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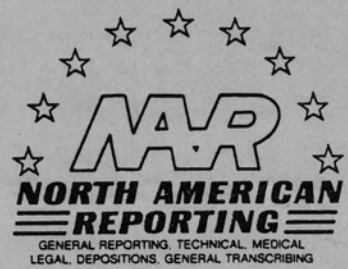
Supreme Court of the United States

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AMERICAN TEXTILE MANUFACTURERS :
INSTITUTE, INC., ET AL., :
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Petitioners, :
 :
v. : No. 79-1429
 :
RAY MARSHALL, SECRETARY OF LABOR :
UNITED STATES DEPARTMENT OF :
LABOR, ET AL., and :
 :
NATIONAL COTTON COUNCIL OF :
AMERICA, :
 :
Petitioner, :
 :
v. : No. 79-1583
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RAY MARSHALL, SECRETARY OF LABOR :
UNITED STATES DEPARTMENT OF :
LABOR, ET AL. :
 :
Respondents. :
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Washington, D.C.
January 21, 1981

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ORIGINAL



IN THE SUPREME COURT OF THE UNITED STATES

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INSTITUTE, INC., ET AL.,

Petitioners,

v.

No. 79-1429

RAY MARSHALL, SECRETARY OF
LABOR, UNITED STATES DEPART-
MENT OF LABOR, ET AL., and

NATIONAL COTTON COUNCIL OF
AMERICA,

Petitioner,

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No. 79-1583

RAY MARSHALL, SECRETARY OF
LABOR, UNITED STATES DEPART-
MENT OF LABOR, ET AL.

Respondents.

Washington, D.C.,

Wednesday, January 21, 1981

The above entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:23 o'clock a.m.

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4 of the Union respondents
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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in American Textile Manufacturers Insti-
4 tute v. The Secretary of Labor, and National Cotton Council
5 v. The Secretary of Labor; consolidated cases.

6 Mr. Bork, you may proceed whenever you are ready.

7 ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

8 ON BEHALF OF THE PETITIONERS

9 MR. BORK: Mr. Chief Justice and may it please the
10 Court:

11 These cases are here on writ of certiorari from the
12 Court of Appeals for the District of Columbia. That Court
13 upheld a health standard promulgated by the Occupational
14 Safety and Health Administration, and the standard specifies
15 the maximum amount of respirable cotton dust that may be in
16 the air of any textile plant. It is intended to reduce the
17 incidence of byssinosis, which is a respiratory condition
18 associated with cotton dust.

19 Petitioner in one case are -- American Textile
20 Manufacturers Association or ATMI, a trade association, and
21 12 manufacturer members. Petitioners in the other case are
22 the National Cotton Council, which represents all seven
23 segments of the cotton industry from farmers to textile manu-
24 facturing. The standard is extraordinarily severe and costly;
25 it requires textile manufacturers to reduce cotton dust within

1 four years to .2 milligrams per cubic meter of air in all
2 yarn manufacturing processes and to .75 milligrams per cubic
3 meter in all weaving processes.

4 Now this standard was arrived at by OSHA by
5 applying their carcinogen policy, which this Court remembers
6 from Benzene. The Benzene case requires that the expos-
7 ure limit be set at the lowest feasible level. It is ironic
8 that just two days ago OSHA rescinded its carcinogen policy.

9 QUESTION: Mr. Bork, how do you define the word
10 feasible in that statute?

11 MR. BORK: Well in a variety of ways, Justice
12 Rehnquist. In the first place, my first point will be that,
13 to find a standard economically feasible, OSHA must have
14 an estimate of costs which is based upon substantial evidence.
15 It must then find what those costs mean to the industry,
16 what impact it will have upon the industry; how many jobs,
17 how much investment will be lost because of that cost.

18 And finally, it has to have a legal criteria by
19 which it is able to state that the impact it finds is
20 economically feasible.

21 QUESTION: And did you draw that definition from
22 the Congressional language or legislative history?

23 MR. BORK: From the Congressional language and also
24 it seems to me, Justice Rehnquist, that it is impossible to
25 say that something is feasible without knowing what it will

1 do to the industry. And OSHA has made no finding here of what
2 it will do to the industry other than to say that some
3 undefined number of plants may close.

4 QUESTION: Well, and that the industry as such
5 would not go -- not cease to exist?

6 MR. BORK: The industry as such, Justice Stewart,
7 will not cease to exist is all they have said. That finding
8 is thoroughly consistent with 90 percent of the industry
9 being left, or 50 percent of the industry being left, or 10
10 percent of the industry being left. In fact, the literal
11 language that OSHA uses would be satisfied if there were a
12 single mil left. That standard of the industry will continue
13 to exist is not a standard at all.

14 QUESTION: But it is the one that OSHA applied?

15 MR. BORK: That's the only one, that's right,
16 Justice Stewart. And one of our contentions is that that
17 standard, if that is considered to be a standard, means that
18 nobody knows what OSHA is doing; judicial review is impossible,
19 and you have the completely uncanalized power over
20 industry that this Court found improper on the benefit side
21 of the act. Here, they are claiming the same power through
22 their power to impose costs without limit, or without any
23 real limit.

24 QUESTION: Well Mr. Bork, if while the Benzene case
25 was pending here, the Board had revoked its carcinogen policy,

1 as you say it now has, would we have remanded that Benzene
2 case for reconsideration?

3 MR. BORK: I trust so. Because --

4 QUESTION: And are you suggesting that that should
5 be done here?

6 MR. BORK: I'm suggesting that, but I have addi-
7 tional suggestions, Justice White --

8 QUESTION: Yes, I know you do. But this is a very
9 recent development, I take it?

10 MR. BORK: Monday.

11 QUESTION: Is there anything official --

12 MR. BORK: I believe it's in the Federal Register
13 as of Monday, is it not?

14 QUESTION: Have the parties given us anything, Mr.
15 Bork?

16 MR. BORK: No, I just learned about it last night.

17 QUESTION: I haven't heard it until you just
18 mentioned it.

19 QUESTION: Well could, I know you have other points
20 but it's possible that would be dispositive --

21 MR. BORK: I think it is, Justice White.

22 QUESTION: Mr. Bork, can you hypothesize the cir-
23 cumstances in which a major industry, producing things we
24 regard as necessary, that is, the entire automobile industry
25 and the entire lumber industry, the entire cotton industry --

1 can you hypothesize any situation in which it could be simply
2 closed down and stopped, by operation of law?

3 MR. BORK: You mean that it would be proper to do
4 it that way?

5 QUESTION: Could it be done that way? Could the
6 Congress of the United States, through its mechanisms such as
7 we have here, in effect say, no more automobiles shall be
8 produced because automobiles kill 63,000 people a year
9 and injure two million people a year, and therefore.

10 MR. BORK: I think, Mr. Chief Justice, that I
11 would agree that the Congress does have the power to do that.
12 There may be problems about compensation, but I think it has
13 the power to do that.

14 However, one thing is clear; that Congress in the
15 OSHA act did not intend just to shut down industries, because
16 they required that the standard be economically feasible.

17 QUESTION: Mr. Bork, the Chief Justice asked you
18 if the Congress could through its technicians, accomplish
19 this result? My understanding of the act was that Congress
20 had delegated to the executive branch the accomplishment
21 of these particular results. I don't know if your answer
22 would be any different if the question were phrased in those
23 terms or not.

24 MR. BORK: Well, I think an additional problem arises,
25 Justice Rehnquist, and that is the problem that Congress did

1 not delegate the power to destroy an industry because it
2 specifically required that economic feasibility be present.
3 So while Congress may have the raw constitutional power to
4 do that, it is perfectly clear that in this statute it has not
5 done that.

6 QUESTION: Well, one of your points is that there
7 was an overdelegation, in the sense that it's -- a delegation
8 without any standards, isn't it?

9 MR. BORK: That is quite correct, Justice White.
10 But it is more than that, because it is a constitutional
11 point in that sense.

12 QUESTION: Right.

13 MR. BORK: But it is also a statutory point, so
14 that --

15 QUESTION: Right.

16 MR. BORK: -- I think those persons who do not
17 think that the delegation doctrine remains a part of consti-
18 tutional law would nevertheless wish to reverse here, for a
19 wholly inadequate set of findings about economic feasibility.
20 One simply cannot judge economic feasibility in any way from
21 the record OSHA has made.

22 QUESTION: The statutory word is feasible, isn't
23 it?

24 MR. BORK: Pardon me? The statutory word is feasible.

25 QUESTION: The statutory word is feasible, I mean,

1 not economically feasible?

2 MR. BORK: That is correct. That is correct. Every-
3 body who has looked at it, every Court who has looked at it
4 has accepted the contention that feasibility requires both
5 technological feasibility and economic feasibility.

6 QUESTION: And maybe some other kind of feasibility.

7 MR. BORK: Perhaps so.

8 QUESTION: And along with the executives, along
9 with OSHA, they think it includes economic --

10 MR. BORK: Yes they do -- no, OSHA does not contend
11 that economic feasibility is not a requirement.

12 QUESTION: Right. But the statutory standard is
13 feasible.

14 MR. BORK: That is correct, Justice Stewart.

15 QUESTION: Mr. Bork, could I be sure I understand
16 your suggestion about the revocation of -- OSHA's carcinogen
17 policy? I didn't understand -- this is not a carcinogen that
18 we're dealing with here, is it?

19 MR. BORK: That's why I find it ironic that OSHA
20 continues to insist upon a standard arrived upon the carcino-
21 gen policy for cotton dust which is not a carcinogen.

22 QUESTION: Well, but did they expressly rely on their
23 carcinogen policy here, or do you think their reasoning was --

24 MR. BORK: As I understand it --

25 QUESTION: -- comparable to that used in the other

1 cases?

2 MR. BORK: It was certainly identical, not just
3 comparable, Justice Stevens. And I think they expressly
4 relied upon it.

5 QUESTION: Was the lead case in this same Court of
6 Appeals?

7 MR. BORK: Yes.

8 QUESTION: Is that a carcinogen or is it more akin
9 to this?

10 MR. BORK: The lead case is -- the carcinogen
11 policy was amended because of the Benzene case, and they said
12 that the -- that lowest, that carcinogen policy requiring
13 the lowest feasible level was inconsistent with the act. I
14 would suppose this is too.

15 QUESTION: My question was the lead case, in this
16 same Court of Appeals?

17 MR. BORK: Yes.

18 QUESTION: Was that like this, a non-cancer-pro-
19 ducing agent? Or was it a cancer-producing agent?

20 MR. BORK: No, it is not a carcinogen.

21 QUESTION: Wasn't the reason for revoking the car-
22 cinogen policy, at least as applied in cases like Benzene, was
23 the failure to make a finding that was made in this case,
24 namely that there was a significant risk. So does revocation
25 really affect this case?

1 MR. BORK: Well, I don't think the -- I'll come to
2 that, I don't think the significant risk --

3 QUESTION: You don't contest the fact there was such
4 a -- the finding required by Benzene was made here, I don't
5 think you dispute that?

6 MR. BORK: That first finding was, yes.

7 QUESTION: Yes, and you don't challenge it as being
8 adequately supported by the record?

9 MR. BORK: Well there is a significant risk in
10 cotton dust, it's a question of at what level and with what
11 controls that risk disappears, is very much before us.

12 But my first point I have, -- really want to
13 argue two propositions. The first one is economic feasibility.
14 And as to that, my point is that three things are required.
15 As I said, an estimate of costs based upon substantial evi-
16 dence. Our point here is that the estimate of costs is
17 based upon no evidence, it is pure conjecture. But the second
18 two elements of economic feasibility aren't even present here,
19 and that is, what do those costs mean for the industry, how
20 much of this industry is going to be destroyed. That isn't
21 even addressed here, except to say the whole industry won't
22 be destroyed. And thirdly, there is no criteria of any sort;
23 no policy judgment, no articulated policy judgment, nothing
24 as to why whatever percentage of the industry is going to be
25 destroyed should nevertheless be considered a feasible policy.

1 So that, two of the three elements which are inherent and
2 inevitable in any finding of economic feasibility simply
3 aren't present here, and that fact alone, I think, requires
4 reversal. Additionally, there is no substantial evidence
5 to support the cost for the bases, so that we have economic
6 feasibility requiring three elements, not one of which is
7 present in this case. And the government's brief I think,
8 quite understandably, attempts to obscure this point which is
9 present in our main brief, by speaking as if we are only
10 arguing about the substantial evidence supporting the
11 cost estimate. We are not only arguing that. We are also
12 arguing that the other two elements which are required for
13 any sensible judgment of economic feasibility aren't even
14 addressed at this point.

15 QUESTION: Well, Mr. Bork, none of this, I gather,
16 as you've now stated, involves an argument that a cost
17 benefit analysis was obtained?

18 MR. BORK: That is my second proposition, Justice
19 Brennan.

20 QUESTION: That's your second point.

21 MR. BORK: And these --

22 QUESTION: Is that under the feasibility or under
23 the reasonably necessary?

24 MR. BORK: I think it's under both, Justice Brennan.

25 QUESTION: Under both.

1 MR. BORK: Under both sections of the statute.
2 But I want to stress that these two propositions are logically
3 independent. The argument about economic feasibility would
4 in and of itself justify reversal, quite aside from whether
5 there was any requirement, which we contend there is, that
6 there be a reasonable relationship between costs and benefits.

7 QUESTION: And were these points presented this
8 way to the Court of Appeals?

9 MR. BORK: The Court of Appeals, the cost-benefit
10 point was presented and the finding of economic feasibility
11 was attacked, yes.

12 QUESTION: But in these terms, in the terms that
13 you are now putting -- with the three elements?

14 MR. BORK: I don't think it was that drawn out, in
15 quite that sharp a form.

16 QUESTION: You're inferring that the Court of Appeals
17 dealt with these particular points?

18 MR. BORK: No. The Court of Appeals simply accepted
19 the idea that if -- which was challenged -- that if the whole
20 industry was not destroyed, that was sufficient. The Court
21 of Appeals articulated that standing.

22 But I think therefore, under the economic feasibility
23 point, that the agency is claiming an unfettered power --

24 QUESTION: Mr. Bork, can I ask you what you -- for
25 a little clarification of the second point in your three points

1 that are required? How much of the industry must be destroyed
2 before it's no longer feasible? Supposing that -- say the
3 figure is 25 percent and supposing 25 percent of the firms
4 would go out of business but the remaining 75 percent would
5 be able to expand their production and continue to produce
6 the same aggregate amount of goods. Would that be feasible
7 or not feasible under your standard?

8 MR. BORK: Well, in the first place, Justice Stevens,
9 I am not advancing any standard because I am not in a posi-
10 tion to do so. These things have never been addressed --

11 QUESTION: No, but you are advancing a proposition
12 that there must be measurement of the percentage of the indus-
13 try destroyed. What do you mean by destroying industry, is
14 that to mean destroying existing firms or a portion of the
15 total output?

16 MR. BORK: Oh, I think it means both. For example,
17 if -- it may be that if there is a section of the country
18 where all of the firms would be destroyed with drastic effects
19 upon employment and so forth and so on, that might be con-
20 sidered not feasible, even though the production would shift
21 to a different section of the country. But I don't really
22 wish to settle that. We haven't -- this is a process of
23 developing this law which has not even been gone through by
24 OSHA.

25 QUESTION: It's just not there.

1 MR. BORK: Pardon me?

2 QUESTION: It's just not there.

3 MR. BORK: It's just not there. And I am really
4 not prepared to spell out all of the conditions under which --

5 QUESTION: Would you say OSHA is free to pick
6 whatever approach to the word feasible makes sense, as long
7 as it follows these three criteria?

8 MR. BORK: That's true.

9 QUESTION: Because certainly there's no Congress-
10 ional guidance on this precise point.

11 MR. BORK: No, that's true. I think the -- while
12 we're talking about practical concerns and so forth -- I
13 think it would be a common law development when OSHA began
14 to give the reasons why it found a certain level of destruction
15 feasible. The Courts could then look at it and we would begin
16 to get some rationality into OSHA's processes and we would
17 know what they were doing.

18 And not least, that would make OSHA politically
19 accountable to Congress, because Congress would know then
20 what price we are paying for this kind of thing. So I
21 think it is a large function of this Court to introduce
22 political accountability into processes, governmental pro-
23 cesses, which lack them. And this one certainly lacks
24 them.

25 QUESTION: Let me pursue the hypothetical question

1 I put to you earlier, Mr. Bork. In your view, would Congress
2 have the constitutional authority to bar cigarettes, for
3 example, unless they can demonstrate that all negative health
4 factors were eliminated? Could Congress do that itself via
5 statute?

6 MR. BORK: In my opinion, you have chosen the
7 example, Mr. Chief Justice, that pains me a great deal, but
8 I think they could.

9 QUESTION: Second question: could they delegate
10 that, by a structure somewhat like the usual pattern of
11 creating a commission like OSHA, could they delegate that
12 to a commission on tobacco hazards?

13 MR. BORK: I think, again, Mr. Chief Justice, the
14 answer is yes they could, if they told the agency what it
15 was to consider in arriving at the conclusion whether or not
16 cigarettes were to be banned.

17 QUESTION: That is, do you mean by that if the
18 commission, after hearings, made findings that it had this
19 definite health hazard factor, carcinogen-producing elements,
20 then the commission could --

21 MR. BORK: I think so, if it's a canalized, struc-
22 tured delegation, so the commission isn't just roaming free.

23 QUESTION: And it would have nothing to do with --
24 or Congress would not be limited by the fact that this would
25 put a great many people out of business?

1 MR. BORK: No, Congress would not be, nor would
2 OSHA, if they had been delegated the task. But they were
3 delegated the task to do it to the extent that it is feasible,
4 which we all, I think agree that it means economically
5 feasible, and given that, I think they have to make the
6 findings that go to feasibility. And they have not.

7 Now the other point --

8 QUESTION: Mr. Bork, before you proceed, does OSHA
9 agree with your assertion that it has authority, under the
10 act, to put 50 percent of a major industry out of business?

11 MR. BORK: Justice Powell, the difficulty is that
12 OSHA has never addressed what it's authority is. I think --
13 well, I don't know --

14 QUESTION: Are OSHA's findings in the papers that we
15 have before us? I couldn't locate them.

16 MR. BORK: OSHA's findings are simply that the
17 entire industry will not be destroyed or industry as a whole
18 will not be destroyed, that's all they said.

19 QUESTION: And I'm sure the Solicitor General will
20 respond to my question, but one of the examples you gave was
21 that --I understood it, that under the standard before us
22 in this case 90 percent of the industry could be put out of
23 business and OSHA would still claim the standard was appro-
24 priate.

25 MR. BORK: OSHA could still claim, under that form

1 of words. I don't know what OSHA would do in that case. And
2 a large part of OSHA's argument in its brief is that they
3 don't really need to state a standard because they are very
4 reasonable and prudent people. And in effect, the brief
5 argues, you can certainly trust us because we're reasonable
6 and we're careful. But that's the --

7 QUESTION: Did OSHA make the sort of findings of
8 fact that we expect from a trial court, and if so, where are
9 they?

10 MR. BORK: I can't find them, Justice Powell. I
11 think it's an extradorinarily vague performance. We don't
12 know what they mean about feasibility, which is my entire
13 point.

14 The -- they did say, that some marginal plants
15 will close rather than comply. One, if marginal means plants
16 that are close to the edge financially, that could be a very
17 large part of the industry. We don't know. Some plants
18 will close rather than comply, other plants may go out of
19 business after they try to comply. We don't know. OSHA
20 simply has not addressed that issue.

21 In a way, I think they have to, to have a rational
22 process that can be reviewed by anybody. The only thing
23 they have tried to do, is state that they have found particu-
24 lar costs. I think I will have to provide that subject in
25 view of the time, because if a careful look is taken at their

1 cost estimates it will be found that they rest upon nothing.

2 For example, in the spinning process, which is one
3 of the most expensive to deal with in terms of getting dust
4 levels down, it turns out that their own contractor, RTI,
5 found 553 million dollars to get down to the .2 level OSHA
6 insists upon, and said that local exhaust would be necessary;
7 local exhaust ventilation. Now it turns out, you can't put
8 local exhaust ventilation on spinning frames, and the experts
9 Hocutt and Thomas, who were our dust control experts, said
10 it couldn't get down to .2 under any circumstances. OSHA
11 did two things: it made up its own technology, both experts
12 agreed, you had to do it by local exhaust ventilation. OSHA
13 just decided no, you can do it some other way; we don't know
14 how they think we can do it, except they speak vaguely about
15 room ventilation, which the people agree won't work.

16 They also made up their own cost figures. They
17 rejected their own contractors' cost figures by about 500
18 million dollars, so that we -- the one thing we do know about
19 the cost that OSHA projects is that they have no relationship
20 to the real costs.

21 QUESTION: Are respirator masks a guarantee of
22 protection, Mr. Bork?

23 MR. BORK: They are not, Your Honor. They may be
24 used by some people, but not by others, and in cases where
25 they may not be used, cannot be used, then transferred to a --

1 QUESTION: But where they are used, are they a
2 guarantee?

3 MR. BORK: As I understand it, yes, Mr. Chief
4 Justice. Now --

5 QUESTION: What is the factor that renders them
6 unfeasible?

7 MR. BORK: Well for some people, the standard sizes
8 don't fit. Some people have a little trouble breathing through
9 them, other people can use them. So you have to try it on the
10 individual and see whether he is one who can use it.

11 One more point about costs which is simply that,
12 I think it is quite clear that less cotton is going to be
13 manufactured as a result of this standard. In fact, the
14 cotton production has been dropping every year since the
15 standard was announced. And OSHA decided it did not have to
16 look at the costs imposed, for example, upon cotton farmers;
17 there are 160,000 cotton farmers many of whom are no longer
18 going to growing cotton and OSHA just simply ignored all of
19 those costs in its standard and didn't even address them.
20 Which, I think, is also improper.

21 But I'd like to turn to the second proposition now,
22 which is the question of whether there has to be a reasonable
23 relationship between costs and benefit.

24 QUESTION: Before you go on to that, Mr. Bork, is
25 there anything in this record that would indicate that with

1 dropping domestic production of cotton and cotton products --

2 MR. BORK: The National Cotton -- I'm sorry.

3 QUESTION: -- that there are imports that are taking
4 up the slack?

5 MR. BORK: That is correct, Mr. Chief Justice. The
6 National Cotton Council put in the evidence on what would
7 happen to cotton farmers, it put in the evidence upon the
8 decline of domestic cotton production which I think is about
9 2.5 percent a year for the last four years, and of course, the
10 import of domestic, foreign textiles, cotton-made textiles,
11 has been increasing and may increase at 6 to 7 percent a
12 year, even under the restrictive trade agreements.

13 QUESTION: Anything to prevent Congress from, or
14 OSHA, from providing that no imports would be permitted in
15 this country unless the sources complied with OSHA's standards?

16 MR. BORK: Nothing that I can think of, Mr. Chief
17 Justice.

18 QUESTION: But, how would we, as a practical matter,
19 how would we --

20 MR. BORK: How would we effect it?

21 QUESTION: Yes, would we send inspectors over to --

22 MR. BORK: Well, I addressed your question on the
23 assumption that Congress has the raw power to try it. I
24 don't think it's a very practical effort.

25 QUESTION: That would take treaties.

MILLERS FALLS
27 B PAGE 1
1 MR. BORK: It would, it would. But on the relation-
2 ship between cost and benefit, I think this is an ideal case
3 to consider it, because --

4 QUESTION: Excuse me for interrupting you again,
5 Mr. Bork, we're not giving you much chance, I'm afraid. But,
6 in connection with your argument, I gather what you're now
7 addressing is a little different than the costs discussion
8 you've been giving us as to unfeasibility --

9 MR. BORK: It's entirely different.

10 QUESTION: -- it is independent, isn't it?

11 MR. BORK: That's right.

12 QUESTION: The cost benefit? Now isn't cost
13 benefit analysis a -- that's an expression of art, isn't it,
14 some kind of --

15 MR. BORK: No, Justice Brennan, I think it is what
16 we all do every day, and in about every decision we make.
17 And OSHA has been doing cost benefit analysis when they
18 chose to go after cotton dust before noise, when they chose
19 a .2 level and chose a .75 level for other processes, they
20 did it because they --

21 QUESTION: Well, yet, what we're concerned with here,
22 I gather, is what the relationship is of cost to benefit,
23 and how do you define benefit here?

24 MR. BORK: We define benefit in what additional
25 worker health protection will be provided by the --

1 QUESTION: Production of the PEL, is that it?

2 MR. BORK: Well, that's not a benefit, unless it
3 provides additional protection to workers.

4 QUESTION: From this -- cost question?

5 MR. BORK: That's right, and here I think the
6 real case to be decided -- the reason I think this is a case
7 that's almost ideal for this kind of discussion, is that
8 byssinosis is not a carcinogen, it develops slowly, it can
9 be caught by a variety of tests long before it gets to the
10 irreversible stage, so that I think there is no benefit, but
11 I don't have to say that -- I think there's no benefit, to
12 reducing the PEL from .5 to .2 when you have a medical
13 surveillance plan which catches these things and the workers
14 can be transferred or put in respirators.

15 But at least OSHA should have addressed the
16 question, whether moving from -- down from .5 to .2 -- .5
17 is a reduction in dust levels, I mean, that's our proposal,
18 whether coming down from .5 to .2 with a medical surveillance
19 plan which OSHA itself has said these tests would insure that
20 any significant change from the baseline determination will
21 become apparent before material impairment occurs.

22 QUESTION: Well even if you are right, where in the
23 statute is the requirement that OSHA do what you're now
24 suggesting OSHA should have done?

25 MR. BORK: I think this comes under the reasonably

1 necessary language, and under the requirement of feasibility,
2 and indeed, it comes I think from the language that OSHA's
3 counsel seem to think goes the other way, which is no material
4 impairment of health to the extent feasible. That isn't a
5 standard about, that isn't a criteria about a single health
6 hazard, that is the worker and the total amount of risks he
7 faces in the marketplace, and you can't come close or as
8 close as is possible --

9 QUESTION: Well, I guess we'd all be better off if
10 Congress had said in express terms that OSHA should have done
11 a cost benefit-analysis. What kind do you suggest?

12 MR. BORK: Justice Brennan, I would stress that I'm
13 not suggesting a computer or a slide rule and a straight weigh-
14 ing. I think OSHA should be allowed -- required, is required
15 to state what range it is dealing with in cost-benefits --

16 QUESTION: Well are we going to -- if they must do
17 a cost-benefit analysis, are we not going to have to define
18 what we mean by cost-benefit analysis?

19 MR. BORK: In the sense that you want OSHA to
20 articulate the -- because they have never done it, the addi-
21 tional benefits from .5 with medical surveillance to .2 with
22 medical surveillance, and I think there are no additional
23 benefits. But they've never articulated it if there are any.

24 And I don't think this is reading something into the
25 statute in any heroic fashion, Justice Brennan, because this

1 is a less heroic reading of the statute than, for example,
2 reading the rule of reason was into the Sherman Act, whose
3 text simply doesn't allow the rule of reason. But in order
4 to make that a rational and useful statute, rather than a
5 wholly destructive statute, this Court read the rule of reason
6 in it. So, here, I think the text of this statute easily
7 allows and indeed, compels, the finding that -- and I want
8 to stress this, OSHA says in its brief, that it is comparing
9 all these factors. So it's not resisting thinking about cost-
10 benefit. On page 57, they give you a list of all the cost-
11 benefit analyses they do, what they are resisting is disclosing
12 their thought processes.

13 QUESTION: Spelling it out.

14 MR. BORK: That's right. So that anybody, Justice
15 Marshall, can review it, or find out what they're talking
16 about, or so that Congress can find out what they're talking
17 about and what kind of --

18 QUESTION: Mr. Bork, do you think they can do it in
19 a meaningful way without putting a value on human life?

20 MR. BORK: Certainly, Justice Stevens. In the first
21 place, I would stress that human life is not at stake in this
22 case, because at the levels we're talking about and the medical
23 surveillance we're talking about, this stuff can be caught
24 before it becomes irreversible and human life is not at stake
25 in this case, nor is material impairment of health at stake

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1 in this case.

2 QUESTION: Well, would it not have to put a
3 dollar value on the irreversible stage of the disease at
4 least?

5 MR. BORK: Not in this case, Justice Stevens, and
6 not in most cases, I think. Not a dollar value. But -- and
7 nobody expects that. We expect them to state -- we expect
8 the following benefits, they're going to cost so much, and
9 that seems to us reasonable --

10 QUESTION: But on one side of the equation is
11 all measured in dollars.

12 MR. BORK: But we're not asking, Justice Stevens,
13 that they come up and say, look, the benefits in dollars
14 outweigh the costs in dollars. What we want is an articula-
15 tion of what they expect to get for how much money, and over
16 time, they will develop a common law and Courts will begin
17 to understand what --

18 QUESTION: So, to that extent, I gather, what
19 you're suggesting is judgmental?

20 MR. BORK: It is judgmental.

21 QUESTION: The ultimate conclusion has to be judg-
22 mental.

23 MR. BORK: It is.

24 QUESTION: But not in dollar terms, based on the
25 benefits?

1 MR. BORK: No. That is correct, absolutely
2 correct. We don't expect that kind of analysis at all.
3 But if their process is to be rational, and if we are to
4 know that it's rational -- if industry is to know, if the
5 Courts are to know, if the Congress is to know, I think they
6 ought to spell out what it is they expect to get for how
7 much money. Here, --

8 QUESTION: You think the statute requires that they
9 do so?

10 MR. BORK: That is correct, Justice Stewart.

11 QUESTION: And is it your further contention that
12 if the statute doesn't require they should do so, that
13 the statute, there may be constitutional doubts about the
14 statute itself?

15 MR. BORK: I would think so, because at that point
16 we don't know what OSHA is doing.

17 QUESTION: A successive delegation standard for
18 this delegation --

19 MR. BORK: At that point it is, at that point.

20 QUESTION: Unless the statute requires them to do
21 what you indicated?

22 MR. BORK: I think so. Of course, the alternative
23 strategy, Justice Stewart, is to help them develop the
24 criteria to save the statute, rather than striking it down;
25 or to interpret the statute so that it is done to avoid that

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1 constitutional problem. But I don't think we're asking any-
2 thing peculiar, or anything they don't say they're doing;
3 we are asking that they tell us what they are doing, that's
4 all.

5 QUESTION: One final question, if I may, Mr. Bork.
6 Do you contend that this is a toxic substance case under
7 Section 6, or whatever the number is, do you contend there is
8 any difference in the cost-benefit analysis in a toxic sub-
9 stance case than in any other standards?

10 MR. BORK: No, I don't think so, in that sense.
11 Because this is not, there are toxic substances that produce
12 harm that can't be reversed. I think that's a very different
13 case, than this case where, despite some confusions upon the
14 topic --

15 QUESTION: Well, we've got to decide which section
16 of the statute we're working with, and Section 6, where the
17 word feasibility is found, is in the toxic substance section.
18 Do you -- first of all, do you agree that that's the appro-
19 priate section for purposes of statutory analysis?

20 MR. BORK: I think --

21 QUESTION: Assuming it's a toxic substance.

22 MR. BORK: I think Section 6 is the appropriate
23 section, but I think all standards are also governed by
24 Section 3.8.

25 QUESTION: So that if, if they are governed by 3.8,

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1 and that's the source of the cost-benefit requirement, then
2 I don't think you can rely on the word feasibility.

3 MR. BORK: No, I rely, Justice Stevens, on both of
4 those sections. It seems to me that both 3.8 and --

5 QUESTION: But you can't rely on both if it's not
6 a toxic substance case, and that's why it seems to me we've
7 got to think through the question whether the rule is dif-
8 ferent for a toxic substance than it is for a non-toxic
9 substance.

10 MR. BORK: Well, we agree it is a toxic substance.
11 And it seems to me that if one wants to discuss 6(b)(5)
12 alone, that the requirement of a cost-benefit comparison, and
13 articulation of reasons, is to be found in 6(b)(5).

14 QUESTION: Well no, my point is somewhat different.
15 My point is, when one is confronted with a non-toxic sub-
16 stance and therefore doesn't have the benefit of the language
17 in 6(b)(5), is there also a cost-benefit requirement. And
18 if so, that requirement is found independently of the feas-
19 ibility language.

20 MR. BORK: That's right, I think it would be
21 found, Justice Stevens, in the reasonably necessary language
22 of the section.

23 QUESTION: If that's enough, then you can't really
24 rely on the feasibility language. Seems to me you're in some-
25 what of a dilemma and I don't know what the right answer is,

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1 but I --

2 MR. BORK: I confess, Justice Stevens, at the
3 moment I don't quite perceive the dilemma I'm in.

4 QUESTION: Well if the reasonably necessary language
5 requires cost-benefit analysis for all standards, then we
6 don't even have to look at the feasibility language.

7 MR. BORK: That's right.

8 QUESTION: On the other hand, if you must look at
9 the feasibility language in order to justify or to support
10 your argument that cost-benefit is appropriate, then you do
11 not require cost-benefit in non-toxic substance cases, which
12 would be somewhat ironic, because that would mean that you
13 have a more strict standard, the agency has a stricter burden,
14 in the toxic substance case than in the non-toxic substance
15 case.

16 MR. BORK: Well Justice Stevens, if I may ask, it
17 would seem to me, and perhaps I'm wrong, that if it was a
18 toxic substance case you can derive it and should derive it
19 from 6(b)(5) to the extent feasible. If it is a non-toxic
20 substance case, it seems to me it can be derived and should be
21 derived from the language that a standard must be one which
22 is reasonably necessary or appropriate. Is that -- am I
23 still in a dilemma?

24 QUESTION: Well I think you are, but I won't take
25 up any more of your time, because --

1 MR. BORK: My time is gone, Justice Stevens.

2 QUESTION: It seems to me that the -- that one has
3 to decide whether Congress intended a different standard for
4 toxic substances than it did for non-toxic substances. Having
5 made that decision, then one must decide which portions of
6 the statute will support your argument.

7 MR. BORK: I do not think that Congress provided
8 cost-benefit for toxic substances alone. It seems to me it's
9 a general requirement of the act.

10 MR. CHIEF JUSTICE BURGER: Very well. Mr. Geller.

11 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
12 ON BEHALF OF RESPONDENT MARSHALL

13 MR. GELLER: Thank you, Mr. Chief Justice, and may
14 it please the Court:

15 The textile industry has presented two main chal-
16 lenges to the cotton dust standard in this case. The first
17 is the cost-benefit issue, second is the factual claim that
18 the administrative record does not support the Secretary's
19 findings of economic feasibility.

20 QUESTION: Excuse me, Mr. Geller, are you going to
21 address this development of a couple of days ago?

22 MR. GELLER: I'd be happy to. I was just about to
23 do it. I wanted to say about the second part of Petitioner's
24 argument, the substantial evidence, that we think the Court
25 of Appeals correctly analyzed that factual question. But

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1 I do want to point out that Professor Bork is incorrect in
2 saying that the cotton dust standard was issued pursuant to
3 any sort of carcinogen policy. It doesn't -- it was not at
4 all.

5 It was issued pursuant to substantial evidence of
6 a significant health risk at the current exposure level. The
7 pre-standard current exposure level. There were 105,000 pages
8 of record in this case, and they pointed conclusively to a
9 substantial risk of material health impairment at the 1,000
10 microgram level. Dr. Merchant produced a dose-response
11 curve, it was not subject to serious challenge at the admin-
12 istrative hearing, showed that at that level 26 percent
13 of the workers would be exposed to some risk of byssinosis.
14 Also showed that at the level that the Secretary proposed
15 that risk would be cut in half, to 13 percent. There's no
16 question in this case we think, both that the Secretary
17 satisfied the Benzene standard, and that he issued the stan-
18 dard pursuant to substantial evidence of the significant
19 health risk that the standard would reduce, not pursuant to
20 any so-called policy. This is just another industry red
21 herring.

22 Now Professor Bork made another -- a number of
23 other misstatements about the record that are purely factual.
24 I want to just mention them very briefly. The answers are all
25 in our brief. I don't think it's very useful here to replay

1 the evidentiary disputes that the Secretary resolved and that
2 the Court of Appeals found were supported by substantial
3 evidence.

4 The respirators are not feasible, the record quite
5 clearly shows that. Secondly, the industry's approach in this
6 case, and certainly the basis for the so-called ATMI alter-
7 native was this notion that the low-grade of byssinosis
8 were no more damaging than the common cold. That's absolutely
9 incorrect. There was substantial evidence in the record of
10 material health risk even at low levels of byssinosis, and
11 more important, the Secretary found that it's a continuum of
12 disease. Dr. Harley, the industry's main witness, testified
13 that byssinosis is a continuum of disease, but it doesn't
14 progress in a rational fashion.

15 QUESTION: Is it possible to tell from OSHA's
16 announcements in this case what it understands feasible to
17 be, to mean?

18 MR. GELLER: Yes, well, the Secretary has always
19 taken the position --

20 QUESTION: Is it something more than affordable?

21 MR. GELLER: It means economically affordable by
22 the industry as a whole, not by every individual employer in
23 the industry.

24 QUESTION: So what -- just as long as it's affordable
25 by the industry as a whole?

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1 MR. GELLER: That's right. That it won't materially
2 impair the industry's financial condition, industry will be
3 able to maintain long-term competitiveness and profit levels.
4 And here, the Secretary found, the industry as a whole will
5 not be threatened by the capital requirements of the regula-
6 tion, that's page 27378.

7 QUESTION: Well, do you mean by that, that if the
8 record showed that compliance would increase the cost of
9 cotton to the ultimate consumer by 500 percent, that then we
10 could go ahead?

11 MR. GELLER: No, because in that situation --

12 QUESTION: You didn't put any limit on the economic
13 feasibility in your earlier statement.

14 MR. GELLER: Well, it would not be feasible if
15 people would no longer buy cotton, the industry would go out
16 of business. But in this case --

17 QUESTION: Well, that would depend upon the elas-
18 ticity of the --

19 MR. GELLER: Well that's right, and the Secretary
20 went into all of that.

21 QUESTION: -- finding that it was an absolutely
22 inelastic demand, and it could be increased 1000 percent --

23 MR. GELLER: Well perhaps then if the costs --

24 QUESTION: -- amount of purchasing.

25 MR. GELLER: And if the costs could all be passed

1 along to the consumers, the consumers would still be able to
2 buy, would still buy the product, then the health costs are
3 the cost of doing business.

4 QUESTION: Are you suggesting that Congress con-
5 templated that the whole country wait until we find out
6 whether it's going to make the cost go up 1000 or 500 percent?

7 MR. GELLER: Well the Secretary has the burden of
8 proving economic feasibility, he does -- he does analyses,
9 in this case, for example, the evidence showed that there
10 would be a decrease in demand for cotton of only about 1 or 2
11 percent under the Secretary's proposed standard, and that
12 costs would rise to keep the same profit levels, only --

13 QUESTION: Mr. Geller, you refer to the word -- the
14 phrase that the Secretary has the burden of proving economic
15 feasibility, as I recall, the statute simply says if feasible,
16 doesn't it?

17 MR. GELLER: That's correct. Feasibility though,
18 is a requirement before Section 6(b)(5) --

19 QUESTION: Well why do you read the word economic
20 into it?

21 MR. GELLER: Well, I think that I agree with
22 Professor Bork and certainly with the lower court, that
23 Section 6(b)(5) has construed the word feasible to mean both
24 technologically and economically feasible. That's what we
25 think Congress meant. That's -- in other statutes, such as

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1 the Clean Air Act which was passed the same week as the
2 Occupational Safety and Health Act, Congress specifically
3 said economically and technologically feasible, and in this
4 statute, that's --

5 QUESTION: But wouldn't that be almost an argument
6 against your position, if Congress the same week, when using
7 the word feasible, had modified it with the words economic and
8 technologically, and in this statute it simply said if
9 feasible --

10 MR. GELLER: Well I don't think, Congress doesn't
11 act in computer-like fashion, but I think that when in the
12 same week they used the word feasible and define it to mean
13 both economic and technological feasibility, that that's what
14 they mean when they -- the same week, used the word feasible
15 without the modifiers.

16 There's no suggestion in very lengthy legislative
17 history, Mr. Justice Rehnquist, that they meant anything
18 other than economic or technological feasibility.

19 QUESTION: Incidentally, Mr. Geller, you just men-
20 tioned pass the cost on to the consumer, was there any
21 finding to that effect?

22 MR. GELLER: Yes, there were substantial --

23 QUESTION: Well, I know there was an extreme assump-
24 tion, I think that's the language, but what was the supporting
25 evidence that it could be passed on or would be?

1 MR. GELLER: There was testimony by experts in the
2 field that --

3 QUESTION: No well, I'm asking, what finding other
4 than the expression extreme assumption?

5 MR. GELLER: No, no, no. There were express find-
6 ings in this case, Mr. Justice Brennan, in cent per profit
7 cent, how much each garment would go up, these are all of
8 course speculations, but informed ones, OSHA did not talk in
9 vague generalities.

10 The preamble to this standard takes up some 40 or
11 50 pages of three column, small type in the Federal Register,
12 justifying every single finding that the Secretary made, and
13 the Court of Appeals took 100 pages analyzing the record very
14 carefully to conclude that the Secretary's findings as regard
15 to these Petitioners were supported by substantial evidence.

16 The -- anyway, I just want to mention another one
17 of the misstatements I think that was made, because I think
18 it's important, the Secretary does not engage in the cost-
19 benefit analysis under Section 6(g), he sets priorities, by
20 statute he sets priorities. And it didn't take very much
21 sophistication for the Secretary to realize that the number
22 one priority facing the textile industry in terms of health
23 was cotton dust. He didn't engage in any cost-benefit anal-
24 ysis to make that decision; it was obvious it --

25 QUESTION: Well, you instinctively do, as Professor

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1 Bork suggested. Every decision that every person or institu-
2 tion makes is instinctively or implicitly inherently -- a
3 cost-benefit decision.

4 MR. GELLER: Not with the same set of --

5 QUESTION: Even in the setting of priorities.

6 MR. GELLER: Yes, but not, I don't think, Mr.
7 Justice Stewart, with the same sort of mathematical precision
8 that these Petitioners are going to require --

9 QUESTION: Whether or not you're going to play an
10 extra rubber of bridge, you weigh the pleasure of playing an
11 extra rubber of bridge with the loss of sleep that's going to
12 be incurred. Every decision that's made is a cost-benefit
13 decision, is it not? Every rational decision?

14 MR. GELLER: Every rational decision takes into
15 account costs and benefits, perhaps, but it doesn't weigh
16 them the way the Petitioners suggest the Secretary has to
17 weigh them in some sort of fine balance in this case.

18 QUESTION: In the setting of priorities, it's a
19 cost-benefit decision.

20 MR. GELLER: And the Secretary does that under
21 Section 6(g), and therefore there's no reason to think that
22 when the standard is issued, that under Section 6(g) and under
23 Section 6(b)(5), and under Section 3(8), that it's going to be
24 irrational. Let me also mention --

25 QUESTION: Mr. Geller, Mr. Bork mentioned the fact

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1 that there were no findings and I can't find any findings.

2 Now will you tell me where they are?

3 MR. GELLER: The findings are in the preamble to
4 the standard which is published in Volume 43 of the Federal
5 Register. We have supplied --

6 QUESTION: I'm talking about the findings in this
7 case.

8 MR. GELLER: Yes, that's what I'm talking about.
9 The Federal Register contains --

10 QUESTION: Well, do you want us to go read that,
11 to take judicial notice of that?

12 MR. GELLER: It's in the Federal Register and we
13 have supplied a copy to every Justice of this Court, that
14 these are the Secretary's findings to justify the standard.
15 And the Court of Appeals found that each of those findings,
16 with regard to these Petitioners, was supported by substantial
17 evidence. I don't understand --

18 QUESTION: Well what finding did they make on
19 economic feasibility? What was the quote and end-quote find-
20 ing?

21 MR. GELLER: Well, the discussion of economic feas-
22 ibility is at page 27378, Federal Register, and the key find-
23 ing that was backed up by a great deal of evidence and cost
24 figures, is that industry as a whole will not be threatened
25 by the capital requirements of the regulation. That these

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1 cost --

2 QUESTION: Do you know of any other case that we've
3 decided that we didn't have papers we were deciding it on?

4 MR. GELLER: I'm not quite sure what you're referring
5 to, Mr. Justice Marshall.

6 QUESTION: We're referring to what's in the Federal
7 Register and is not in this Court.

8 MR. GELLER: Well --

9 QUESTION: Period.

10 MR. GELLER: Let me also address the statement that
11 Mr. Justice Stevens was making to Professor Bork at the
12 very end, about Section 3(8)--

13 QUESTION: Before you do that, I think just as a
14 matter of mechanics, I don't recall ever seeing the copy of
15 the decision that is -- the findings that you say are in the
16 Federal Register and were supplied to each of us individually;
17 I don't think they were.

18 MR. GELLER: Well, --

19 QUESTION: I frankly assumed they were in the
20 Joint Appendix --

21 MR. GELLER: No, they were not -- reprinted in the
22 Joint Appendix, but they are in the Federal Register which is
23 of course a public document, and we did supply, or we sent it
24 up to the Clerk -- I'm surprised it hasn't been distributed
25 with the cover letter.

1 QUESTION: Well I don't think it was.

2 MR. GELLER: It's all, it's easily accessible to
3 the Court.

4 QUESTION: I don't have it before me -- saving money
5 by not putting it in the Appendix?

6 MR. GELLER: It's -- the Federal Register, June
7 23rd, 1978, Federal Register, beginning at page 27350 and I'm
8 sure the Clerk will be happy to --

9 QUESTION: Does it look like what you have in your
10 hands?

11 MR. GELLER: Yes it does, it's --

12 QUESTION: I've never seen it.

13 MR. GELLER: I'm sorry, Your Honor. We sent that
14 up about 10 days ago.

15 QUESTION: Does that comply with our rules with
16 respect to type size and page -- pagination?

17 MR. GELLER: Well I'm not sure that we had an obli-
18 gation under the rules to reprint all of this, it would have
19 been very burdensome. We thought it would be useful for the
20 Court, rather than simply to have the Court go to the library
21 to get a public document, that we give Xerox copies. We
22 understand -- the Petitioner's of course, had the burden of
23 producing the Appendix, and not the Respondents.

24 QUESTION: Which if any of the questions presented
25 by the Certiorari petition do you think raise a question that

1 requires us to decide whether there's substantial evidence
2 to support a finding?

3 MR. GELLER: I think the way that this case was
4 argued in the Court of Appeals was that there was no substan-
5 tial evidence to support the economic feasibility argument.

6 QUESTION: I didn't ask you about how the case was
7 argued in the Court of Appeals --

8 MR. GELLER: And I think that is one of the questions
9 presented in the petition that the Court granted certiorari
10 on. The Court did not grant certiorari on one of the four
11 questions, which just went to whether the Court of Appeals
12 in fact applied a substantial evidence test.

13 I'd like to spend my limited time discussing what
14 I think is the key issue in the case, which is the cost-
15 benefit issue. It's become something of a rallying cry for
16 industry forces in this area. Simply stated, Petitioners
17 claim that the Secretary may not issue an Occupational Health
18 Standard for toxic substances till he first determines, on
19 the basis of substantial evidence, that the benefits of the
20 standard bear a "reasonable relationship" to the attendant
21 costs.

22 I think it's important to begin this discussion by
23 repeating what the Court said just a month ago in the Crushed
24 Stone case. That is that the question here is not what the
25 Court thinks is generally appropriate to the regulatory

1 process. Congress is, the question is what Congress intended.
2 We've heard a great deal from the textile industry, both in
3 its briefs and from Professor Bork today, about wise policy
4 choices. The issue here --

5 QUESTION: Congress didn't say anything about cost-
6 benefit analysis, did it?

7 MR. GELLER: It did not, and that is our point, that
8 there is, that the construction statute adopted by the Court
9 of Appeals we think, reflects wise policy, but that's not the
10 point. The point is that there's nothing in the statute,
11 either expressly or by reasonable implication that requires
12 the Secretary to engage in so-called cost-benefit analysis
13 before issuing a health --

14 QUESTION: Well was there anything in the statute
15 then, that sets any standards at all?

16 MR. GELLER: Yes, there is.

17 QUESTION: And if the answer to that is no there
18 isn't, then, my brother Rehnquist's opinion in the Benzene
19 case, is a telling one.

20 MR. GELLER: If, I think that if Justice Rehnquist
21 were right about the statute, he would be right about his
22 conclusions. But the statute sets criteria that the Secre-
23 tary has to follow. There is first of all, Section 6(b)(5),
24 which says that the Secretary can't issue any standard unless
25 he first finds that there's a significant risk of material

1 health impairment in the work place, that it's an unsafe
2 work place.

3 QUESTION: Well, but the -- there, as we held
4 in Benzene, misconstrued that requirement.

5 MR. GELLER: And that the standard would substan-
6 tially reduce that risk.

7 QUESTION: Well those were -- that's what was
8 involved in the Benzene case.

9 MR. GELLER: That's right, that's right. That's
10 a substantial --

11 QUESTION: In which we had to correct the misappre-
12 hensions of OSHA.

13 MR. GELLER: That is a substantial check on the
14 Secretary now, he can't issue --

15 QUESTION: Well it wasn't understood by OSHA to
16 be any check at all, until the Benzene case, isn't that cor-
17 rect?

18 MR. GELLER: I don't want to re-argue the Benzene
19 case --

20 QUESTION: Well of course you don't.

21 MR. GELLER: -- but, be happy to if I thought the
22 result might change. But, the point is that in light of
23 Section 3(8) as construed by this Court in Benzene, the Secre-
24 tary now in issuing health standards, has to find that there's
25 a significant risk of material health impairment and there's

his standard will reduce that risk. He also has to find that it's technologically and economically feasible.

QUESTION: Mr. Geller, I'd like to come back with a question that I put to Professor Bork, is it the government's position that this standard would be perfectly valid under the act if it destroyed 50 percent of the cotton industry in the United States, whether you measure it by number of companies or by total output, was that the government's position?

MR. GELLER: It's not the government's position, but --

QUESTION: Suppose 10 percent, would that --

MR. GELLER: Well, the one thing that I agree with Professor Bork about, is that these are not issues that can be decided in the abstract. The economic feasibility determination is that basic factual determination by the Secretary --

QUESTION: Yes, but --

MR. GELLER: -- with judicial review --

QUESTION: Yes, but what troubles me and perhaps others, is that we're not getting any guidance, at least I've found none so far in this case, as to what the impact of -- economically speaking, you admit that that's important -- in view of the competition that our industry, our major industries are now suffering from industries in foreign countries, I would have thought OSHA would have taken a better, closer look, to ascertain whether 50, 20, 25, 45 percent of the

1 cotton industry was going to be put out of business.

2 MR.GELLER: Well, but the Secretary did make
3 findings in this case, Justice Powell.

4 QUESTION: Where are they, specifically?

5 MR. GELLER: Well, I think, once again, page 27378
6 is the prime discussion of this issue.

7 The Secretary found that only certain marginal
8 employers, very close to the margin -- first of all, the
9 Secretary found that there was a concentration process going
10 on in this industry, wholly regardless of health standards,
11 that firms at the margin, because of economies of scale or
12 other reasons, were simply not making it and going out of
13 business. It's not a very heavily concentrated industry by
14 the way, by and large. There are --

15 QUESTION: Mr. Geller, did the Secretary consider
16 in these findings that we haven't seen, whether these stan-
17 dards would materially affect the capability of the industry
18 to modernize and expand and improve its production facilities?

19 MR. GELLER: Yes. Yes, he did. He found that
20 there was great excess capacity in the industry as it was,
21 there was not going to be a great deal of expansion going on --

22 QUESTION: But we have excess capacity in the steel
23 industry, but it's suffering from competition for more modern
24 facilities in Japan and Germany. I just don't know whether
25 OSHA considered or considers that the act requires it to

1 weigh factors of this kind.

2 MR. GELLER: Yes, it does.

3 QUESTION: It does?

4 MR. GELLER: It does, and OSHA must consider, in
5 making the economic feasibility determination, the industry's
6 capital needs, the industry's costs of doing business. And
7 it has to determine if, by adding to those costs, the costs
8 of the proposed standard, the industry as a whole will be
9 able to function much the same way it was functioning prior
10 to the issuance of the standard. It's no suggestion that
11 the Secretary thinks that the way to solve health problems is
12 to take away the productive activity that causes the health
13 problems. The purpose is to try to reach some reasonable
14 accomodation. The word feasibility does that, and I think the
15 other standards of the statute do that.

16 Let me, I do want to address this one question that
17 Justice Stevens asked Professor Bork about Section 3(8) because
18 I think it's an important question in the Court's determination
19 of the answer to this case. That is, that Section 3(8) could
20 not have been thought to have any cost-benefit analysis in
21 it, because if you recall, Section 3(8) was a definitional
22 section, it was in the statute in precisely the same form it
23 exists today from the very beginning, and yet, Senators
24 Dominick and Senator Javits and others were quite concerned
25 during the latter stages of the legislative history, that

1 the statute might require absolute hell for spending a lot
2 of money for things that weren't worth it, and they restruc-
3 tured Section 6(b)(5) to take account of that, by adding the
4 feasibility language and material health language and all the
5 rest, there would have been no reason for them to have engaged
6 in that discussion if anybody thought that a cost-benefit
7 analysis was already in the reasonably necessary or appropriate
8 phrase in Section 3(8). But nobody suggested that, during a
9 length of an exceedingly lengthy legislative history, not
10 one person suggested that 3(8) meant that. Section 3(8)--

11 QUESTION: Well there wasn't really any discussion
12 of cost-benefit as such, was there?

13 MR. GELLER: That's -- no one suggested that the
14 statute was going to require that, that's exactly right. And
15 that's why we think it's totally --

16 QUESTION: The discussion was whether this was some
17 sort of an absolute requirement?

18 MR. GELLER: And there would have been no need for
19 that discussion if someone thought that Section 3(8) already
20 imposed a cost-benefit analysis in setting standards. Sec-
21 tion 3(8) tells the Secretary when he may issue a standard,
22 it doesn't tell him where along the various alternatives
23 he should issue --

24 QUESTION: Do you think this raises no delegation
25 questions under Schechter and other cases?

1 MR. GELLER: No, I don't, Mr. Chief Justice.

2 QUESTION: And your time doesn't permit you to go
3 beyond that, --

4 MR. GELLER: I'd be happy to answer, but --

5 QUESTION: -- you're in your colleague's time now.

6 MR. GELLER: Thank you.

7 MR. CHIEF JUSTICE: Mr. Cohen.

8 MORAL ARGUMENT OF GEORGE H. COHEN, ESQ.,

9 ON BEHALF OF UNION RESPONDENTS

10 MR. COHEN: Mr. Chief Justice, and may it please
11 the Court:

12 My name is George Cohen, I'm appearing on behalf of
13 the Union Respondents. Although I'm not sure this is the
14 point to put the proper focus on it, I would like to point
15 out to Mr. Justice Powell that, in response to your questions,
16 Your Honor, that the Research Triangle Institute studies
17 which were the contractor working for the Department of Labor
18 at Joint Appendix pages 118, 120 and 123, discuss precisely
19 the question that Your Honor raised, and basically concluded
20 that insofar as achieving the costs necessary to achieve the
21 standard that the Secretary set, the demand, the total demand
22 for cotton products in this country would go down approximately
23 one percent, and the impact on employment would be approxi-
24 mately .6 percent.

25 QUESTION: Mr. Cohen, excuse me.

1 QUESTION: No, go ahead.

2 QUESTION: What is your definition of the word
3 if feasible, in the statute?

4 MR. COHEN: Mr. Justice Rehnquist, the words of
5 the statute are to the extent feasible, there's a bit of
6 deja vu in this, because we do this together in the Benzene
7 case, our -- my answer then and my answer today, as further
8 enlightened by this Court's decision in Benzene, is that
9 the Congress of the United States was not seeking to impose
10 impossible, impossible health -- a solution that would be
11 impossible as far as industry would be concerned, and that
12 impossibility has been translated into two dimensions. Number
13 one, that it must be achievable in the sense that there is
14 the technology and work place practices available, so-called
15 technologically feasible. The economic feasibility aspect
16 which has also been imported into the statute, is in essence
17 what this case -- or what --

18 QUESTION: Well, imported into to the statute by
19 this Court, or by --

20 MR. COHEN: No, I don't think it's been imported
21 into the statute by this Court, I think Senator Dominick --

22 QUESTION: You mean yet.

23 MR. COHEN: Well, I thought the question, Mr.
24 Justice Marshall, was does the origin of the importing come
25 out of this Court? I think the answer to that is no, I think

1 this Court properly concluded that the legislative history
2 as reflected most precisely by Senator Dominick, the leading
3 spokesman for the Nixon Administration as this bill was
4 passing through the halls of Congress, who made it very clear
5 that what he was most concerned about -- and this then became
6 the consensus of the Senatorial concern, was that in the name
7 of providing safety and health what would happen would be
8 that you would drive industries as a whole out of business
9 and ban occupations as a whole in the course of that process.

10 And it was that concern, whether one wants to then
11 put in terms the word economic feasibility which I am per-
12 fectly comfortable with and all the reviewing Courts have
13 used, and this Court --

14 QUESTION: And OSHA, and OSHA.

15 MR. COHEN: And OSHA, yes.

16 QUESTION: And that feasible includes economically
17 feasible, everybody agrees?

18 MR. COHEN: Yes, everybody agrees there. The
19 question, among the questions presented here is in order for
20 something to be feasible, must this magical cost-benefit
21 analysis be done, we of course reject that argument. We
22 reject it because we say, number one, it's not there on the
23 face of the statute, and number two, it is not there in the
24 legislative history.

25 QUESTION: What do you mean by cost-benefit analysis?

1 What do you think the other side means by it?

2 MR. COHEN: Mr. Justice White, I must confess that
3 the more one studies this issue the less, I think, one
4 comprehends it.

5 QUESTION: Well then you are very -- so far,
6 what you have said is meaningless. And so --

7 MR. COHEN: Well I --

8 QUESTION: -- apparently then, is what your
9 opposition is saying, you think, is meaningless?

10 MR. COHEN: I do that, yes. And I'll be glad to,
11 I'll be glad to explain why.

12 We've been told that, let's take the industry posi-
13 tion. They have rejected the notion that "formal" cost-
14 benefit analysis should be done. They've rejected the notion
15 that anything more than saying there's a reasonable balance
16 between costs and benefits is necessary. They've rejected
17 the notion that you're going to place a value on human life.

18 Now let's take this case as a frame of reference.
19 We know, as government counsel --

20 QUESTION: Well let me ask you, you say the statute
21 does not require a cost-benefit analysis. Now, you tell me
22 what you think you're saying the statute doesn't require?

23 MR. COHEN: Yes.

24 QUESTION: What do you think that it doesn't require?

25 MR. COHEN: It doesn't require, after the Secretary

has laid the -- has done the following: has met the threshold determination, made a threshold determination that we have a significant risk of health involved, and that that risk can, through a variety of procedures, be dramatically reduced.

QUESTION: Right.

MR. COHEN: That the Secretary must select the most protective way to achieve that result, consistent to the constraint or consistent with a constraint and the constraint is that it must be feasible, it must be technologically achievable and it must be feasible in the economic sense, namely, that as a result of complying with this standard industry as a whole's financial viability will not be challenged. And that, at that point, Mr. Justice White, our position is the Secretary's obligations are over and the standard is entitled to --

QUESTION: Well, I think Mr. Justice Stewart may have suggested before that -- well, isn't that a cost-benefit judgment in itself?

MR. COHEN: All right. Now --

QUESTION: That the benefits that you're going to get, are worth whatever --

MR. COHEN: I think you are precisely correct.

QUESTION: -- are worth whatever impact there is on the industry?

MR. COHEN: Yes, we believe you are precisely

correct in this sense. We believe that what Congress did was, in effect, do its own "cost-benefit analysis". Congress made the determination --

QUESTION: Well I know, but the Secretary has too. You've -- I suppose, he sets these levels after having concluded that the impact on the industry isn't so great that he should set a higher standard.

MR. COHEN: Well if you -- on your terms --

QUESTION: Is that right or not?

MR. COHEN: That's what the Secretary has said, that's what we believe satisfies the statute --

QUESTION: Well, then the answer to my question is yes, isn't it?

MR. COHEN: Well I have a sense of responsibility. I don't want to mislead you into thinking the other side agrees that that's a cost-benefit analysis. We think that is a cost-benefit analysis, in the sense that that's all the Congress was concerned --

QUESTION: At least you think that's all the cost-benefit analysis the statute requires?

MR. COHEN: Exactly. And that is the policy judgment --

QUESTION: And in any event it does not require any quantifying in dollar terms, of the benefits?

MR. COHEN: Absolutely.

1 QUESTION: It may, on the cost side, but not on
2 the benefit side.

3 MR. COHEN: Absolutely. And I want to just carry
4 that point one step forward, Mr. Justice Brennan. If you --
5 reading the industry position knowing as they come before the
6 Court and tell you, that it doesn't require valuing human
7 life, there's only one way to get away from that proposition
8 and they try to get away with it by saying what the Secretary
9 should be doing in setting a standard for one toxic sub-
10 stance, is to compare what the risk is going to be for other
11 potential hazards, what the technological feasibility will
12 be for all of those other hazards, what the cost of compliance
13 will be for all of those hazards, and in that nice, simple,
14 little package, says the ATMI, we have offered a "feasible
15 solution" to ways this statute should be interpreted. Now
16 that in our judgment, in effect, would be asking the Secre-
17 tary of Labor, in the name of doing something, to do every-
18 thing, he would have to inventory the entire list of every
19 single potential toxic substance.

20 QUESTION: Mr. Cohen, I take it it's undisputed
21 that Congress, under its Commerce power, could flatly ban
22 child labor? Supposing Congress passed a statute saying we
23 ban child labor to the extent it is feasible, and delegate to
24 OSHA the promulgation of regulations for banning it. What do
25 you think OSHA would have to do?

2 ERASE
1 MR. COHEN: I think -- I don't think, I want to
2 emphasize this, I don't think we're anywhere near that in this
3 case. We have much clearer guidance from Congress than the
4 discussion and rhetoric that's gone back and forth here in
5 Court today, and our brief spells out what that discussion
6 was and what those concerns were. Now I know we've got a
7 hypothetical, but let me stay with the concerns.

8 The concern was that small employers particularly,
9 were not devoting the necessary capital investments in order
10 to provide safe and healthy work places. Congress understood
11 this was a problem. This is not a problem that's just emerged
12 in the context of the cotton dust case. And Congress said,
13 we are going to insist on a uniform, nationwide approach;
14 we're going to compel each and every employer to meet these
15 standards because if we don't go that way we're never going
16 to get it, the ultimate protection that this statute is all
17 about.

18 Congress went further. They also understood, and
19 there's been discussions here of who would go out of business?
20 Well we're way removed from that problem in this case. As
21 a matter of fact, in the Court of Appeals, the Court of
22 Appeals' opinion says that the American Textile Manufacturing
23 Industry concedes that at 550 million dollars there's no
24 economic feasibility problem insofar as the entire industry
25 as a whole is concerned. But getting back to my point, Mr.

1 Justice Rehnquist --

2 QUESTION: Well I thought it was my question that
3 you were trying to get back to.

4 MR. COHEN: Yes. I am trying to. What I guess I'm
5 saying is that I'm not sure that I know what precise tools
6 would be brought to bear to deal with the child labor. I am
7 saying that the tools are there to deal with it, based on
8 the legislative history of this statute. And I hadn't fin-
9 ished that precise point. And it was. Not only was the
10 judgment uniform, nationwide, small employers, but there is
11 a recognition that this would well or might well have a
12 severe impact on small employers. That was not something that
13 comes out of the blue; that was a major subject of concern.
14 Senator Dominick repeated that concern, but what was the
15 solution? Was it to carve out or exempt the small marginal
16 employer? No. Was it to dilute the protection of the statute
17 as to workers in those plants? No. What Congress said, in
18 Section 28, will address this in terms of a small business
19 loan proposition. If an employer who would otherwise be
20 driven out of business needs the economic wherewithal to
21 be able to comply, we will afford that program. Very similar,
22 incidentally, to the program that this Court addressed --

23 QUESTION: Mr. Cohen, you keep saying that the
24 problem is and the complaint of Petitioner is that OSHA didn't
25 go through this. I thought the complaint was OSHA hasn't yet

1 told anybody what they did? Now isn't that the complaint the
2 Petitioners made, is that you can do anything -- that you can
3 find out whether they did right or wrong.

4 MR. COHEN: Mr. Justice Marshall --

5 QUESTION: Is that their position?

6 MR. COHEN: That's their position. We and the
7 Solicitor General have each responded to that proposition.
8 What we have said, basically, is insofar as economic feas-
9 ibility is concerned, that the aggregate amount of money,
10 the 550 million dollars which the Secretary found wasn't a
11 dream, it was a finding.

12 QUESTION: How many businesses would be put out
13 of business?

14 MR. COHEN: The Secretary --

15 QUESTION: How many business would be put --

16 MR. COHEN: -- of Labor found one thing, one
17 precise thing on this point. He said industry --

18 QUESTION: Did they find any figures as to how many
19 would go out of business?

20 MR. COHEN: He said although some marginal employers,
21 although some marginal employers might choose to go out of
22 business rather than comply, -- I'm reading to you now from
23 the Federal Register 27378, column 2.

24 QUESTION: Where does it say how many?

25 MR. COHEN: Didn't say how many, didn't say how many.

1 You should know, you should know, in the record, Mr. Justice
2 Marshall, --

3 QUESTION: Well you have to put it in there if I
4 should know it.

5 MR. COHEN: I say --

6 QUESTION: And now, you didn't put that in the
7 record.

8 MR. COHEN: We could only take the Secretary's
9 finding. I wanted to be true to the finding --

10 QUESTION: But he did make, he made conclusions
11 of law, he didn't make findings.

12 MR. COHEN: He said some marginal employers, some
13 marginal employers --

14 QUESTION: Isn't that a conclusion?

15 MR. COHEN: Well, it was based on his analysis of
16 this overall record --

17 QUESTION: How do we know that? We take his word.

18 MR. COHEN: He states that, he states that --

19 QUESTION: Of course, and we take his word and your
20 word. That's the answer.

21 MR. COHEN: My red light is up. I would just like
22 to say as I leave the podium, that we have addressed in detail,
23 the comments of Textile Manufacturing Institute as to the
24 respirator, as to their so-called alternative, and we have
25 explained why it does not provide the health protection

1 obligations that should be imposed here. Thank you.

2 MR. CHIEF JUSTICE BURGER: Very well. Thank you,
3 gentlemen. The case is submitted.

4 (Whereupon the case in the above-entitled matter
5 was submitted at 11:30 o'clock a.m.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Nos. 79-1429 and 79-1583

American Textile Manufacturers Institute, et al., and

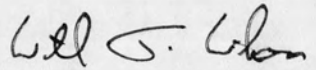
National Cotton Council of America

v.

Ray Marshall, Secretary of Labor, United States Department of Labor, et al.

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