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 Thursday, November 3, 2022. This is the sixth interview.

MR. POLLAK: George, it's nice to be back with you.

MR. COHEN: Great to be here, Roger.

MR. POLLAK: Tell us what you'd like to talk about today.

MR. COHEN: I think it's about time we might as well face up to the Supreme Court, and I thought we would do it in chronological order, saving the major cases for last. I'm not going to talk about one of the two OSHA cases, the *Benzene* case, because within one year after that, *Cotton Dust* came down, which answered the questions the Supreme Court left open in the *Benzene* case.

What I thought would be the most interesting for people who are reading this would be to give a little back story before I tell what happened in that case.

My first case was *HK Porter* about 1968 if I'm not mistaken. And how did it come about that as a 34-year-old guy who had just entered private practice with the law firm of Bredhoff and Gottesman in 1966 I got to handle that case up to and including a Supreme Court argument? It really was quite an unusual story.

I had been at the NLRB for six years starting in 1960, the first three years on Board Member Jerry Brown's staff as an attorney-advisor learning about the National Labor Relations Act. After three years there, I decided I had to get closer to the real world, and I was fortunate enough to

transfer from the NLRB side where I wrote memos and drafted decisions for board members to the Appellate Court Branch of the General Counsel's Office. For the three years from 1963 to 1966, I had this fortunate opportunity to draft briefs and then actually argue cases in the circuit courts of appeal.

Then I was hired by a two-person labor law firm, Elliott Bredhoff and Michael Gottesman, and was enthused, as you might imagine. I wanted to stay in Washington. I wanted to be a lawyer representing working men and women through their unions. This opportunity arose. They hired me in the fall of 1966. When I was hired, Elliott and Michael were in regular communication with Bernie Kleinman, the new General Counsel of the Steelworkers Union. And when Bernie found out who I was, he said to Mike in particular, look, George is coming here with six years at the NLRB. He should be a natural to help us with NLRA-related cases, and they agreed. I guess I should say for the record because it's fascinating, they also agreed to pay 50% of what was going to be my starting salary at Bredhoff and Gottesman (i.e., $15,000 per year). I worked 96% of my time for the steelworkers, and they reimbursed 50% for my time. So while that might be viewed as a downside, the upside was HK Porter.

Initially, I knew nothing about HK Porter. There was an NLRB charge filed by the United Steelworkers of America which ended up with a refusal to bargain complaint being issued against the company. Under the

NLRB procedure, a full-blown evidentiary hearing took place before a trial examiner and ultimately a decision of the Board issued affirming the complaint. I had nothing to do with any of that, but the NLRB then filed a petition to enforce that decision in the United States Circuit Court of Appeals for the District of Columbia. And somehow in the discussions between Bernie and Mike, they said why don't you handle that case. That's what happened.

What is fascinating about that case? Here goes. The Steelworkers had succeeded in a recent organizing campaign. They were recognized by HK Porter, and they were negotiating their first contract against what you would call a pretty tough company in the southland. The union proposed a traditional dues checkoff provision in which the employer agrees that if individual employees sign an authorization card saying you can deduct my union dues, and in return, the union says we will pay for whatever the cost is and will agree to assume any liability if any employee ever turns around and says the employer was not authorized to deduct my dues. The union made that precise offer, and the employer basically said thank you, but no thank you. There then unfolded an interesting fact-finding inquiry in which the NLRB ultimately decided that given there is an obligation to bargain in good faith, the company failed to satisfy that duty. Instead, what this company did was to say we are not going to give the union a dues checkoff to help them to raise money to represent their members, and the Board decided no lawful reason has been offered; it appears you want

to defeat the purposes of bargaining in good faith and do not desire to reach an agreement with the union. We've come to that conclusion in part because the record evidence is that you're checking off dues and other payments for all sorts of organizations, for the Red Cross, for polio, for some nonprofit groups, so there is no reason logistically or administratively why you're not doing that for the steelworkers. The case went before the U.S. Court of Appeals for the D.C. Circuit, and that's when I entered the case.

MR. POLLAK: George, let me interrupt just for one second. Did the NLRB impose on HK Porter an obligation to agree to that provision?

MR. COHEN: Not yet. That's what makes this so interesting. Issue one in the Court of Appeals was the traditional issue: Is there substantial evidence on the facts that exist that these are correct, supportable findings of fact and the conclusion of law that flowed from that? The court's answer was yes.

That's the final decision at that moment, but what occurred is what is noteworthy. An oral argument was conducted by a highly respected panel. I believe it consisted of David Bazelon, Skelly Wright and another strong-minded, very thoughtful judge who knew all about the National Labor Relations Act. When Skelly Wright asked company counsel could you be kind enough to tell the court what precisely was your objection to the union's proposal for dues checkoff, the company lawyer leaned forward, took his right hand, and put it where his backside wallet was and said, "Your Honors, I like to keep it in my back pocket." Now I had been

in a small number of oral arguments, but I must say I was not surprised by the court's reaction of disbelief to that response. The company lawyer realized that that was probably not the most desirable way to express his legal position, he then volunteered "by the way, I'm just passing through," which is a code word for saying I know I'm not going to win in this court, I'm going to the Supreme Court. And that is exactly what ultimately happened.

Okay. The Court of Appeals issued its order directing the company to bargain in good faith, a standard bargaining order. The parties went back to the bargaining table. I'm not involved in that negotiation, but the company repeated with even more enthusiasm, you still ain't gonna get this. Back they go to the Board.

The Board then rules. We are really frustrated here because the whole purpose of a bargaining in good faith order is to effectuate the policies of this Act, i.e., to try to get parties to conduct themselves in good faith and reach agreements. The Board decided what we have here is the antithesis of that, and in these unique circumstances, we believe, a more powerful order has to be issued, notwithstanding the language of Section 8(d), which I should read for the record, Roger. Section 8(d), after talking generally about the obligation to bargain in good faith, includes the famous words, but that obligation "does not compel either party to agree to a proposal or to require the making of a concession." Those are very strong words in which Congress was saying we don't want to have the

government inject itself into what actually happens in the bargaining itself other than to require a fundamental obligation to do it in good faith. Okay. The Board maintained it had, under Section 10, very broad authority to remedy violations and opined we think reading Section 10, the language citing the importance of effectuating the purposes and policies of the Act, it had the power and authority to compel the party, HK Porter, to agree to the dues checkoff provision in these unique circumstances. And that went up to the Supreme Court of the United States.

The way the oral argument proceeds when a government agency is a party, that agency – the NLRB – gets half of the time, and the union as intervener gets the other half, so the key lawyer for the NLRB argued for the NLRB, and I had a chance to argue for the union. We came awfully close but didn't quite make it. We lost 6-3.

So that was the end of HK Porter. I would say to you that's now hornbook law. And all that case really stood for was even in the unique, special circumstances of that fact pattern, Section 8(d) language that I quoted prevailed.

MR. POLLAK: Do you think that the Board considered dues checkoff provisions to be so fundamental to the entire structure of employer-union relationships that they thought it could be an exception?

MR. COHEN: I can't give you the Board's mindset, but yes. I think what they were saying to themselves, if a party can flaunt this obligation, we've really lost the ability to enforce the law as we were obliged to.

Now, I did leave out a nuance in which the Board I think was looking at also an alternative – i.e., to initiate a contempt proceeding against the company. That tactic might have given the Board ammunition in support of its precedent-setting effort to require HK Porter to agree to the dues checkoff provision. Whatever the reason, the Board didn't pursue a contempt proceeding.

MR. POLLAK: Interesting. Well a small note. When I first came to Bredhoff and Kaiser, many years later in 1990, I think it was in the very first year I worked on the HK Porter bankruptcy.

MR. COHEN: The great thing about our interview is you can always pick up any thread from something I did a few years before and say by God, you worked on it. That's great.

MR. POLLAK: We were trying to protect the retirees' interests.

MR. COHEN: You know the other observation that you would completely understand is this was sort of the beginning of my learning about labor relations in the South and how powerful the opposition was to agreeing to recognize a union in the first place and then how tough it was to negotiate your first contract when something as simple one would think as a non issue as that could actually have generated that case. So I'm now in 1969, 1970, I'm learning a lot.

MR. POLLAK: Tell us about what it was like for the 35-year-old you to appear before the Supremes.

MR. COHEN: I've actually spoken about that, and what I said was the following: that any rational human being, young or old, who knows they have to walk up thirty-four Vermont marble steps in order to see the sign "Equal Justice Under Law" in big gold letters and then walk into that room with the drapes and the bench with the nine Justices bedecked in robes, if you aren't a bit overcome, the answer is then you don't deserve to keep doing that! So I viewed it as an amazingly wonderful opportunity and experience, and I think at the end of it, I said Wow, I'd like to try to do this again someday. And I had the total support of Michael and the lawyers from the Steelworkers even though we lost. That's a good thing to have going for you.

MR. POLLAK: Did you get very far into your argument without being interrupted?

MR. COHEN: No. I realized very quickly that you had to really give the Justices some "meat" in order for them to get interested. I'm sure I was able to, or at least I tried to communicate what had happened down below to see if I could convey a little extra pizzazz.

MR. POLLAK: Anything more on HK Porter?

MR. COHEN: No. I think that's all I'd like to say. Thank you.

MR. POLLAK: Okay, next we are going to talk about *Buffalo Forge*.

MR. COHEN: Yes. Buffalo Forge. Following my theme here, background. Buffalo Forge was another Steelworker case, and it arose out of a pretty interesting but not too unusual circumstance. For many years in the steel industry, at the major steel companies, or even a medium size like a Buffalo Forge, the

production and maintenance employees joined the United Steelworkers of America. They organized. They won an NLRB election, and they start a relationship with the company. Over time, the two parties entered into a number of collective bargaining agreements, usually three years in length. And the relevant thing to think about in this case is the quid pro quo. The union agreed that during the term of that three-year agreement, they will not engage in a strike and instead, they are getting the right to arbitrate any dispute as to the meaning of any contract provision and get a final and binding award from a neutral impartial arbitrator. That's sort of the very standard arrangement.

In this case, at midpoint in one of those three-year agreements, the office and clerical employees, who had never joined any union before, were organized by the Steelworkers, and lo' and behold, a majority of them in an appropriate unit, voted in favor of the union and established an Office and Clerical Employee Local. Then they began their first round of negotiations. They were met with some significant opposition. Not surprisingly, because it's one thing for a company to realize its blue-collar workers have joined the union, it's quite another thing for them to emotionally come to grips with oh my God, our office and clerical employees too? These are people we see every day of our lives. These are people who we treat really well, and now they're telling us they want to reject us as their lone supporter and join a union. Making a long story

long, the office and clerical employees went out on a lawful economic strike after several months of abortive negotiations.

Now, at that point, a few days after the strike took place, apparently the leadership of the production and maintenance local met and said, you know what, this is the moment of truth for solidarity here. We're going to help our brothers and sisters in the office and clerical unit, and the production and maintenance employees then engaged with what you and I call a "sympathy" strike. It's a strike in sympathy of the office and clerical's downtrodden situation designed to maximize the economic pressure on the company so it might agree to a better agreement for the office and clerical workers than they had been able to achieve on their own. So all the magic words: togetherness, solidarity, unity, and sympathy are all built into what happened.

Now, when that happens, a company has its their own anti-sympathy approach to life, and so in this case, it did two things. It filed a grievance claiming that that the production and maintenance employees strike which was going on was in breach of the contractual "no-strike" clause between the company and the union. And then what caused this to become a cause celeb, Buffalo Forge also moved for an injunction, a temporary restraining order, pending the actual arbitration that was going to take place. So there was no doubt that at some point in time the question of could you be engaged in a lawful sympathy strike was going to be before an arbitrator. The Supreme Court precedent was also clear. If

the arbitrator ruled that what the union did in the name of a sympathy strike was in breach of its no-strike commitment, then the company could get an injunction once the arbitration award issued, notwithstanding the language of the Norris-LaGuardia Act against labor injunctions.

The narrow question presented was what about during the interim period between the demand for arbitration and the award? Would there be a right to get an injunction in that limited period of time? The Supreme Court ruled that when those workers went out on strike, they had no dispute with Buffalo Forge. There was no issue between them and Buffalo Forge, i.e., they didn't really have an arbitral dispute at the time they went out on strike. In those circumstances, the Supreme Court decided that the anti-labor injunction section of Norris-LaGuardia prevailed, and therefore it denied Buffalo Forge's effort to get an injunction during this period of time.

Again, you've got to ask yourself in practical terms, what does this really mean? Well, it meant that the union did have an open period of time where that sympathy strike could have put a lot of pressure on that employer awaiting the moment of truth when they got an arbitration hearing, an arbitration award, and then an injunction. One would ask was that a desirable result for the union? The answer is absolutely yes, and was it the result that the company didn't want? Absolutely yes.

Now comes the real fascination. How did this opinion come about, because when you looked at it, Justices Marshall and Brennan were in

dissent. And I believe, Roger, and I haven't researched this, but that may have been the only labor case in which a union ever won in which Marshall and Brennan both dissented and ruled against the union. All the experts sat down in a room and said, how did we ever win this case. And the answer seemed to be that the court was really concerned if they opened the flood gates to more injunction proceedings, they were going to be besieged with cases and disputes on that issue, and they didn't want any part of expanding the scope of the court's workload by having to decide if Norris-LaGuardia impacted on similar cases.

MR. POLLAK: That was a pretty favorable outcome for the union. Was the union in danger of having to pay damages?

MR. COHEN: They're always in danger of that, but you know how these matters get resolved. Workers come back to work and work overtime, so the company has not lost any production or profits and will likely conclude let bygones be bygones. Otherwise you'll have a two-year battle about damages, and you know how difficult it is for a company to win a damage suit when the strike only lasts three or four or five days, and they immediately start making up for lost income by overtime blah blah blah.

I did leave out the one human dynamic which remains near and dear to my heart. It is this: where was I on July 6th of that year, the last day of the term? Incidentally, it was also the last case decided by the Supreme Court that year because I believe the 5-4 was back and forth because of Brennan and Marshall. On that day, I was at Ambassador

Laurence Silberman's residence in Yugoslavia. He had been a very highly-respected management labor lawyer who later became a D.C. Circuit Court of Appeals judge. And on the Bible, the equivalent of a FedEx package arrived at the embassy. Phyllis and I and Bruce and Julie, my two children, were standing at the door with Larry and his lovely wife, Ricky, and the FedEx package was handed to him, and he opened it up and announced that I had won that case! He was not a happy camper, but we had a remarkable experience that night with him hosting, drinking wine, and celebrating. He never forgot that, and I never forgot that. Larry just recently died a few weeks ago, and I attended the memorial service in his honor.

MR. POLLAK: It's hard to imagine he would have ruled in your favor had he been sitting on the bench.

MR. COHEN: I have nothing to say about that, but it was poetic justice.

MR. POLLAK: Very much so. Well, I'll ask you the same question I asked about *HK Porter*. So now it's like six years later. What do you remember about the day, the argument itself, the Justices?

MR. COHEN: I'm really glad you're asking me that question because I'm passing all that by. So two fascinating nuances. My name is George H. Cohen. The lawyer for Buffalo Forge was Jeremy Cohen. So there were two Cohens arguing against each other. My very good friend, Doctor Paul Schlein and his wife Sally, were there and he's never forgotten the fact that two Cohens argued against each other in that case.

The thing I remember the most was the following. You know about protocol in the Supreme Court. No matter how you describe protocol, you never completely capture it. So in this instance, the Court sat from 10:00 to 12:00. There's a lunch break from 12:00 to 12:30, and then they resume at 12:30. That's what they were doing in those days. I literally stood up at 11:59. I didn't think they were going to call my case, but they do. I stand up. I speak for thirty seconds. Down comes the gavel from the Chief Justice. Lunch. I did not eat lunch that day! That I remember.

I remember one other thing. All of my brilliant Supreme Court colleagues, Bob Weinberg in particular, who worked assiduously with me on the brief, on the strategy, et cetera. We thought that Justice Brennan had written a decision in *Retail Clerks*, an earlier case, and that the rationale he used in that case was available to us to build on and rely upon in our case. I opened my mouth and said words almost to that effect. He slammed down his hand on the desk, called his clerk. The law clerks are in the back room. Get me that decision, he shouted, and they brought him the decision, and he cited a specific page and let me know in no uncertain terms I was not going to be able to use that precedent in this case to support my argument! You remember those things.

MR. POLLAK: So you had to pivot.

MR. COHEN: I had to go home. In my mind, I was through. I've lost the Justice I'm relying on to be the key vote and hopefully to author the opinion.

MR. POLLAK: That's not how it turned out.

MR. COHEN: I learned another lesson in life, how complicated it is when you have circumstances that you think are really applicable and analogous, and that doesn't automatically mean they're going to be found to be.

MR. POLLAK: Also sometimes the judge you think is going to be on your side isn't.

MR. COHEN: That was the bottom line, more than being on my side. That was going to be the key to the argument. We had of course, as you'd expect, back at Bredhoff and Kaiser that night, we were moaning and groaning.

MR. POLLAK: I bet. So winning was really unexpected?

MR. COHEN: Totally unexpected by anybody. The reason alone I told you. Nobody who knew anything about the Supreme Court ever would think a union could win a case having lost Justices Marshall and Brennan.

MR. POLLAK: Extraordinary. Well, should we move on to the *Rawson* case?

MR. COHEN: Absolutely. Bottom line: to be involved in that case has had a very dramatic affect on me and any and all of my colleagues in my firm who worked on it for a very simple reason. In May 1972, at Sunshine Mining Co. in Kellogg, Idaho, there was a horrific, unprecedented, fuel-rich fire that started somewhere like at 3,000-4,000 feet below ground level and spread. At the end of the day, 92 miners died of asphyxiation. Ninety-two miners. The media showed photos of all those bodies being pulled out of the mine that evening amid shrieking wives, families, and friends. I'm going to cry right now. Everybody is there watching. I'm not aware of this. I was assigned the case about a month later, but what I

found out, which was probably as reprehensible as anything you or I or anybody can contemplate, was several plaintiffs lawyers were flying into Kellogg, Idaho, to meet with and sign the widows as their clients. There's 92 dead people. That's all they know. They had no idea what had happened and who might have been responsible. All they knew was they were going to file lawsuits and hopefully get to a jury. And indeed, six or seven lawsuits were actually filed, some of which named the government, some of which named the manufacturer that had placed chemicals on the walls. I mean to this day, nobody ever definitively determined what caused the fire.

But one group of lawyers ultimately found their way to learn that the United Steelworkers of America Local had a Safety and Health Committee, and why don't we have a claim for wrongful death under Idaho law alleging that the lay committee members (and that's who they were – not experts) were negligent in several respects. The committee members allegedly didn't have enough respirators available. They didn't do enough to have the condition of the respirators checked out. They didn't do enough to educate themselves and inform the miners where the exits were located. In that mine, many individuals worked in isolated areas, removed from others, and that's why so many of them allegedly died so quickly of asphyxiation. And, of course, the plaintiffs' lawyer alleged that these negligent acts caused the miners to die. Perhaps more

revealing getting to a jury in those emotion-packed circumstances would be a dream come true for them.

MR. POLLAK: What were they mining for?

MR. COHEN: It was a silver mine. The largest silver mine in the United States. I'm called by Bernie one day, maybe a month or two later, and he tells me what's happened. These lawsuits were filed almost immediately. I was assigned to be the lead lawyer representing the union. And he assigned an excellent in-house lawyer named David Gore to work with me. Among all his wonderful attributes, David also happened to be African American, which led to a number of human dimensions when we arrived in Kellogg, Idaho. Probably nobody there had ever seen a Black person. Aware of that reality, David handled himself magnificently. He informally greeted many white kids, and they seemed elated.

I know enough by then, it's 1972, and I've been with the firm for six years, that in order for me to get the story from any working man and woman in a mine, let alone with 92 of their brothers dead, I've got to know what's going on there. And I know nothing. When the local union staff met us, the first thing I arranged was for both David and me to get certified by the government mining agency to enable us to go underground. My thinking was that more important than anything else, we had to show these miners who were being asked to disgorge their life experiences that we were worthy of hearing them. The course was about six hours. You learned how to use the respirator and other safety gear.

Very professional course. We were taken down a shaft in a wooden elevator, and when you got to about 2,500 feet, you got off and you're like in an air-conditioned cafeteria and say oh my God, this is pretty nice. There's the cafeteria. There's the coffee. There's lunch. There's the guys at their lunch break. David was a little more circumspect about it than I was. I was totally naïve.

Well at 3,500 feet, we learned there's a lot of difference because now you get out of that wooden shaft with ropes. This is not a high technology operation. This is one of these little good old mines that's running for the owners as a low-cost operation and not for the troops' safety. At that level when you got out, you felt like you're being asphyxiated. Your glasses and everything else started fogging up on you, you're sweaty, and you felt like you wanted to leave the area as quickly as possible. That was a half hour or hour experience that we had walking around trying to see who we could locate and then interview the individual miners. I will also say my partner Bob Weinberg later on was involved with me for years, but that was after the court case proceeded.

Now the court case. Well, first of all, we're the defendant, and what's going on is the city was building a statue outside of Sunshine Mine in honor of 92 of their brothers who were now dead. The lawyers entice these widows to be plaintiffs. So you're saying to yourself, I don't have to have gone to law school. I don't even have to have gone to college. I know if a jury in Kellogg, Idaho, is going to decide whether to provide

some poor, shaken widows much needed financial assistance versus supporting the union and dismissing their lawsuit, I'm not in good shape, right.

Now what you don't know, and I learned to make it even worse, Idaho worker comp law was about as unfavorable to workers as you could imagine. I believe I'm correct in saying that in 1972, a widow could get $40,000 for the death of her husband to survive for the rest of her life in consideration for which she gave up the right to bring a private damage suit against the company. So their lawyers decided to bring a tort action against the Steelworkers under Idaho tort law. So what did we do as the Steelworkers lawyers? We moved to dismiss on the grounds of federal preemption, i.e., that the union's only duty, when you're talking about functioning as the exclusive bargaining representative (i.e., whether functioning as a safety and health committee, as a negotiating committee, as a grievance committee, et cetera), is controlled by settled Supreme Court precedent holding that there is no negligence claim that can be filed against the union. The union's only duty is the federal duty of fair representation established by the Court which meant that a union's only legal obligation was not to be hostile to, discriminate against, or engage in arbitrary conduct against the employee. And if plaintiffs can only prove that the union may have been negligent under Idaho tort law, the case should be dismissed. That's where we were. And the case was initially assigned to a really impressive lower state court Idaho judge sitting right

outside of Kellogg, Idaho. So I enter. You know what I do. I'm moving to dismiss, relying on federal preemption.

Our team consisted of Bob Weinberg, Jeremiah Collins, and myself. We immediately recognized this is a biggie. The only telephone call I have ever received in my whole life from a Secretary-Treasurer of any labor union came from the Secretary-Treasurer of the United Steelworkers of America, a wonderful gentleman named Walter Burke, who had nothing to do with its lawyers or lawyering. That was President I.W. Abel's job in those days. Walter Burke got on the phone and said to me something to the effect of, George it's really important that you win this case. And so why was it so important? Because the thought that with 5,000 or more local unions with safety and health committees at every one of those locals, any time a worker was injured or died on the job, somebody could get to a jury and seek damages against the union, you might as well kiss the union's treasury goodbye. I mean it was that clear in everybody's mind.

That was in the back, or more aptly, the front of my mind all the time. Unbelievable as it might seem, that lower court judge ruled in our favor. He concluded in the most simple words. Without a collective bargaining agreement, there would not have been a safety and health provision. And without that safety and health provision, there would be not have been a committee with the right to inspect the premises. So he opined that the plaintiffs' claim was directly and completely interrelated

with the union's basic representation function and what they had achieved in the collective bargaining agreement. The bottom line, he concluded, was that plaintiffs Idaho tort law claim was preempted by federal labor law. The contrary argument that was used throughout the various stages up to and including the Supreme Court was all the collective bargaining agreement did was describe the nature and scope of the duty, but it didn't control the way in which a worker could turn around and sue his union. That fundamental argument was rejected.

The plaintiffs then appealed to the Supreme Court of Idaho. We are now cautiously optimistic. All these findings of fact were made. It was a pure legal issue at that moment, and we believed that the lower court judge was respected by the five judges constituting the Supreme Court of Idaho.

Now comes without a doubt the most bizarre moment in my career, probably in life, but certainly as a lawyer with an eyewitness, my colleague Penny Clark at counsel table for the oral argument before the Supreme Court of Idaho sitting in Boise. I am up second because we won below, and when it was my turn to argue, I immediately focused on federal preemption. I had all of the undisputed findings below showing the direct relationship between the collective bargaining agreement and plaintiffs' claims. I'm at the peak of my argument: Your Honors, you have to understand that the federal law governs in this circumstance. The federal labor law preempts the Idaho State torts law. In plain words, tort

law is supplanted by federal law. And on the Bible, as I said those words, the American flag, which was situated on a stand right behind where the Chief Judge was sitting at the bench, fell down and hit him in the head! Without batting an eyelash, the Chief Judge said, Mr. Cohen, you have made the most powerful argument that I have ever heard in this court. And Penny Clark will attest to those words. It did in fact happen. When the argument was over, the tradition was that judges would leave the bench, shake hands with each of the counsel, and you know each judge had something memorable to say about that incident – all lighthearted.

Okay. We leave the courtroom. Months go by. We're waiting for the decision. It's about 4:00 in the afternoon. We're all working, and the clerk's office calls, and the clerk tells me very formally they we're faxing me a very lengthy decision that had just been issued a few minutes ago by the court. I replied thank you, Mr. Clerk. And I promptly marched into our fax room. You're very familiar with where our fax room is, and as the pages are coming in, I'm not looking at the early pages, I'm waiting for the last page, and it says 3 to 2, we have won the case. Three judges supported our position that the Idaho wrongful death act and its negligence principles do not apply. The federal duty of fair representation applies, and the plaintiffs have not even come close to making out a case of breach of that duty. And I'm shaking hands. I'm hugging Penny. I'm hugging Bob. I mean this was a monumental victory at that moment.

MR. POLLAK: What year was this?

MR. COHEN: I don't know the year. The Supreme Court came down in 1990, so it was in the late 1980s. For fourteen or fifteen years we had been back and forth, which I've left out, between the lower court and the Supreme Court of Idaho. We're saying okay, we've got to go down to the bar and have a drink. We've got to celebrate.

Then a short time later, the phone rings. It's the clerk of the court, and this is essentially what he said. Mr. Cohen, this is the most embarrassing moment in my career as a clerk of the Supreme Court of Idaho. What we sent you was not the final decision. What we are now sending you is in fact the final decision in which there is now a three-judge majority in favor of the plaintiffs' Idaho tort law claim. Well, I assemble everybody in the office and we discuss whether there is anything that you can actually do when this happens other than saying go to the newspapers or go out and cry in public! You know what the conclusion was? A judge can always change his/her mind. The court could have issued a decision three days later revoking their first decision. So we were sitting there totally in a sense of disbelief. But as always at Bredhoff and Kaiser, we had our eye on the ball. We couldn't do anything about this. There was nothing we could do. Period. End of quote. Except get ready to file a cert petition. And that's what we did.

MR. POLLAK: George, did you have any reason to believe that the Supreme Court of the United States would take this case?

MR. COHEN: Absolutely, cautiously optimistic! But keeping in mind in those days they were taking 125 or 150 cases a year that was yet another concern. Now, as you know, they're taking 80 cases or so. Well, our case raised for the first time the question whether or not a union functioning under a contractual safety and health article is held to a different legal standard than under the duty of fair representation when they're doing anything else, i.e., negotiating a contract, deciding whether to file grievance, or participating in an arbitration. Once cert was granted, we had some inkling that we have a decent chance of prevailing. We're likely going to get Justices Marshall and Brennan on this one, we were saying to ourselves. In any event, in my own mind, it was my least successful argument before the Supreme Court. I was bogged down in a lot of state tort law, and I therefore was thrilled and bedazzled by Justice White's powerful opinion. I think it was six to three. We lost Rehnquist, Scalia, and I forget who else. But obviously it was a great victory, and now I can say to you which I know, 1972 to 1998 was 18 years after David Gore and I started representing the Steelworkers in that case. It got plenty of attention, as it should have. Walter Burke was no longer the secretary-treasurer, but whoever our secretary-treasurer was, he probably was a happy person, and I had a chance to talk about it in a lot of lawyer conferences.

MR. POLLAK: That's really a fascinating and tragic story.

MR. COHEN: I have told that story about the American flag at least 25 times in my life in front of every audience that I ever lectured to. Who could ever outdo that incident. Nobody, right? The moment as I'm saying preemption and the federal law governs the state law, down comes the American flag, hits the Chief Judge on the head. Oh my God, right? If I had pulled the right cord and said I was responsible for it, that would have been something else. But clearly I was not.

MR. POLLAK: It's funny that he was the one who changed his vote.

MR. COHEN: Yes. Whatever it was, it was.

MR. POLLAK: I think we're now going to talk about *ATMI versus Secretary of Labor*.

MR. COHEN: Yes. If there's anything you know that you look back on and say you are proud of, this would be it because here's the background. It's 1972 and the Congress passes the Occupational Safety and Health Act the same month it passed the EPA Act. So the EPA was going to protect the climate and the environment in the outside world, and the OSHA Act was going to protect the air quality inside a plant or a facility. It's almost as simple as that. The circumstance which led Congress to do that is very easy to describe. At that point in time, only state worker comp laws addressed worker safety and health issues, with one very minor exception, the Walsh-Healey Act. We had fifty states. Each one had its own worker comp law, and all they had in common was the basic premise there's going to be non-fault liability, so the workers are going to get some form of compensation, but the quid pro quo is that they're not going to get too

much – lost wages and paid medical bills or perhaps one lump sum payment to the heirs. That's their complete recovery. Worse than that, there was no worker comp law that ever seemed to apply to an occupational health caused illness. They essentially covered on-the-job injuries, machine malfunction, cave-ins in a construction site. The classic kinds of safety injuries. Occupational diseases, no.

By 1972, the epidemiologists, the doctors, the public health experts, had already identified a dozen of the worst occupational health hazards you can imagine, all of which seem to have, over the span of a working career, caused either the distinct likelihood of a serious illness or indeed death. And that's what the legislative history of OSHA documented, and Congress finally decided the time had now come to create a completely new system. This system is going to be predicated on prevention, not after-the-fact payments under the worker comp system.

Now for my involvement. The Bureau of National Affairs, when it sees a new labor law, convenes a national conference in Washington, D.C., in part to promote the marketing of their new services. Elliot Bredhoff, my senior partner, was invited to participate and to give a presentation on the union's view of the Occupational Safety and Health Act. And I would say that the prior Friday at 4:00, Elliot walked into my office and gave me the assignment to speak in his stead. It turned out to be the opportunity of my life. I went home over the weekend, and you know what you do. You read the new law and start thinking. And I came

out by Monday saying wow, this is the most worker protective statue I've ever encountered. This is amazing. How did they ever get this law through? I was particularly focused on occupational health because he had given me an article accompanying the statute listing a number of worker rights related to their exposure to occupational health hazards.

Section 6(b)(5) struck me as the "biggie." First of all, the Secretary of Labor was authorized to set up a completely new organization, the Occupational Safety and Health Administration ("OSHA"). A top-level scientist could become the head of it, and Congress also realized that the Labor Department staffers did not have the expertise that a doctor or an epidemiologist or research people have. So Congress created a new sub-agency called the National Institute for Occupational Safety and Health ("NIOSH"). It's an independent agency, and it was to have the same kind of talented research personnel as the NIH. It was to have all these dedicated civil servants, researchers, epidemiologists, doctors – all wanting to work on this precise problem. They were to be the Secretary's own research arm, and they're authorized by statute to do two things: to do the research on each of the potential toxic chemicals and then report to the Secretary with a list of the following priorities: which are causing the most serious health conditions, and which are going to affect the largest number of workers. And NIOSH was also to recommend not just the order in which particular toxic chemicals should be regulated but even more important, what the permissible

exposure levels (PEL's) should be and the other provisions that should be adopted to protect workers and enable companies to achieve those PELs.

Congress identified all these toxic chemicals. They had never been regulated, and now Section 6(b)(5) was promulgated to authorize the Secretary to go forward with the authority to issue standards which then could be imposed on industry after informal rulemaking procedures. Specifically, the Secretary was authorized to set the standard which, to the extent "feasible" (that's the magic word) based on the best available evidence (i.e., it doesn't have to be definitive) that will guarantee that no working man or woman for the entire period of their working life (which they said was up to 45 years) will suffer either material impairment or death from that lifetime exposure. I was really impressed. I didn't see anything about economic constraints. I just saw the phrase "to the extent feasible."

So now fast forward. What starts to happen when OSHA was implemented? One toxic substance after another was identified by NIOSH, and then the Secretary proposed a standard subject to informal rulemaking in which parties from both sides plus the government could call witnesses, produce documents, research papers, et cetera.

Before the hearings took place, the Secretary issued a Notice of Proposed Rulemaking which focused the parties on the central issues: (1) was the existing exposure to the particular toxic chemical posing a health risk to the employees, (2) if so, what should be the permissible level

of exposure (PEL) to eliminate or at least substantively reduce that health risk; (3) what feasible techniques or procedures were available to achieve the desired results, and (4) what role does "cost-benefit analysis" play in setting a standard?

Unions, companies, and public interest groups all actively participated. Witnesses included professional health experts (doctors, epidemiologists, research experts), engineering professionals, economists, and staff personnel from NIOSH, unions, and employers and public interest groups.

The testimony of witnesses plus voluminous exhibits in most of these standard setting proceedings consisted of 5,000 to 10,000 pages and took a year to 18 months until the standard was promulgated. Each standard as printed in the public record was between 50 and 100 or more pages with three different columns, single space, tiny print. It's monumental.

Once promulgated, every standard was then subject to review in a U.S. Circuit Court of Appeals. Industry responded by establishing "war chests" to finance both the costs incurred in rulemaking and then the litigation. This resulted in the petitioners being the industry associations rather than individual companies. To name a few examples: The Asbestos Institute, The American Iron and Steel Institute, The American Textile Manufacturing Institute. What that meant was all the companies in a particular industry(ies) were going to get together en masse. They all

hired the best scientists, doctors, lawyers, economists, etcetera, and they geared up to fight each standard tooth and nail in the U.S. Circuit Courts of Appeal. So the challenge to myself and a few of my colleagues at Bredhoff faced was extraordinary.

In retrospect, it was the most satisfying ten years of my career because it took from 1972 to 1981 for it to come to an "end." But it didn't come to an end because problems like this don't ever come to an end!

We began with asbestos. I'll give you the scenario. The challenge to the asbestos standard took place in the D.C. Circuit. Now, by that point, I had read the statute and a lot of the legislative history. I had lectured about the statute. I probably was the first union lawyer to read it. I certainly was the first union lawyer who was being quoted in BNA for saying I'm telling you union lawyers, there's a lot you could be doing to implement, and here's what I've already figured out. My bottom line was that we've got a law here that makes the NLRA look comparatively weak because for every phase in the investigation and enforcement procedure, the union's given a meaningful statutory participatory right.

Jack Sheehan, the Steelworker Legislative Director, played a major role informing me of the history of the legislative process that culminated in the OSHA Act. Jack was a great friend of mine. Once I got this assignment to start handling this case, the first person I went to was Jack Sheehan. He was a brilliant lobbyist, and he was respected by the Republicans as well as the Democrats on the Hill. I can't tell you what a

contribution he made to what actually ended up in that law. But I knew it, and therefore, he was my greatest resource to start with. I also knew every union had a safety and health department consisting of key staff knowledgeable in this particular subject area. They were also my resources. For example, Mike Wright (USW) Shelly Samuels (IUD), and Peggy Seminario (AFL-CIO). So we were getting the help from individuals with real practical knowledge. I established a working relationship with the Department of Labor's key administrators and counsel and with NIOSH's research scientists and epidemiologist. And then I sought out some incredibly talented doctors who were interested in working men and women who suffer from asbestos exposure. I have a book on my desk signed by Doctor Irving Selikoff from Mount Sinai Hospital. He was the leading authority. He and I worked together. I helped to provide him cohorts of working men and women through their union, and he did all the premier asbestos research extant. He became a great resource on the health effects of worker exposure to asbestos throughout the proceeding when the first asbestos regulation was promulgated. The Oil, Chemical Atomic Workers Union retained me. The Industrial Union Department was our client. The AFL-CIO became our client. And what happened was that over time, Bredhoff and Kaiser ended up being retained in every one of the numerous circuit court of appeals cases addressing each of the individual toxic chemicals subjected to regulation by OSHA.

As I mentioned, we started with asbestos in the D.C. Circuit. Then in short order came Vinyl Chloride in the Second Circuit Court of Appeals, Coke Oven Emissions (steel industry) in the Third Circuit Court of Appeals. What then followed was Lead in the D.C. Circuit. Arsenic in the Ninth Circuit, Cotton Dust in the D.C. Circuit, and Benzene in the Fifth Circuit. For some unknown reason, the latter was the only case I did not argue, but I got to argue it in the Supreme Court. All told, quite a challenging agenda for critically important oral arguments and briefs.

What we did was a group of us at Bredhoff and Kaiser sat down and agreed we've got to come up with an interpretation of 6(b)(5) that can carry the day across the board – a daunting undertaking. We started with the phrase "to the extent feasible." Feasible, according to every dictionary, meant can be achieved. And we all said that should mean capable of being achieved by a combination of engineering controls and work practices.

For its part, industry designed its own three-pronged attack on every standard proposed by the Secretary. First, the exposure did not pose a health risk. Second, even if it did so, the PEL proposed by NIOSH and the Secretary of Labor were simply unnecessary and not achievable. The technology isn't there. And, finally, whatever technology exists, it would be too costly to require us to pay to implement a broad scale program of engineering controls. Moreover, industry opined, the Secretary erred by failing to conduct a cost-benefit analysis, and if the Secretary had done so,

he would have concluded that the costs far exceeded the benefits to workers.

MR. POLLAK: So that was the employer's argument across the board?

MR. COHEN: Absolutely. From the day I argued the asbestos case in the D.C. Circuit in 1973 until the day we went before the Supreme Court in *Cotton Dust* in 1981. That was the common approach Industry embraced. Which is my lead into the court's opinion. To begin with, Justice Brennan laid out some basic undisputed factual truths. The health risks caused by exposure to cotton dust were severe. Byssinosis is a disease affecting the respiratory function with prolonged exposure contributing to progression. He also cited with approval the Senate Report accompanying the OSH Act estimating 35,000 active and retired workers suffering from the most disabling form of byssinosis and another 100,000 suffering from some grade of the disease. All in all, exposure produced a chronic and irreversible obstructive pulmonary disease.

What to do about it? Justice Brennan explained that the record supported the Secretary of Labor in two critical respects: (1) the permissible exposure limit; (2) an implementation strategy whereby reliance would be placed on engineering controls (ventilation systems, etc.) and work practices (sweeping, etc.), with a four-year period to achieve the PEL and authority to use respirators in the interim period.

Justice Brennan then turned his attention to the central issue: whether the Secretary is required to perform a cost-benefit analysis to

show the benefits have a reasonable relationship to the costs. Initially, he launched into an extensive review of the literal language of Section 6(b)(5) and the legislative history that gave rise to that language. His powerful words deserve to be quoted:

> "The plain meaning of the word "feasible" supports respondents' interpretation of the statute. According to Webster's Third New International Dictionary of English Language 831 (1976), "feasible" means capable of being done, executed, or effected." *Accord*, the Oxford English Dictionary 116 (1933). Thus, § 6(b)(5) directs the Secretary to issue the standard that "most adequately assures . . . that no employee will suffer material impairment of health," limited only by the extent to which this is "capable of being done." In effect, then, as the Court of Appeals held, Congress itself defined the basic relationship between costs and benefits by placing the "benefit" of worker health above all other considerations save those making attainment of this "benefit" unachievable. Any standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in § 6(b)(5). Thus, cost-benefit analysis by OSHA is not required by the statute, because feasibility analysis is."

Further, Justice Brennan observed "[W]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent

on the face of the statute." Last, but not least, the legislative history made clear Congress was well aware that it would cost employers money, but that was a cost of doing business.

And as the icing on the cake, Justice Brennan concluded by announcing the precise words we were hoping to read:

> When Congress passed the Occupational Safety and Health Act in 1970, it chose to place pre-eminent value on assuring employees a safe and healthful environment, limited only by the feasibility of achieving such an environment.

MR. POLLAK: This is a passionate area of your career, George. So you framed beautifully how the argument was set up and what happened in front of the Supreme Court. Is there anything you want to talk about in terms of how the case got to the Court or what happened the day of the argument or what your expectations were going into the argument?

MR. COHEN: Like every one of your questions, they trigger some other thing I want to tell you before I answer your question. So I think you also have to understand how successful we were on our way to the Supreme Court. Carl McGowan, who you know, a liberal, progressive, brilliant judge, wrote the first court of appeals opinion in this whole area in the asbestos case. Really thoughtful. So that's the first case. As we lawyers like to observe, the Supreme Court was not writing on a clean slate.

We then were in the Second Circuit Court of Appeals in the polyvinylchloride case, and retired Justice Tom Clark was sitting by

designation. He wrote a compelling opinion in that case citing Judge McGowan's analysis.

We then went to the Third Circuit Court of Appeals, which may be the one I was most pleased about. Three Republican-appointed judges sitting on a panel that unanimously ruled for the Steelworkers against the American Iron and Steel Institute, which challenged every section of the Secretary of Labor's Coke Oven Emissions standard. A terrific experience. Thoughtful, well-prepared judges asking hard questions and paying amazing attention to everything we're telling them, and we were telling them plenty because we had a powerful case to present. The Steelworkers, our major client, were elated about the successful outcome.

MR. POLLAK: Did you win in all the circuits?

MR. COHEN: All but one – i.e., we prevailed in both the lead standard and cotton dust standard before the D.C. Circuit and the arsenic standard before the Ninth Circuit. We lost in the Fifth Circuit in *Benzene*. I didn't argue that case. But I'm not saying we would have won if I handled the argument!

In any event, we ended up with a conflict between the Fifth Circuit and all these other circuits, which resulted in cert being granted.

I only want to tell you a vignette because I think its well worth telling. The Second Circuit case was unique because it involved an Emergency Temporary Standard. This is a very special procedure: Congress recognized that where workers faced an imminent risk of death, waiting two to three years for a standard to issue would be unacceptable.

And that's what happened here. About five rubber workers died of a particular discernible cancer in a two-week period at a Goodyear Tire and Rubber facility. So the Labor Department petitioned for emergency relief in the Second Circuit. Walter Connelly, the lawyer for the industry, argued first. He was representing industry, not just Goodyear. In retrospect, he made a very stupid, arrogant argument. He stood up, and literally, these were his opening words. Your Honors, do not be intimidated by the AFL-CIO being here in court today. That's me, and Larry Gold sitting next to me. We were dividing the argument. And then Mr. Connelly uttered the magic words: And besides which, all that the government has established is that there are several dead workers. Mr. Justice Tom Clark leaned forward and inquired in essence, so how many do you want before the government acts? That was the end of the argument. I had almost nothing further to argue, right? How many more deaths do you want? Okay, that should be a perfect lesson to future litigants: what not to argue.

MR. POLLAK: The argument before the Supreme Court, do you have any remembrances from that day or how that argument went

MR. COHEN: Yes. I mean the most obvious recollection was when I argued the *Benzene* case. As I stood up to argue, Mr. Chief Justice Rehnquist leaned forward and said Mr. Cohen, isn't this an impermissible delegation of authority from Congress to the Secretary of Labor? I spent four minutes giving a comprehensive response that no other justice was interested in other than

the chief justice. Nothing appeared in their opinion. Fast forward one year later almost to the date. I stood up, *ATMI versus Donovan*. Chief Justice Rehnquist presiding. Mr. Cohen, isn't this an impermissible delegation of authority from the Congress? I replied, Mr. Chief Justice, you actually asked me that precise question one year ago today, and it's quite clear I didn't give you a satisfactory answer. He leaned forward with a big grin, everyone on the bench was laughing. And I then gave it another shot, and I didn't persuade him this time either. But it didn't affect the outcome of the case. That's what I can remember.

Before I leave this subject, it is interesting to note that I argued that "cotton dust" case the day after Ronald Reagan took his oath as the President of the United States of America, January 21, 1981. The decision issued in June at the end of the term 1981. Literally a dream come true. A Supreme Court decision expressly holding the Secretary of Labor was fully empowered to issue the most protective worker standards, and it would affirm them as long as you've given the appropriate findings that the standard was "feasible", i.e, capable of being achieved by engineering controls and work practices.

So this is it. We've spent eight years in six different circuit courts of appeal advocating that precise result. But with great regret, I must acknowledge that did not put an end to the matter. Why? As I told you, Ronald Reagan became the President of the United States. He appointed Thorne Auchter the new Assistant Secretary of Occupational Safety and

Health, a gentleman who was a construction contractor from Florida. The best we could ascertain, his only credential was that he was a big donor to the Republican Party and had some well-placed friends. A couple of months after the decision is issued, I received a call from his office. Mr. Auchter would like to see you in his conference room at 2:30 next Thursday afternoon. I said I will be there. I'm confident Bob Weinberg was with me, and we walked into the conference room, and there were all my former Labor Department OSHA officials with whom I had spent the last eight years in large measure coordinating, collegially working together on most of the cases that I described. These people were 95% in lockstep with everything that I had been arguing and Bob and I had been briefing. Okay. And they're sitting adjacent to Mr. Auchter. In essence, he decided to read me the riot act! In very explicit terms, he let me know that the Supreme Court decision in *ATMI* was not an acceptable state of affairs. His administration was going to review and revise the whole standard. In the meantime, we should understand that. So what do you do when you're in that situation given what we had achieved?

So I think I said something like you know, Mr. Auchter, you're going to regret the words that you just used. I don't know what else to say to you except that every one of your colleagues sitting here knows that the Labor Department must respect the Supreme Court's decision. Indeed, they've been devoted to achieving that result. Therefore, myself and my colleague will leave right now. And I was later told that Mr. Auchter

issued a directive to his entire staff that if I ever called that office, he wanted a memo of when I called and what I called about, and they were instructed not to talk to me. Of course that was the biggest status symbol I had ever achieved in my entire career!

But what did that mean? It meant that Ronald Reagan had instructed him, or he figured out himself, no more regulations. If that's what workers are entitled to get from a regulation, we'll stop regulating. So we spent the better part of the next five years with various mandamus actions.

MR. POLLAK: That's sort of a sad ending to a fight that continues on today.

MR. COHEN: It's the reality. But you never forget that. That's why I'm glad to memorialize that. It's good for people to look at and understand what can actually happen.

MR. POLLAK: We've been at this for a while. Your passion about OSHA and that experience comes through, and it's an extraordinary story. So any final thoughts?

MR. COHEN: Roger, I feel compelled to end up on this note. Without question, OSHA provided the most satisfying ten years of my career. In two critical respects: assisting working men and women to achieve meaningful protection against deadly substances they confronted every day they arrived at their workplace, and second, it is equally clear that my peers recognized and respected the contribution I had made to this great cause. Thank you.