Sweeney. And that's what happened although I had to wait about a year because I was at the Interior Department.

Ms. Feigin: Let's start with the first job at the Railroad Retirement Board. What did you do there?

Mr. Hollander: Actually, I wrote district court briefs. They were involved in a lot of litigation. It was the first Social Security program in the nation and there were all sorts of constitutional questions.

Ms. Feigin: Like what?

Mr. Hollander: I don't remember.

Ms. Feigin: And did you argue the cases?

Mr. Hollander: No. Actually, I was admitted to the bar in New York in October of that year. I never argued the cases. I would brief them either for Kramer or Fanelli or Joe Freehill. It was a big deal at that time to argue a case even at the federal district court.

Ms. Feigin: And these were all cases in the D.C. district court, or around the country?

Mr. Hollander: There were a couple of cases that were not in D.C. But most of the litigation

that the office's attorneys handled were cases that were filed in the United States District Court for the District of Columbia.

Ms. Feigin: And do you remember some of the issues?

Mr. Hollander: No. I was with them for about a year. You know the Railroad Retirement Board, the Social Security organization, had nothing really to do with the war effort so they packed up the Railroad Retirement Board and shipped them off to Chicago. And they're still there.

D.C. needed war space for outfits like the War Production Board. They obviously were taking millions into the military service. When they moved to Chicago, I took an agency job, a wartime-created agency, which was the Office of Price Administration.

Ms. Feigin: And who was the head of that?

Mr. Hollander: Porter, Paul Porter. My immediate boss was a very good Wisconsin lawyer named Carl Auerbach. My assignment there was to prepare maximum price regulations freezing products like a lead bullet rod. The bullet rod was manufactured and cut into bullet size. The rod itself is. And the prices of that lead bullet when the hundreds of thousands or millions of soldiers were being inducted, the price shot up about 300 percent. So my job was to roll back the prices to March of '41. I was there in '42. I had to roll back the prices by regulation, roll back the prices to March of '41, and freeze them as of the March '41 price level.

Ms. Feigin: So did you draft the regulations?

Mr. Hollander: Yes. There were so many regulations being drafted. It was just filling in the names of the products that were involved. And make sure that you're not too far off in setting the price, which at that point became the only price that the product could be sold for. In other words, it was the maximum selling price, the price that was fixed in the regulation.

Ms. Feigin: Is Paul Porter the one who went on to Arnold and Porter?

Mr. Hollander: Yes. The two largest agencies were OPA, which controlled the maximum permissible selling price, not only for war materials, but even for sugar and gasoline.

Ms. Feigin: How large was this agency?

Mr. Hollander: I'm sure we had hundreds of lawyers there. That's why I wasn't concerned when the RRB moved to Chicago. But the other giant agency that was created was the War Production Board, WPB. They did whatever was humanly possible to expand production facilities that would be used in the war effort.

Ms. Feigin: So this all started in '42 and by this time you were married.

Mr. Hollander: Yes. I was married in November of '41.

Ms. Feigin: And where did you get married?

Mr. Hollander: The wedding took place in a rabbi's study in Brooklyn.

Ms. Feigin: And when Ruth moved down here, where did you live then?

Mr. Hollander: Well, first I had a lot of trouble getting an apartment. It wasn't a question of discrimination, although I think that may have entered into it in part.

Certainly that was true when I got back out of the service. But there were so

many people flooding Washington looking for apartments that it was very difficult to get an apartment. And I got one actually, I think, through a guy by the name of Samuel Magazine who, among other activities, was president of the congregation that's known as Ohr Kodesh today, and that's on the East-West Highway and Meadowbrook Drive in Chevy Chase. At that time it was called The Montgomery County Jewish Center.

Initially, he found a place in Southeast. Barnaby Terrace. With the baby we needed a two-bedroom apartment, so that worked out satisfactorily. Of course I had to take a bus. It was about a forty-minute bus ride because I remember having to change at Georgia and New Hampshire.

Ms. Feigin: Can you tell me what D.C. was like at the time?

Mr. Hollander: D.C. was segregated, not probably as badly as Jackson, Mississippi. But the buses themselves – First there was no Metro of course. And the buses themselves allocated the last two rows for black people. And there were some hassles because sometimes a black person would try to board the bus when the two rows that had been reserved for them were already fully occupied. So the bus driver usually told them to stand.

Ms. Feigin: Even if there were empty seats.

Mr. Hollander: Yes. They had to stand towards the back of the bus. That was true in Washington, not only insofar as buses were concerned, but the precursor to CVS, the drug store chain, was People's drugstores. They would serve blacks but they were not allowed to sit down at a table in the drugstore. They

generally had about four or five small tables. So if you stopped there for breakfast or lunch you could pick up your stuff at the counter and then sit down. The black people had to take whatever food they brought out with them. And I think that persisted until Lyndon Johnson's time, in the 60s.

A related story, so far as discrimination is concerned – When Bobby Kennedy was attorney general, I was in his office with about seven or eight other people. Actually, I think we were discussing a case in which a district judge in Mississippi had ordered FBI agents to testify in a certain matter involving voting rights by blacks. This must have been during Johnson's administration. And during the course of our meeting, this was, as I say, when Bobby Kennedy was attorney general, he says, "Dammit," and he picks up a phone that's directly wired to Edgar Hoover's office because Hoover was calling him. And he listens to Hoover for about five minutes.

Ms. Feigin: Hoover the head of the FBI?

Mr. Hollander: Yes. And he tells us what the substance of the phone call was. And as Kennedy described it, the substance of the phone call is that they're rioting in the state capital in Jackson, Mississippi, which also houses the Supreme Court of Mississippi. They were rioting because blacks were not allowed to be in white latrines in the building. They had segregated the white and black bathrooms. I thought it was – The way Bobby Kennedy put it, I lost a lot of respect for him. Because this was a cavalier statement by him and not really appreciating what was at that time going on in Washington and Lyndon

Johnson's efforts to curb that.

The case that we were discussing was *Hauberg*. The United States Attorney had been told by this federal judge in Mississippi that he was going to be held in contempt because of his refusal to give the judge his full cooperation in this voting rights case that the blacks had filed, claiming that they were being discriminated against and turned away from the polls, that the questions that were asked of them went far beyond the literacy questions that they were allowed to ask.

Ms. Feigin: And what was the outcome of that discussion?

Mr. Hollander: I think what happened was that after – and there were people there from the Civil Rights Division and from the Criminal Division – nothing was decided by Kennedy. But we went back to our offices and by telephone we decided to have my section file an application for a writ of mandamus against the district judge.

Ms. Feigin: The Civil Division Appellate section?

Mr. Hollander: Yes. To prevent him from holding Hauberg in contempt. And we did. We got the writ of mandamus from the Court of Appeals for the Fifth Circuit and the judge got himself, I think it was an Atlanta – maybe it was a Jackson, Mississippi law firm – but I don't know why I feel they went to Atlanta to see if they could get someone to petition for *certiorari* in order to overturn the Fifth Circuit Court of Appeals decision awarding us the writ of mandamus we sought against the district judge filing contempt charges. So the petition was

filed; we filed an opposition and the Supreme Court denied *cert.*

The guy I credited most with good work in that case was Dave Rose. He later started to specialize in discrimination cases. Among his clients, and not a bad client to have, were a host of professional football players, so he didn't have to worry who was going to pay the lawyer fees.

Ms. Feigin: Let's go back to the war years. You came down to a segregated Washington. How urbanized was Washington then?

Mr. Hollander: I don't remember when we got to an apartment on Wayne Avenue in Silver Spring. It may have been even before we got to that apartment that Magazine had suggested in Southeast Washington. But not all the streets in Silver Spring were paved. Including Wayne Avenue. And there were actually cows parading down the street. But it was livable. The buses were running okay.

Ms. Feigin: So you started working for the OPA –

Mr. Hollander: I was with them only about six months. I was told that it's probably going to take about a year before I get into Sweeney's section at Justice. Mel Richter was keeping me advised of the progress. So I signed up with the Interior Department and was assigned, for the most part, to the Bureau of Land Management.

Ms. Feigin: Why did you leave OPA before you got into Justice?

Mr. Hollander: I felt that I'd gotten everything I wanted out of OPA in a sense. I was eager to stay in Washington after the Board moved to Chicago. And I wasn't really sure how long Sweeney would keep me waiting before he offered me a

definite job in appellate at the Civil Division, or the Claims Division, as it was known at that time. I just thought it would be a safer place to be at. And I was working on cases I found a lot more interesting than writing regulations on lead bullet rods, which just meant changing the name of the product and picking up some regulation that was close to it.

What I did at the Interior Department, particularly in the Bureau of Land Management, was analyze cases that the Interior Department was going to bring in court, and try to outline some of the arguments that we were suggesting to the Justice Department that should be used in order to accomplish the work we had to do in those cases. This was months before the cases were filed.

Ms. Feigin: So the litigation was done by the Justice Department?

Mr. Hollander: Oh yes. Interior had no role in litigation at all.

Ms. Feigin: Did you work on any cases that you recall now?

Mr. Hollander: I had some contact with the *Tidelands* controversy, the claim being that the states, rather than the federal government, owned the rights to the ocean waters. I forget whether it's up to six or seven miles from the shore. States of course hotly contested the federal government's claim, but that was one area that I was working on. Ultimately, the Supreme Court decided that they're federal lands and that the federal government not only owned them, but had the right to lease them to private parties.

Ms. Feigin: How long were you with Interior?

Mr. Hollander: About a year. I must have that backwards because this was after the War already. Immediately after OPA, I entered the service. I was in the service from November '42 to April '46.

Ms. Feigin: And where were you stationed?

Mr. Hollander: I was stationed at probably about ten different posts in the States. The one post that I spent the most time at, because I was there for two summers, was Cornell.

Ms. Feigin: Tell me what you did at Cornell.

Mr. Hollander: That was not a soldier's life. It was better than the average student's life. We still had to get up at seven o'clock in the morning and do our calisthenics exercises. But then a bus would take us over to Willard Straight Hall, that's S-t-r-a-i-g-h-t, which was our mess hall, a beautiful building where we had our meals. I think I may have told you that what I remember most about that cuisine was Sundays. They would prepare Baked Alaska, which they would serve.

Ms. Feigin: What were you studying at Cornell?

Mr. Hollander: I was studying Russian. It was a very intensive course because they wanted us to know not only the language, but they taught us the Russian Army marching songs. We had courses in Russian geography, in English, and in Russian political history. It was intensive not only as far as the language was concerned. Classes would end after five o'clock in the afternoon.

Ms. Feigin: What were you expected to do with the Russian?

Mr. Hollander:: Their plan, one that obviously did not materialize, was to prepare us to work alongside Russian soldiers who were already stationed in Teheran and in charge of administering the United States Government's Lend-Lease program. So the soldiers already there would be working on whatever the Lend-Lease program covered, whether it was a B-17 bomber or something a lot smaller. And supposedly the proficiency we were expected to acquire in the language would enable us to work alongside the Russian soldiers. But that never materialized. The code name for the project was FAH but I never was able to find out what that meant or stood for.

Ms. Feigin: Classified?

Mr. Hollander: Probably.

Ms. Feigin: You said last week that you had been at Camp Ritchie. Can you tell me a little bit about that?

Mr. Hollander: I was at Ritchie actually in '45 to '46, the last year of my military service.

Ms. Feigin:: And what did you do there?

Mr. Hollander: We took courses in the makeup of the Japanese Army. It was not only a Russian school. The camp itself was an intelligence school and we learned a lot about Russian capabilities. We already knew what songs they sang. But we also studied the makeup of the Japanese Army, I guess to fill in the time, because nobody had ever suggested that we'd have anything to do with that.

Ms. Feigin: Did you learn the Japanese language?

Mr. Hollander: No. I'm glad I didn't have to, because my sister Marilyn tried to. She took

some courses at Sarah Lawrence in Japanese. She said they have so many different languages, the Japanese themselves, and dialects, that even though she generally sticks to it, she gave that up. (**Indistinguishable**) her daughter studied Japanese; it's a challenge.

Ms. Feigin: So you were in the intelligence service?

Mr. Hollander: Well, actually that's what my discharge certificate shows but I didn't know it until then. Every few months they would send us to a different post. Some of the posts would just not bother with us. Some of the posts we had to undertake advanced infantry replacement training. One of the posts that I wound up at was Lowry Field, an Air Force installation in Denver, Colorado. And they were teaching us to become B-17, that's the name of one of the main bombers, B-17 or B-24 is another, how to work as bombardiers on the B-17.

Ms. Feigin: And did you ever serve in that capacity?

Mr. Hollander: (laughs) No. The whole thing was so silly. I was kicking myself. I really shouldn't complain I suppose because Ruth was with me all the time. She was able to – up at Cornell in particular – we were able to rent a place for eight or nine months at a time. And I would spend nights there even though I was supposed to stay in the quarters provided by the service (Feigin laughs) which was, I think, in Chi Psi fraternity.

Ms. Feigin: You snuck out?

Mr. Hollander: Yes (Feigin laughs). But nobody checked what time I came back.

I'm familiar with most of the gorges around there. Cascadilla Gorge.

Ruth and I both learned to ice skate at Lake Beebe, which is a huge – it's not as large as Cayuga – but it's a huge lake. It was, as far as I can remember the winters, always frozen over, so it was very good skating.

Oh, I think you should know this. The reason I was selected, as one of this group of thirty who would study Russian, was because in forms that I filled out at the time I entered the military service, I said that I speak French fluently.

Ms. Feigin: And did you?

Mr. Hollander: At that time I had four years of college French and I could hold my own. My former son-in-law Reid Feldman – I used to marvel at his ability to speak French, as he does every day, because ever since Nancy died, he's been working in Paris as a French avocat, they call them. He knew by the time he was finished with high school, he loved that language so, that he was very, very fluent.

Ms. Feigin: So the fact that you could speak French led them to think you would be able to speak Russian?

Mr. Hollander: I don't know. I can't see the transfer there at all.

Ms. Feigin: And the people in your group –

Mr. Hollander: Nobody in the group came from a Russian-speaking home. There were thirty of us. I don't remember my co-soldiers too well, but I do remember one guy who had his wife up there too. His name is David Starr, S-t-a-r-r. His father owns a chain of newspapers, and he himself I know is connected with that

chain. I forget the name of the chain.

Ms. Feigin: Did this group of thirty go together –

Mr. Hollander: Yes. From post to post.

Ms. Feigin: But nobody ever saw action, none of the thirty?

Mr. Hollander: No. We mustered out and nobody had any war stories to tell. But they were very slow in releasing us. Very slow. Because V-J Day was the first week in August of '45, and I was not discharged from the service until April of '46. And I was upset about that, because I had a wife. I felt that I could be doing a hell of a lot more.

Ms. Feigin: Do you remember where you were when you learned that President Roosevelt had died?

Mr. Hollander: No, I don't remember.

Ms. Feigin: Or when the bombs dropped, do you remember the reaction then?

Mr. Hollander: Oh yes. That's what we all were waiting for.

Ms. Feigin: So what did you do while you were still in the military but after the War was over?

Mr. Hollander: In April of '46, I must have started looking for a job. I had a wife and a year-old baby. That's when, of course, I put in a year with the Interior Department.

Ms. Feigin: So when you were released in April of '46 is when you came to the Interior Department?

Mr. Hollander: A couple of months after that I guess.

Ms. Feigin: And is that when Ruth was working at the White House?

Mr. Hollander: She was working then at the White House and then she went back when the kids were a bit older. She continued to work in the same Greetings section.

Ms. Feigin: Can you tell me anything about life at the White House before we get on with your legal career?

Mr. Hollander: Well, I was invited once over to the White House. In fact I think I have a picture of Ruth in the Oval Office,

Ms. Feigin: With the president?

Mr. Hollander: No, herself. But I probably was confusing you as well as myself before, because my stint with the Interior Department did not antedate my military service; it was subsequent to it. And the OPA, that did antedate military service because I was with OPA until November of '42. And in November of '42, I entered the service. I had been writing to people at the Interior Department while I was still in the service.

Ms. Feigin: And how long did you stay at the Interior Department?

Mr. Hollander: I think it was less than a year before Sweeney came through.

Ms. Feigin: Can you explain how you got in touch with Sweeney and how you got to be on his radar screen?

Mr. Hollander: There wasn't much that I had to do. This guy Melvin Richter was very helpful. He was very eager for me to come over there. He thought I would like the work and I certainly did. And he paved the way. He would keep on pestering Sweeney's office.

Ms. Feigin: And what office was that?

Mr. Hollander: At that time, it was called the Supreme Court section of the Claims Division because its principal purpose at that time was to write briefs and briefs in opposition to the grant of *certiorari* in cases filed by the government's opponents in the Supreme Court. Sweeney at first was opposed to the notion of his people handling arguments even in courts of appeals. He felt that they should concentrate on being an adjunct to the Solicitor General's Office, and he wanted to limit the staff's work to writing briefs, not arguing cases in the Supreme Court. Preparing briefs for the solicitor general's staff to argue in the Supreme Court.

Another function of the solicitor general, vis-à-vis the Supreme Court section of the Claims Division, was that every time we took an appeal, or that the division itself wanted to take an appeal from an adverse trial court decision to a federal court of appeals, we had to get permission from the solicitor general. And that of course was doubly true when we wanted to seek *certiorari* after the court of appeals had done us in.

Ms. Feigin: How large was this section?

Mr. Hollander: No more than six or seven people.

Ms. Feigin: And was it in proximity to the Solicitor General's Office?

Mr. Hollander: No, it was still down on the third floor in the main Justice Building, which is where it still is, I think. It was a very small section. Richter was one of the mainstays. There was a guy named Morton Liftin, L-i-f-t-i-n, who actually was probably even of more assistance to me than Richter himself. Richter was

too tied up generally on his cases. And Oscar Davis, who later moved up to the Solicitor General's Office, was in the original Supreme Court section.

Ms. Feigin: Was it a new section at the time you joined it?

Mr. Hollander: No. When Kreeger ran it, and Sweeney ran it, it was small. Five, maybe six attorneys. It underwent a tremendous expansion when Burger came in as assistant attorney general.

Ms. Feigin: Let's go back for a minute. Who was Kreeger and when did he run it?

Mr. Hollander: Kreeger ran it before Sweeney did. I don't know just what period of time Kreeger was there. But most of his life was spent as general counsel and probably senior vice president at GEICO.

Ms. Feigin: That followed his time at the Justice Department?

Mr. Hollander: Yes.

Ms. Feigin: Is that the same Kreeger who endowed the Art Museum in Maryland?

Mr. Hollander: Yes. That's his home. David Lloyd Kreeger. He spelled his last name, if he's no longer around, K-r-e-e-g-e-r.

Ms. Feigin: But he was not there when you came?

Mr. Hollander: He left before I got there in '48. Very nice guy. I met him only once. I think I mentioned to you that he came down to speak to one of our alumni meetings.

Ms. Feigin: Is he also the Kreeger of the theater, the Arena Stage Kreeger Theater?

Mr. Hollander: Yes.

Ms. Feigin: So did you get to argue cases?

Mr. Hollander: I got there in '48 and I was arguing Supreme Court cases by '52.

I think when Burger got in, he didn't want any of this Claims Division characterization of the division he was heading up. When he came in, the division he was assigned to as assistant attorney general was called the Claims Division.

Ms. Feigin: This is Warren Burger?

Mr. Hollander: Yes. He said we had to change that to Civil. He didn't like that idea. He was, incidentally, a very nice guy.

Ms. Feigin: So there was a Criminal Division and a Claims Division, but there was no Civil Division?

Mr. Hollander: There was a Criminal Division, which had its own appellate staff. Does the name Bea Rosenberg mean anything to you?

Ms. Feigin: Yes it does, but tell us who she was.

Mr. Hollander: She and a guy by the name of Bob Erdahl, E-r-d-a-h-l, headed up what was in effect the Supreme Court section of the Criminal Division, which also acted as an adjunct to the Solicitor General's Office, like our Supreme Court section did in the Claims Division. Bea was a very powerful attorney. She was very good.

Ms. Feigin: So within four years of your getting there you were arguing cases in the Supreme Court?

Mr. Hollander: That's right. I don't have the dates here. The first case I argued was at 338 U.S. so that was probably 1950.

Ms. Feigin: What can you tell me about some of your arguments? What would you

consider your most significant?

Mr. Hollander: Actually, the case that I was excited about happened to be a workmen's compensation case. There is a federal statute on the books, known as the Longshoremen's and Harbor Workers' Compensation Act. And, as its name implies, longshoremen and harbor workers are the principal beneficiaries of that compensation system. But in *O'Leary v. Brown-Pacific Maxon*, which is in 340 U.S., it started out with this peculiar set of facts. You know basically, workmen's compensation cases provide for compensation awards for people who've been injured or killed in connection with some activity arising out of, or in the course of, their employment. Every state has a workmen's compensation statute and they all carry that language. The federal government has at least three compensation schemes. Longshoremen's, and then the Civil Service Employees Compensation Act. The injury has to be tied down to some connection with employment in order for it to qualify for benefits under the Longshoremen's Act or any other compensation act.

O'Leary is the name of the deputy commissioner for the Department of Labor which administers the Longshoremen's and Harbor Workers' Compensation Act, and he awarded compensation benefits in a situation which at that time, fifty or sixty years ago, was considered to be an extraordinary award. The decedent was a worker at Brown-Pacific Maxon, which had a contract to rebuild the Guam naval base. The employees of Brown-Pacific Maxon were considered eligible for Longshoremen's and

Harbor Workers' Compensation Act. I don't remember the details, but there was a sufficient tie-in between their work on the Guam base to make them eligible for compensation benefits.

On a beautiful Sunday, when there was no work at all being done for Brown-Pacific Maxon, one of the employees, the decedent, went down to the ocean, there probably being no other recreational activity in which he could participate on the base itself or in the Brown-Pacific Maxon quarters. He went down to the ocean and one of his associate workers was already swimming. But he was having trouble fighting the tides, the guy who was already in the water, so the decedent stripped himself of whatever clothing he had and went out to rescue him. And he died in that attempt. The other guy got back to shore. The guy he went out to rescue got back to shore.

O'Leary had to make a decision. Was the guy's death, had it arisen out of or in the course of employment? O'Leary argued that there really was no other place for them to take on any work or recreational activities. It was isolated and they were pretty much limited to swimming or bathing in the ocean. So he awarded death compensation benefits to the survivors on the theory that the activity that the guy was engaged in, even though it was recreational, had arisen out of or in the course of employment.

There was some precedent for that because there were many cases on the books, before the Supreme Court ruled, where an employee is playing in a baseball game sponsored by his employer and is seriously injured. Almost

invariably, the courts say, well he was where he was because of his employment. And they don't have too much trouble connecting that up with an act arising out of or in the course of employment. So based on those cases, and taking a very liberal approach, O'Leary awarded benefits to the survivors of the family of the employee who died while he was trying to rescue his co-worker.

O'Leary's decision was appealed by Brown-Pacific Maxon or the insurance company for Brown-Pacific Maxon. It was appealed to the local district court in Guam and the district court affirmed O'Leary's award. But then the insurer for Brown-Pacific Maxon decided to take the case up to the Ninth Circuit Court of Appeals. And there they won, the court of appeals holding in effect, that's stretching it too far. This guy, acting like a Good Samaritan, decided to go in after his co-worker, but there's no tangible connection between that Samaritan act, or act of heroism, and any incident connected with, or arising out of or in course of his employment for Brown-Pacific Maxon.

Sweeney asked me if I would like to brief the case for the Supreme Court because we had sought, and got permission from the solicitor general to petition for *certiorari* from the Ninth Circuit's decision adverse to *O'Leary*. I did that, and I got sufficiently interested in it, so I told Sweeney if there are no other calls for arguing this case in the Supreme Court, I'd like to argue it too. It was fine with him, and at that time, as I pointed out before, and as you'll see

from this list here (holding list of colleagues), there were probably more cases being handled by our division lawyers than there were by the solicitor general's staff in the Supreme Court.

Ms. Feigin: Why is that?

Mr. Hollander: They were short-handed. You can see all these blank spaces here. These represent not only people in the Supreme Court section, or the Appellate section, but people elsewhere in the division.

Ms. Feigin: This is a list of cases and who argued them.

Mr. Hollander: Yes. Richter was of course in my section. McGinnis was not; he led up the General Litigation section. Colby was an Admiralty lawyer, working in the Admiralty section. Jayson was in my office, Leslie Jayson. We called Leslie the King of Torts because he wrote a several-volume work on Torts, not only the Federal Tort Claims Act. And also Doub, who was the head of our division. He was Eisenhower's assistant AG. And Slade was a long-time member of the Supreme Court section. Samuel Slade.

Ms. Feigin: So just by asking you got the argument?

Mr. Hollander: Yes. Two days afterward I got that blue slip. You know that blue memo slip that they use at the Justice Department. Signed by Philip Pearlman, who was solicitor general, saying that you are assigned the oral argument. I was thrilled.

Ms. Feigin: Was this your first?

Mr. Hollander: I'm not sure. Because *Wisner* I argued but I really didn't like that argument.

Ms. Feigin: What was preparation like for an oral argument?

Mr. Hollander: We had to have two moot courts with the rest of the group, five or six lawyers. We had at least two, sometimes three, moot courts. And they did cover every aspect of the case. And we also followed that, not with two, but all court of appeals cases we moot-courted once.

Ms. Feigin: Were you in a mourning coat when you argued?

Mr. Hollander: For the first few cases, yes. I resented that because I had to rent it (both laugh), although as I remember, back in the early 50s, you could rent formal mourning wear for four-and-a-half or five-and-a-half dollars. They also supplied the shirt and the tie.

Ms. Feigin: And do you remember who you argued in front of? Was there anything dramatic about the argument itself?

Mr. Hollander: I don't remember anything about the argument itself, other than the fact that Frankfurter wrote the opinion in our favor. I don't remember who else was on the bench, but Warren I'm sure was there. I felt I would get his vote, but I don't really remember it. Anyway, it was nice to win because I felt, and this is true of all cases that I've handled, or at least argued, I felt that it was an important question. You might not think so. A guy goes in, exposes himself to suicide, in effect, this other guy was having so much trouble, and winds up with his family being awarded compensation for benefits until the survivors die. But I thought there was an important issue, and that's the way I tried to present it, of administrative law. Here the deputy commissioner, who

supposedly is the brilliant guy so far as figuring out what is or is not an act arising out of or in the course of employment. He had come down very heavily in favor of it meeting that test. And then the district court had no problem in affirming the administrative award by Commissioner O'Leary. And then the court of appeals takes it upon itself – And the basic question in most of these administrative law cases was: was there substantial evidence? Was there substantial evidence to support the deputy commissioner's conclusion that this drowning, this death, had arisen out of, or in the course of, his employment for Brown-Pacific?

Now one thing the courts have been very careful with, is most of them recognize that that decision as to whether or not there's substantial evidence sufficient to support the administrative determination or conclusion, the right to make that determination is reserved to the administrator, the deputy commissioner. And the cases had already made clear at that time that if there is a challenge to the administrative determination, on the grounds of lack of substantial evidence, the cases made clear that the higher courts are not allowed to second-guess the commissioner and decide for themselves whether there was sufficient or substantial evidence to justify the administrative determination. Put another way, the cases seem to agree that, number one, that kind of determination, substantiality of evidence sufficient to support the administrative determination, that's a test assigned by Congress in these federal compensation acts to the administrative agency, in this case

Commissioner O'Leary. And the cases also are clear that the courts, in looking into that question, are not allowed to reweigh the evidence which O'Leary felt established that the act had arisen out of or in the course of employment. They're not allowed to reweigh the evidence in order to come to a conclusion that there was no substantial evidence, the commissioner having found to the contrary. Not only is the reweighing of evidence prohibited, but the court is also prohibited to determine the credibility of the witnesses who testified before the deputy commissioner. If the deputy commissioner was satisfied that these guys' testimony was credible, it's not open to the courts to come to a different conclusion.

Actually, *O'Leary v. Brown-Pacific* was decided the same morning that a case involving similar questions, as to the integrity of administrative determinations, was handed down. Another government case. It was argued by Robert Stern. The name of that case, which was decided along with *O'Leary*, was *Universal Camera Corp. v. NLRB*. But I was obviously very pleased with the result.

Ms. Feigin: This is probably a good place to stop. With a significant case that had a huge impact.

Mr. Hollander: It did; it did. At least on me (both laugh). I was delighted!

Ms. Feigin: Well beyond you.

Mr. Hollander: It has been cited very, very frequently of course. But you would expect that of any case that's been on the books for fifty or sixty years! Particularly if it's a

Supreme Court Frankfurter opinion.

Ms. Feigin: Thank you very much.

Mr. Hollander: Thank you for listening to me.