Oral History of George Cohen, Esq.

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Roger Pollak, and the interviewee is George Cohen. The interview took place at the home of George Cohen on Tuesday, January 18, 2022. This is the third interview.

MR. POLLAK: Today George and I are going to talk about OSHA and George's amazing experience with what was then a brand-new statute back in 1971, perhaps. So, George. Hello. How are you?

MR. COHEN: Hello. I'm fine. Thank you for being here again.

MR. POLLAK: You're so welcome. It's my pleasure. So, George, what is it that led you to want to focus your attention on OSHA in this interview?

MR. COHEN: The Occupational Safety and Health Act ("OSHA") became effective in 1971. Over the course of the next ten years, I had the privilege of serving as the lead counsel for various unions in the most significant cases brought by representatives of American industry in numerous U.S. circuit courts of appeal challenging occupational health standards promulgated by the Secretary of Labor pursuant to his broad authority under Section 6(b)(5), OSHA. In a nutshell, each of the standards was designed to provide meaningful protection to the many thousands of working men and women in each industry where they were exposed to a toxic substance recognized as hazardous to their health – namely, asbestos, lead, cotton dust, coke oven emissions (steel industry), vinyl chloride, and arsenic, to name just the major standard-setting initiatives. The D.C. Circuit reviewed lengthy briefs, heard oral arguments, and issued comprehensive decisions in the asbestos case (Judge McGowan, case of first impression under OSHA),

the lead case and the cotton dust case; other circuits did likewise, the Second Circuit in the vinyl chloride case (Justice Tom Clark, retired, authored a unanimous opinion), the Third Circuit (coke oven emissions standard), the Ninth Circuit (arsenic standard). In virtually all respects, each of the Secretary's standards was affirmed. Thus, history was made as this was the first time that workers (or their predecessors) whose lives were literally at stake received court-ordered protection against the hazards they confronted merely by going to their workstations. And yes, Roger, together with the Department of Labor's counsel, I argued all of those cases. Of course, with the benefit of incredible assistance from my colleagues at Bredhoff & Kaiser. In retrospect, the representation I provided in those cases, plus my role in successfully arguing before the Supreme Court in the cotton dust case, were without doubt the most satisfying and rewarding aspects of my career. Mr. Justice Brennan's majority opinion essentially embraced the interpretations of the key provisions of OSHA that we had consistently championed in each case for the entire period. That alone was extraordinarily rewarding professionally. And from a personal standpoint, my clients recognized me as the "go to" union OSHA guy. Perhaps more satisfying, I had earned the respect of my peers, prominent corporate lawyers and talented counsel for the Department of Labor, et cetera.

The Historical Society may be interested in knowing my review of "dusty files" disclosed that I presented about 25 oral arguments before the

D.C. Circuit in OSHA cases. The judges I appeared before reads like a "Who's Who" of legends, McGowan, Bazelon, Skelly Wright, Leventhal, to name just a few. Those experiences led me to recommend to you that an OSHA interview ought to be a self-contained event.

MR. POLLAK: Very good. Can you talk some more about your Supreme Court experiences?

MR. COHEN: Yes. We had the two lead cases that emanated from all the work we had done. First was the *Benzene* case in 1979. I won't focus attention on that because the Supreme Court in essence said it wasn't satisfied that the state of the record enabled it to address the complex legal issues. Interestingly, one year later they granted cert in what is known as the cotton dust case, *American Textile Manufacturing Institute versus OSHA*, and that became the lead case before the Supreme Court. To repeat, Mr. Justice Brennan authored a majority opinion in which amazingly all of the arguments we had pursued going back ten years were essentially adopted by the Court. It vindicated the positions that we had espoused. But for the fact of the intervening election of President Reagan on the heels of the Supreme Court's decision, the unions and the government were perfectly situated to provide the maximum protection to working men and women in all occupational health standard-setting initiatives.

MR. POLLAK: I have a feeling maybe we'll come back to a little more of that later on, but how did you first become involved with OSHA and litigation around OSHA?

MR. COHEN: You know, Roger, my basic theme in life is "coincidence, coincidence, coincidence." And this is a classic example. It's still quite vivid in my mind. OSHA was passed in 1971, but the effective date was delayed until the spring of 1972. Somewhere in that timeframe, the Bureau of National Affairs (BNA), the best-known labor periodical, decided that, given that it was a new statute, they were going to conduct a major conference inviting government officials, industry representatives, union representatives, public interest representatives to a one-day orientation program in Washington, D.C. Elliot Bredhoff, then my senior partner, was contacted by BNA, and all I can recall is probably on a Friday afternoon, he walked into my office and suggested it would be a good experience for me to be the presenter of the union's position on the panel. I asked when was the meeting going to take place, and I believe he told me Monday morning. So I then hid in my office that weekend. I read the statute, probably the first union lawyer to do so. I did some quick legal research of the legislative history, and I appeared on the panel. My task was to provide a preliminary view of a union lawyer's perspective of what was in that statute.

MR. POLLAK: What was your first impression of the statute?

MR. COHEN: Roger, my first impression was oh my goodness, this is astounding. As you know, our practice included a number of labor laws that predated OSHA. And I felt when reading that statute there were more express provisions giving unions participatory rights than any labor law statute I

had ever read. Further, the thrust of the statute was extremely union friendly. So when I was done reading it, I thought whoever was responsible for enacting this ought to be given an award because it was so oriented to the problems that working men and women have had long before that statute was passed.

MR. POLLAK: Interesting. That was the Nixon administration.

MR. COHEN: Absolutely. It was contemporaneous with the EPA. Those two statutes were enacted during the Nixon administration, and they gave you a sense of what could be accomplished when Republican and Democratic congressmen and women were working together to honestly address serious problems.

MR. POLLAK: Yes. Something we all wish we were seeing more of currently. Tell me about some of the basic provisions of the statute particularly as they came into play with your litigation and other involvement.

MR. COHEN: So you know when you read a 25-page single-spaced statute there's a lot of meat to absorb. I would synthesize it by saying the two most critical components in terms of unions and working men and women were what was known as the basic "general duty clause," which provided that all employers covered by this law are obligated to provide their employees a place of employment free of "recognized hazards." That was the fundamental catch-all provision. And then, of course, the whole world of the Secretary of Labor being given the authority under what I considered to be the single most important section of this law, Section 6(b)(5), to set

occupational health standards. I think it makes sense just for the record to read the precise words of Section 6(b)(5) so that everyone understands what it actually said. Section 6(b)(5) provides:

> The Secretary . . . shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence," and here comes the real kicker, "that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."

The legislative history made clear that when Congress used the phrase "working life," they meant upwards to forty-five years of employment. So here was Congress announcing that we are requiring the Secretary to set the standard so that if you're exposed for the entire period of your working life, there will be no material or functional impairment of your health. Amazingly powerful declaration.

MR. POLLAK: Amazing. So, what were your thoughts after reading that provision?

MR. COHEN: My thoughts were first of all that I'm a neophyte. I knew nothing about occupational health in 1972, so my first question that you'd completely understand was what are the types of substances that have never been regulated before. I listed many of them earlier. And what immediately came to my mind when I quickly looked at the summary of the legislative history was the following: there are state worker comp laws. They've been in effect for many, many years, but none of those statutes seem to

meaningfully address occupational health hazards. Most of them were involving safety issues, workers injured because of machine malfunction, cave-ins on construction worksites, for example, and they were all premised on the principal that there'll be after-the-fact compensation of a minimal amount of money in consideration for the provision that employers would face no-fault liability. No employer could defend on liability grounds, but the converse was workers weren't going to get very much, i.e., lost wages plus small lump-sum payments and paying hospital and medical expenses, et cetera. By contrast, when I finished reading 6(b)(5) and the legislative history, the basic principle was the exact opposite. The principle was we have to take steps in advance to protect working men and women so that they will not suffer the adverse consequences of being exposed to toxic chemicals. A remarkable change of purpose.

MR. POLLAK: Extraordinary. I take it by saying across their whole life, forty-five years, that that could mean very low levels of exposure but over a long period of time were protected. How were the standard-setting rulemakings conducted?

MR. COHEN: Well, I'll tell you what Congress had in mind. It was what we would refer to as "informal rulemaking." But in order to really understand what happened, Roger, I think a certain backdrop is important. Congress understood that giving the Secretary of Labor all this authority in areas that obviously involved significant medical judgments, et cetera, it was

imposing a burden involving a subject concerning what the Secretary lacked, expertise. So thoughtfully, Congress established in the law a new federal agency, the National Institute of Occupational Safety and Health, the famous acronym "NIOSH." And what Congress said was we want a group of public sector doctors, researchers, and epidemiologists to be the research arm of the Secretary. NIOSH, among other important functions, was to ascertain which, on a priority basis, were the worst toxic chemicals in terms of either the health risks they created or the number of employees who were going to be subjected to those kinds of exposures. And that became a critically important part of the way OSHA was administered. This led NIOSH to make recommendations to the Secretary, both as to which chemicals should be the subject of standard setting and what the appropriate permissible level of exposure should be.

A "Notice of Proposed Rulemaking" took place, and hearings were conducted under the auspices of the Secretary. The hearings, Roger, would last somewhere between one and three years. Oodles of government officials testified, industry retained large numbers of doctors and researchers as their experts. We on the union side did the same. Public interest groups appeared. Thousands of pages of testimony were generated. Hundreds of exhibits were included in the record, and, ultimately, it was the task of the Secretary to promulgate a standard which then would be subject to court review, directly to a court of appeals.

MR. POLLAK: Were the proceedings confrontational?

MR. COHEN: The proceedings were extraordinarily confrontational. I must say, parenthetically, neither myself nor anyone from my law firm was involved except in rare instances. Staff representatives and safety and health experts from all of the major unions involved were the people who participated. On occasion, I was asked to appear at a hearing where my clients thought it was going to be particularly confrontational and a legal issue was implicated. My best example of a confrontation went something like this. NIOSH was recommending to the Secretary that there ought to be two premier ways in which to address the problem of achieving a PEL. One was engineering controls. For example, ventilation systems. The other was ongoing work practices that would ensure that there was a continuous effort made to "monitor" what was going on in the workplace. On the other side of the aisle, the industry folks, realizing engineering controls were costly, vigorously opposed them. Their alternative answer was let's put respirators on working men and women eight hours a day, five days a week. So the day that particular critically important issue was before the hearing panel, I was asked to participate. The representatives of all the parties sat in an audience at the Department of Labor auditorium. You raised your hand. You were given five minutes to question members of the panel. They yelled, "Mr. Cohen on behalf of the Steelworkers Union." I stood up, and I looked at a gentleman who was representing industry. His attire was a three-piece suit, the vest, a watch fob, and perhaps a Harvard Law School alum. I suggested we ought to call a brief

recess during which time a respirator would be put on him for five minutes, after which I'd like to ask him a few questions about his experience with wearing a respirator. That was not greeted with a bit of enthusiasm from my industry counterparts. My request was denied, but my clients were delighted. I believe it also helped to seriously focus attention on the difficulty, the real difficulty, wearing a respirator would have. We recognized that sometimes you accept respirators as an alternative in an "emergency" setting, but certainly not as the favored way in which industry should be allowed to handle the entire permissible exposure level situation.

MR. POLLAK: Amazing, but not surprising, sadly. So there would be these one- to three-year-long procedures where there's notice and comment, I take it it was just the administrative procedure, then there was going to be review, and I'm guessing that the appeal would be generally from the business side, the corporate side.

MR. COHEN: That's a very good question. The answer is yes it was. Two things you should know were that what the statute provided was quite fascinating. Any party aggrieved by the standard, and virtually every one of these situations industry asserted that it was being aggrieved, could file a petition to review in the United States court of appeals wherein such person resides or has his principal place of business.

I want to quickly tell you that individual employers were not usually the moving "party" in the court cases. I'll give you four or five

examples. When the asbestos standard was promulgated, the Asbestos Institute of North America petitioned; with the coke oven standard, it was the American Iron and Steel Institute; when the cotton dust standard was promulgated, the American Textile Manufacturing Institute. And what were they? They were organizations, generally industry lobbying arms, that created big war chests. They hired doctors, they retained lawyers, the researchers, engineering experts, economic consultants, and they had enormous resources available to them.

The unions intervened in those cases. But a union also had a right, if it felt that, on balance, the Secretary's standard was worthy of our support, which is what occurred in almost every case. However, if we had an issue or two against the Secretary that we thought was worthy of court of appeals review, we had the right to file as petitioner. And a number of these lawsuits the Industrial Union Department AFL-CIO or AFL-CIO or the Steelworkers Union did so. But for the unions, most of our time was spent firming up the comprehensive provisions of the Secretary's standard.

MR. POLLAK: Were there other provisions set forth in OSHA that you want to discuss?

MR. COHEN: They were unlimited, of course. I mean a union or employees could exercise their rights to allege that the employer is either violating the general duty clause or a particular provision of a standard. A union could file a charge that would generate an inspection of a workplace by a federal inspector employed by OSHA. A union also had the right to participate in the actual walk-around inspection. If the inspector thought there was a

violation, the inspector could issue a citation, which usually included two components: a civil penalty, and even more importantly, an "abatement date" setting forth when the employer was required to correct that violation.

So basically what happened is that you'd have an evidentiary hearing before an administrative law judge, all provided by the statute. Any party aggrieved by the decision of the administrative law judge could appeal to a commission that was established by this statute, the "Occupational Safety and Health Review Commission," and that decision of the Commission, a la the NLRB, was likewise appealable to a U.S. circuit court of appeals. All that was provided.

There were provisions addressing "imminent danger" situations. There were provisions anticipating, as you just pointed out, a situation where we shouldn't have to wait for three years before a standard issued. It authorized an "Emergency Temporary Standard." There were also provisions for criminal conduct and provisions for the relationship between the federal government and states who might want to assert jurisdiction over this subject area. It was a very thoughtful, comprehensive approach to the vast variety of safety and health situations that the parties were familiar with by the time OSHA was enacted.

MR. POLLAK: Just as a side note, was the standard promulgated to deal with COVID that came before the Supreme Court, was that an Emergency Temporary Standard?

MR. COHEN: Yes it was. While you say that, yours truly had one experience very early on with an Emergency Temporary Standard, maybe one of the first, or the first that was ever issued by the Secretary. It took place under circumstances in which three workers died of a particular type of liver cancer, which the researchers told us was caused by their employment at a Goodrich Tire facility in Louisville, Kentucky, where they were exposed to what was called vinyl chloride. While the Secretary was contemplating whether to seek an Emergency Temporary Standard, three other rubber corporations advised that ten other employees had likewise died from the same liver cancer. So an Emergency Temporary Standard was issued. It was immediately challenged by the Society for the Plastics, Inc., in this instance in the Second Circuit Court of Appeals. We had nothing to do with the actual setting of the standard, but Larry Gold, on behalf of the AFL-CIO, and myself on behalf of the Rubber Workers Union, were retained to handle the court of appeals case in the Second Circuit.

That was another unique, quite astounding experience because when we arrived in the Second Circuit, who were on the panel? It consisted of Mister Justice Tom Clark, retired, presiding together with two designated federal district court judges. This was one of the most interesting arguments I've ever participated in because when opposing counsel Mr. Conley stood up on behalf of the industry and Firestone Tire and Rubber Company, the first words out of his mouth were, "You should not be intimidated by the presence of the AFL-CIO and Messrs. Cohen or

Gold because after all, only three workers have died." At which point, Justice Clark interrupted him and basically said, and how many more deaths do you think we should wait for until the Secretary acts? I looked at Larry, Larry looked at me, and we knew we didn't have too much to say as far as that argument was concerned.

MR. POLLAK: I was going to say that sounds like one of those classic situations where less is more.

MR. COHEN: Exactly. And Justice Clark authored a phenomenally powerful opinion which undoubtedly added to the development of what followed, all the very powerful opinions that were issued by other circuit courts of appeal. It was virtually unanimous as to how they were reacting to the enforcement of the law and what the law was designed to do.

MR. POLLAK: That's a good segue to asking you about who your clients were in all of this work that consumed you for a decade or more.

MR. COHEN: I'll tell you my clients, and then I'll tell you the back story. Initially, our clients were the law firms' clients, namely, the United Steelworkers of America, and there was a wonderful organization called the Industrial Union Department of the AFL-CIO, which, as you know, was an administrative arm of the AFL-CIO, a counterpart to the Building and Construction Trade Department at the AFL-CIO. The IUD was designed to represent all the basic manufacturing unions. So those two were our clients when I started to handle OSHA cases.

After we had become the go-to union firm in this subject area, our client base expanded extensively and included the AFL-CIO itself, the Oil Chemical Atomic Workers, the Amalgamated Textile Clothing Workers Union, the United Rubber Workers Union, and others. So as each one of the standards appeared to be affecting workers represented by a particular union, we had the high honor of being retained to represent them, even though we weren't their regular general counsel.

MR. POLLAK: Just as a historical note, was the IUD sort of the institutional expression of the CIO after the merger?

MR. COHEN: That's exactly what it was. One of the original leaders of the Industrial Union was the President of UAW, and then later on, other major industrial unions.

MR. POLLAK: Bredhoff and Kaiser, going back to when it was Arthur Goldberg, he represented the CIO.

MR. COHEN: Yes. We were always on the industrial side of the sector.

MR. POLLAK: Which I can say comes down to the current day.

MR. COHEN: Yes. I think there's one other thing that you can understand in the chronology. After the BNA experience, we started getting some calls from other unions because there was a lot of publicity involving the panels I participated in and my emphasis on the broad array of union rights under OSHA. I also started being invited to various labor law conferences around the country. I spoke in Ohio at the Midwest conference. As a result of that presentation, I started receiving calls from our colleagues in

the union bar asking what more guidance I could offer them. So I made a decision that, in retrospect, turned out to really be an intelligent one. I decided to write a law review article. My article appeared in the 1972 *Ohio State Law Journal*. I basically gave union lawyers a primer on the history and substance of the law, what rights they should be looking at in terms of what they can do to represent unions effectively, what were the open legal questions, and what additional thoughts they might have to put their best feet forward for their clients. I believe the combination of what happened at that conference plus the law review article and the dissemination of it emphasized the fact that if you wanted to get some help, call Bredhoff Kaiser and ask for me.

MR. POLLAK: Sounds like it. Super interesting. Tell me a little bit about the union staff that you got to work with at this time. I'm sure they were very important.

MR. COHEN: I already said to you I started as a total neophyte. I realized very early on that I needed a lot of help, a lot of education and orientation, and I got it. I started by getting it from the union staff members who were basically the Safety and Health representatives or department heads in their respective unions. I was extraordinarily fortunate with our client, United Steelworkers of America, because Jack Sheehan was their Legislative Director working at the AFL-CIO headquarters, a few blocks away from our law firm office. I had developed a wonderful relationship with Jack, and it turned out, he was the most knowledgeable union official about how the law came into place. Further, he played a very, very affirmative role

in educating the congressional committees on the subjects that unions wanted to cover in the statute. So Jack became my right-hand man. At a later point, Mike Wright, who became the head of the Steelworkers Safety and Health Department in Pittsburgh, fit into that category. From the AFL-CIO standpoint, the original director was George Taylor during the early days, and he was succeeded by Peggy Seminario, who was another source of great help – thoughtful, very intelligent, very knowledgeable concerning the protections workers needed where separate standards were involved. I had Tony Mazzocchi and Steve Wodka at OCAW, Eric Frumin at the Amalgamated Textile Clothing Workers Union, and Shelly Samuels from the IUD. In sum, they supplied me an enormous amount of the nitty gritty practical assistance. But, of course, I still needed the help with a multitude of medical issues. I'm not a doctor, so I immediately established excellent working relationships with the brilliant research staff of NIOSH. I also recognized that industry had available to it some of the most premier doctors, epidemiologists, and consultants. So what could we do on our side to try to counterbalance their expertise? I found out at an early time that Dr. Irving Selikoff of the Mount Sinai hospital in New York City had already established himself as one of the foremost authorities on asbestos. He immediately responded affirmatively to my request to utilize his services. He provided invaluable assistance both with research data, his cohort studies, and ideas. I also had the help of a Ralph Nader public interest group, most especially Dr. Sydney Wolfe.

Then there was the matter of lawyering. Two of my colleagues at Bredhoff without question made unsurpassable contributions: Jeremiah Collins, who proved to be the world's greatest researcher and also produced initial drafts of virtually all our briefs, and then on an ongoing basis, in all respects, I relied upon my long-term senior partner, colleague, and great friend Bob Weinberg. Bob was brilliant in every respect – as a brief writer, a strategist, and most important, in helping to make the critical judgments concerning how best to handle oral arguments.

In general, everything that I ever did at Bredhoff & Kaiser was as a team. You know that, but in this instance, it was even more intense because over the ten-year period, the three of us were constantly working on matters together. On occasion, one of our other colleagues would join in. Bruce Lerner helped out on one particular case, and I think other colleagues did as well, but for the three of us, it became a labor of love.

MR. POLLAK: Tell us about the litigation that unfolded.

MR. COHEN: Industry launched a vigorous three-pronged challenge to each of the occupational health standards set by the Secretary. The challenges were masterminded by highly paid consultants with expertise in three relevant subjects – medicine and epidemiology, engineering, and economics. The challenges took on a common thread, namely, a three-pronged argument. First, the health risk workers confronted could be significantly reduced even if the permissible exposure levels were much higher than those set by the Secretary; second, industry lacked the technology to achieve the

Secretary's PELs – i.e., they were not "feasible" within the meaning of Section 6(b)(5) of the Act, and third, even assuming the technology could achieve those mandated levels, the costs would be prohibitive when compared with the benefits to the exposed workers. The latter contention necessarily meant that a so-called cost/benefit analysis would have to be performed as a prerequisite to any decision to set a standard, a process which would entail the distasteful task of estimating the value of the lives of workers either deceased or maimed, et cetera. In the sum, that was the trifecta that lay ahead for counsel for the Secretary and myself and my colleagues on behalf of the unions who had exercised their rights to intervene before the courts.

MR. POLLAK: How did your OSHA litigation career begin?

MR. COHEN: The very first case was the asbestos case. Incidentally, at a time in which the researchers had not determined it was a carcinogen. It was just causing serious lung abnormalities, but it was not yet designated a cause of cancer. That proceeding ended up before the D.C. Circuit, and Judge McGowan wrote the first court of appeals decision analyzing the entire statue from the beginning of rulemaking up to and including all the substantive issues that had to be addressed, such as the applicable permissible exposure level, the core technology question whether the PEL should be achieved through engineering controls, together with work practices or just by respirators, and finally, the way in which the cost impact ought to be envisioned.

We made one really important contribution to the use of data and information. As I said, industry was coming in to the rulemaking with one tale of woe after another from individual companies making a two-fold argument: We don't need to reach the PEL because there is not a health risk at a higher level of exposure than the Secretary set; and second, even if we could view the higher PEL as a health risk, we do not have the technological capability to achieve the Secretary's PEL. We knew that was going to be a very big battle because when I read 6(b)(5). It did provide "to the extent feasible," which we interpreted to mean capable of being achieved through technology. So what we succeeded in doing was to identify an outlier. If one company came to the OSHA hearing and said here's how we were able to achieve the same level that the Secretary proposes as the PEL, this company became the "beacon," whereas the vast majority of companies represented the lowest common denominator. Our strategy was to put one of their fellow companies out front to discredit the naysayers. And we succeeded in doing that in virtually every major standard-setting procedure we had. That became our model.

More important, we championed the interpretation of Section 6(b)(5) that to accept Industry's claim that the Secretary was required to conduct a cost/benefit analysis was contrary to the overriding purpose of providing maximum worker protection.

This is a good introduction to discussing the Supreme Court's ruling in *ATMI v. OSHA* (1980). OSHA had chosen an implementation

strategy that depended primarily on a mix of engineering controls (ventilation systems, e.g.) and work practice controls, according employers four years to achieve the PEL, and in the interim, respirator use was required. Mr. Justice Brennan, writing for the majority, noted that the evidence contained in the record supported OSHA's choice. He then explained that the principal issue presented was whether OSHA required the Secretary to conduct a cost/benefit analysis. Again, the interpretation of the word "feasible" for purposes of Section 6(b)(5) became the focus of the Court's decision.

Justice Brennan introduced his discussion by noting the Webster dictionary's plain definition to be "capable of being done executed or effected" – the language that left no room for "cost" considerations. What followed was the Court's conclusion that any standard relying upon a cost/benefit analysis that strikes a different balance than that issued by the Secretary would be inconsistent with the command set forth in Section 6(b)(5). In passing, Justice Brennan also observed that whenever Congress intended a cost/benefit analysis to be performed, it explicitly provided for one – not so in OSHA.

As for the extensive legislative history, the Court said it all in one conclusory phrase "when Congress passed OSHA, it chose to place preeminent value on assuring employees a safe and healthy working environment. . . ."

This was a monumental victory for all our clients. It was consistent with what we had argued in each of the court of appeals cases I mentioned. The day after the Supreme Court issued its decision, Linda Greenhouse, on the front page of *The New York Times*, quoted yours truly as saying that decision "vindicated our efforts over the past decade." And it was true.

Now, you asked me an intervening question which I want to get back to. First, let me say that the case was argued before the Supreme Court on January 20th, 1981, the day after Ronald Reagan was sworn in as the President. In June, six months later, the Supreme Court issued its decision granting the Secretary the broadest authority imaginable to promulgate occupational health standards to protect workers against all toxic substances, including those not yet known. The message to the Secretary was clear: Go forth and do your job.

Now comes probably the most diabolical experience that I had in my career as a lawyer. As noted, the decision was issued in June. In the interim, a new Assistant Secretary of Labor OSHA has been named by President Reagan and affirmed by the Senate. His name was Thorne Auchter. The best that we could ascertain from his public resume is he had come from Florida and been a construction contractor in a pretty low-keyed position with no OSHA experience. And literally, Roger, I'd say weeks or a month after the Supreme Court decision, I get a call from his secretary asking me to meet with him. I'm confident that Bob Weinberg

went with me. We walked into the room, and I saw Ben Mintz, the Assistant Solicitor of Labor for OSHA, and several other OSHA staffers. I had worked closely with Ben in virtually every one of the court cases in which he proactively supported the Secretary's standard. In essence, this is what happened at the meeting. Mr. Auchter looked up and said, I want to assure you that notwithstanding the cotton dust decision of the Supreme Court, OSHA is now going to be administering and enforcing this statute in the way in which we believe it was intended. That is the purpose of the meeting, to alert you to that reality. And I believe I said something like I thank you for the opportunity to be here. I think you are going to rue the day that you ever uttered those words to myself and my colleague and I'm going to get up now and leave. I did so. I later learned that he instructed the legal staff of OSHA that if anybody received a call from me or one of my colleagues, they were to send a memo to him immediately letting him know what I was asking for and what their response was.

So I had the ultimate accolade that anybody could be given. But on a really serious note, can you imagine. Here we were just having received one of the ultimate success stories on behalf of working men and women only to find out that was not going to happen: the Reagan administration did just what Auchter had warned. They stopped regulating health hazards. So we were left mandamus actions to attempt to persuade courts to require the Secretary to initiate standard-setting proceedings. You know the difficult, uphill struggle to prevail in a

mandamus. We did succeed in a few instances, getting a court to order a rulemaking. But in the end, this was a complete unmitigated disaster for the entire term that Reagan was in office.

MR. POLLAK: Yes. Elections matter.

MR. COHEN: Yes.

MR. POLLAK: Before we go back to the question of your non-litigation involvements, is there anything from that period in the twenty-plus circuit court cases that you were involved with that you wanted to share?

MR. COHEN: I think we've highlighted all the things that were involved. I think quickly another high spot was the coke oven emission case before the Third Circuit which also consisted of three Republican-nominated judges whose experience had been on the corporate side but who ended up issuing a fabulous pro-steelworker decision. The coke ovens were likely the worst of all the workplaces you could imagine. Extreme heat, thick dust, and the fumes that would periodically emit these famous puffs that would take place in which an enormous cloud of dust would appear encompassing the entire workplace in the coke ovens. So for the first time in my career as an appellate court advocate, we devoted an appendix to photographs that were part of the record so that the court of appeals judges could actually see what it was like to be in a coke oven at that time. I believe that played a significant role in the decision affirming the entire coke oven emission standard.

I should quickly say to you that I did have, on behalf of the firm, relationships with the two assistant secretaries before Thorne Auchter. One was Dr. Morton Corn in the early days of OSHA, and then probably one of the most incredible political appointees I've ever met, Dr. Eula Bingham, who was despised by industry because of her ongoing dedication to proactively provide protection to working men and women. She was not so affectionately referred to as the "Wicked Witch of the West." She and I shared many discussions in terms of establishing government strategy and what could the unions do to support that strategy. She was my model because political pressure, concern about what was going to be said about her or what people were threatening to do to her were all treated as immaterial. She had one objective in mind, how to take that law and squeeze out of it the maximum protection working men and women were entitled to.

MR. POLLAK: You talked about your experience with Ohio State and the article for their law review. I also meant to ask were there other opportunities that OSHA afforded you to spread the word?

MR. COHEN: Yes. Thank you for asking that. OSHA offered an opportunity to teach a fascinating, intellectually challenging course. Some of my friends on the faculty at Georgetown Law School early on asked me to put together such a course. I thought that was a great honor. I said immediately I would love to do that. I brought into the picture Ben Mintz who was the Assistant Solicitor, OSHA, at the Labor Department. He and I began, as

early as 1973 or 1974, to co-teach The Law of Occupational Health and Safety, I believe the first such course ever taught in any law school. I continued to do that with him every other year for about five or six years, and then he dropped out, and I recruited a management counterpart who joined me in doing that. That was obviously a great academic experience.

The Johns Hopkins School of Public Health and Hygiene realized that all this exciting research was taking place. This was their stock and trade. I was asked to join their Advisory Council, which was, again, not only a high honor, but what it meant was I had another group of potential research scientists who were more than happy to undertake to help unions conduct cohort studies of working men and women exposed to specific toxic chemicals. I stayed on that advisory council for a decade. A lawyer in the midst of all those MDs and PHDs. What could be more desirable.

MR. POLLAK: Did the ABA get into the action?

MR. COHEN: Yes. Roger, that was a separate story unto itself because early on the ABA decided that the labor law section should create a new Committee on Occupational Safety and Health. Again, I was asked, and I agreed to be the first Union Co-chair of the Committee. I arrived on the scene and was told essentially the following. We have 75 members signed up. They're all enthused, 73 of whom are labor lawyers representing major corporations, and you and one or two others are union lawyers. So instead of "throwing in the towel," you know how strongly I feel about reverse snobbery, I wanted to do all I could with that committee so that it

wouldn't get carried away and start making lobbying-type recommendations to Congress that might reflect pro-management sentiment. Indeed, it was no secret that Industry was "interested" in cutting back on the authority of the Secretary of Labor and other possible legislative initiatives. So over the course of my experiences going to two or three committee meetings a year, I had the time of my life challenging and/or opposing the views of 65 of my contemporary colleagues, all of which, as you might imagine, was a lot of fun.

But I'm going to give you one more even better nuance. At some point, one of my colleagues from the Chamber of Commerce called me and said would I be willing to come to the Chamber of Commerce and give a talk on the union's perspective of OSHA. And of course you know I was going to say yes, and what actually turned out the story was these were all prominent OSHA lawyers representing management, and they wanted their clients to listen to me give the most proactive union presentation possible so that prospective clients might get more enthused about using them for other OSHA matters in the future. I was therefore a willing conspirator, and of course I enjoyed that experience immensely.

MR. POLLAK: George, tell me about the state plan lawsuit and the role that the states could play.

MR. COHEN: Yes. That was a fascinating intellectual exercise because when the law was being considered, the background was that states had done nothing to protect working men and women from occupational health hazards. So

the union's position was forget about the states. Let the feds take control. Let them have exclusive jurisdiction. But of course that's not how Congress works. There was a very strong effort on behalf of the supporters of states' rights to come up with some kind of a compromise, which ultimately carried the day. The compromise was to allow states to have the authority to set and enforce occupational health standards, if but only if, they could demonstrate that, with respect to funding and staffing, their plan would be, in the words of the statute, "at least as effective as" the federal government standard. Well you can imagine what then took place. This triggered an ongoing battle with our clients continuously complaining that a state was setting up criteria that really didn't guarantee it's going to be effective as the federal standard. But here's the rub – the feds never geared up enough regarding the number of inspectors or more generally, funding.

Anyway, to make a long story long, after a battle in the District Court and before the Court of Appeals panel, Judge Leventhal wrote a very thoughtful opinion in which he ended up saying I'm going to let the Secretary's criteria carry the day with the understanding that future improvements have to be made by the states as to both the staffing and the funding. So we lost, but we got a foot in the door. That became an ongoing disappointment for my clients because states were allowed at least to continue to perform the enforcement function that we wanted the federal government to take care of exclusively.

MR. POLLAK: Are there other areas under OSHA that you got involved with?

MR. COHEN: One quick unique one. American Cyanamid had a plant in Willow Point, West Virginia, and they had very high lead exposures particularly hazardous to women of childbearing age. There was significant research to indicate that those women could give birth to malformed babies or maybe even miscarrying. The company maintained that it could not reduce the exposure level to a point at which those health risks could be eliminated. Instead, the company adopted "a policy" whereby the thirty or so women in the inglot pigment department were given two choices: Either leave your high-paying job because you are of a child-bearing age (defined as between 16 and 50) or you can have what it called "buttonhole surgery" to sterilize you so that you would not be subjected to the problem a fetus might have if you remained on the job. After that horrific "policy" presenting a "Hobson's Choice" was announced, the union asked us to represent them. We let them know that they were trying to "push the envelope." We were going to argue that the policy itself created a "recognized hazard" and therefore the general duty clause applied. The Occupational Health Review Commission rejected that position, holding that, as a matter of law, the general duty clause was applicable only where a machine or a process causes a health risk. This is not a machine or a process. This is a policy, and policies are not covered by OSHA. To challenge that decision, we filed an appeal in the Circuit Court of Appeals for the District of Columbia Circuit. I had the honor of appearing before

Judges Scalia, Bork, and Williams at a time when Judge Scalia was not yet on the Supreme Court. Needless to say, I had a very, very fascinating oral argument. Probably my best exchange with Judge Scalia was at one point he looked at me and said, "Well Mr. Cohen, why not bring this case under Title VII of the Civil Rights law?" The only reply I could think of at that moment was I'm having a hard enough time trying to persuade you to rule for us on the OSHA law I'm relying upon. I don't think it would serve any productive purpose for me to have an argument with you about another statute. He laughed and said you're right, go on with your argument.

In any event, Judge Bork wrote an opinion that became quite notorious. He threw us out of court, and he ruled the way I had anticipated. He ruled that a policy can't be the equivalent of a machine. In our brief, we noted that if the exposure to a chemical used at the workplace resulted in the equivalent of sterilizing women, that would clearly be covered by OSHA. So we asked why shouldn't a policy that was requiring sterilization be treated in the same manner? Judge Bork was sufficiently concerned about that argument that he chose to respond in a separate segment of his majority opinion. He acknowledged the ingenuity of that argument, but rejected it by returning to the theme that a "policy" is still not covered by the Act.

But what became the cause of a great amount of public scrutiny is what Judge Bork stated at the end of his opinion: "the women involved in

this matter were put to a 'most unhappy choice.'" I want you to know that history will show that when Judge Bork was up for nomination for the Supreme Court, his opinion in that case and the words he used were the subject of various inquiries by Democratic Senators shocked about Judge Bork's insensitivity to a problem that involved this horrendous dilemma that these women were confronted with.

So that was an unhappy experience for us. We had hoped we'd get a more expansive approach to the general duty clause, but we were shot down.

MR. POLLAK: Just out of curiosity, why couldn't the substance that was causing the damage to the fetuses be regulated under the provision?

MR. COHEN: This was the "feasibility" issue. In the evidentiary hearing before the administrative law judge, the company actually sold him on the proposition that there was no feasible way it could regulate the fumes to satisfy the permissible exposure level, and that's why the company had no choice but to put into place and implement this policy. It was too late in the game for us to try to get around that reality because the findings of fact had already been part of the record in the case.

MR. POLLAK: Tell me a little bit about employee complaint cases where the OSHRC played a role like the NLRB.

MR. COHEN: The area that we got involved with and that I had the honor of arguing before the Commission and then eventually in court involved the question of the union's role in frequently used Settlement Agreements. As I

mentioned, the statute gives the union the right to file a complaint to begin the enforcement process. The statute also gives the union the right to "walk around" during the course of the inspection. Further, the statute gives the unions the right to make recommendations to the inspector as to what kind of citation should be issued. But the reality is that probably 90% of all the times that employers had challenged the citation and commenced to litigate, the end result was a settlement agreement between the Solicitor of Labor (as the prosecutor) and the Company. The union that had played a very proactive role in everything up until the settlement wanted to participate in the settlement as well because in numerous instances, we were concerned that the settlement should not have taken place and/or that the Secretary was allowing the company too long a period for abating the hazard. We were met with a very traditional position of a prosecutor. We have the exclusive authority to decide, in our unreviewable judgment, whether to settle and what a settlement should contain. From our perspective, we were being refused the opportunity to participate in what we knew at the end of the process was a critical component of the whole enforcement machinery. We took an appeal to the Second Circuit, and the court ruled that the prosecutor could do exactly what he did.

MR. POLLAK: Interesting. So I think maybe we're coming to the end of this very interesting conversation about OSHA and your work after the statute was established. Just one last question is about collective bargaining and

provisions relating to safety and how that interacted with the statutory framework.

MR. COHEN: I'm very glad you raised that because I obviously had first-hand experience with the Steelworkers Union. In terms of safety and health, the Steelworkers was always at the forefront. They had always negotiated important provisions in their collective bargaining agreements, and I'll give you the essence of their position. First of all, whatever our rights are under a statute, we're not going to agree to waive any of them. That was the single most definitive and simple proposition. So don't Mr. Steel Company, don't come to us and try to get us to do anything that would in any way denigrate, diminish, or limit what our statutory rights are. What we intend to do in collective bargain is further improve worker safety and health protections. I was a tremendous supporter of that approach. I urged that result in conversations with the steel industry officers and their lawyers. I agreed that management had the ultimate decision-making authority on safety and health issues, just as with any other terms or conditions of employment. That's a management right. But that doesn't mean that a manager can't take into consideration recommendations from employees with "hands on" experience operating the machines on the plant floors. And what we wanted, and what the Steelworkers in large measure achieved, were provisions whereby that on a regular recurring basis its Safety and Health Committee members would meet with their Company counterparts (the plant-level management representatives)

involved with safety and health to discuss all the problems that they had been identified on the plant floor and to make recommendations as to how to best achieve what management always wanted – efficiency and productivity – provided that worker safety and health were adequately protected. So there was an enormous amount of attention paid to safety and health through the collective bargaining procedure.

Another really significant contract provision was the one that stated if any worker reasonably believes that he's being asked to do something that poses an imminent danger to him, he has the right to file a grievance to invoke immediate emergency arbitration. The machine would be shut down, and an arbitrator, selected from a panel, would be available on a one- or two-day basis. The arbitrator would conduct an expedited hearing and then decide whether or not an imminent danger existed and, if so, award an appropriate remedy. So all of those were examples of the enormous influence that OSHA had on collective bargaining over safety and health.

MR. POLLAK: This was an extraordinary conversation, and the way that you were able to engage in so many facets with the development of law for the first ten years of the statute makes for great story. I'm interested was there recognition of you that came at the end of this time?

MR. COHEN: Well, the *American Lawyer* named me the Best Labor Lawyer of the Year in 1981 after the Supreme Court argument in the cotton dust case, and then an honor that I'm not sure I want to give myself much credit for being

named a “Legend of the D.C. Bar” in 1981 or so. I’m going to say to you I’m attributing both of those honors in large part to OSHA. I did say, as you might imagine, when the person called said I was being named a legend as a posthumous award! I tried to get the D.C. Bar to change the title, but I was told that this was the fourth year that a person was being named a legend of the D.C. Bar, so I would have to live with that. attributable to that experience.

MR. POLLAK: Thank you, George.

MR. COHEN: Thank you, Roger.

MR. POLLAK: I think we’ll wrap up for today.

MR. COHEN: Yes. Fabulous.