

The Association for Diplomatic Studies and Training
Foreign Affairs Oral History Project

MARK B. FELDMAN

Interviewed by: Robin Matthewman
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Mark B. Feldman served in the State Department Office of the Legal Adviser from May 1965–May 1981, including as deputy legal adviser and acting legal adviser, 1974–1981, taught foreign relations law at Georgetown University Law Center, and has been involved in significant international matters in private practice since 1981. Professor Feldman is best known for his work drafting/negotiating the Foreign Sovereign Immunities Act of 1976, Iran Claims Agreement [1981], UNESCO Cultural Property Convention [1970], and U.S. maritime boundary treaties [Canada/Gulf of Maine Case, Mexico, Cuba, USSR]. His CV is attached to this transcript [Annex A]. See also <http://www.markfeldmaninternationallaw.com/>. This oral history is also available in book form: "Footnotes to History, Law and Diplomacy (Xlibris June 30, 2023).

Topics addressed herein include the Vietnam War [POWs, riot control agents], the U.S.-Japan Peace Treaty [return of Iwo Jima and Micronesian War claims], 1967 Refugee Protocol, extradition of James Earl Ray, Panama Canal Treaty negotiations, Cuba [Hijacking agreement], expropriation of U.S. investments in Latin America [Peru-IPC Mission, Chile/Allende [Korri copper negotiations; Church committee], Mexico [protection archeological heritage, Colorado River salinity], Klaus Barbie, anti-terrorism treaties, UNESCO Cultural Property Convention, Henry Kissinger, North-South dialogue [CERDS, NIEO], Foreign Bribery/Stanley Sporkin/FCPA, OECD Declaration on International Investment, World Food Conference, U.S.-Soviet Grain Agreement, Maritime Boundary negotiations/Gulf of Maine case [Canada, Mexico, Cuba, Venezuela, USSR], Foreign Sovereign Immunities Act, China recognition/Blumenthal mission, Nuclear exports-NEPA, Freedom of Information Act, Berlin Hijacking Case, Uranium Antitrust Case, Iran Hostage Crisis/U.S.-Iran Claims Agreement, Kalamazoo Spice Case [Ethiopia], Gulf War [1991], and Iraq War [2003].

Since 2020, Mark has filed three briefs amicus curiae in the Supreme Court seeking to clarify the case law interpreting the Foreign Sovereign Immunities Act. Two briefs supported claims of Holocaust victims: *Republic of Hungary v Simon*, 141 S. Ct. 691 (2021) (damage claims) and *Cassirer v Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 747 (2022) (claim to Pissarro painting). The third, with Professor Chimene Keitner, helped persuade the Court that the Act does not bar criminal prosecution of commercial entities owned by foreign states, *Turkiye Halk Bankasi v. United States*, 598 U.S. (2023).

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INTERVIEW

Q: Good afternoon. It is April 28, 2021. This is Robin Matthewman, and we are initiating our oral history interview with Mark B. Feldman.

Welcome, Mark. So, let's start at the beginning. Where and when were you born?

Family; Education; First Days at State

FELDMAN: I was born in Rochester, New York, October 3, 1935.

Q: What were your parents' names?

FELDMAN: Edward Paul Feldman and Grace [Relin] Feldman. My father was born in Hartford, Connecticut in 1904 to an immigrant family. My mother came to Rochester, NY from Ukraine around 1905 as a newborn.

Q: Let's start with the Feldmans then. Tell me about where they came from and what you know about the family background.

FELDMAN: Well, in both cases there was not a lot of interest in talking about the old country. Our generation regrets that. We've tried to build genealogies, but it's very limited. All I know is that the Feldman family emigrated from somewhere in Lithuania under Russian occupation. It was the Vilna route to Leeds, England to Montreal to New England.

Q: And do you know when they came over and where your Dad grew up?

FELDMAN: They came around 1899; he was raised in Springfield, Massachusetts.

Q: And your mom's family?

FELDMAN: The Relin family came to Rochester from Kiev [now Kyiv] and Ekaterinislav [Dnipro]. My mother had ten siblings, seven sisters and three brothers.

Q: Did your parents speak Yiddish?

FELDMAN: A little bit. My grandparents spoke Yiddish.

Q: How were they touched by World War II?

FELDMAN: Two of my father's four brothers served in World War I; one was gassed. The other two served in World War II. My Uncle Sam was a naval doctor. He ran a hospital for the indigenous population on Tinian in the Pacific—the island from which we flew nuclear bombs to Japan. He never spoke about to me about the Bomb. My Uncle Paul was in the Army Corps of Engineers training in England on D-Day. Fortunately, he was not in the first wave. I remember hearing my parents shouting on December 7, 1941; my Dad wanted to enlist, and my mother was terrified.

Q: Did you have siblings?

FELDMAN: I had one younger brother who died a number of years ago. Larry was very smart, but he had a difficult life.

Q: So, how was your childhood? How did you develop your interest in international relations?

FELDMAN: My childhood was normal, fine. I was educated in the Brighton public schools—the Kodak suburb of Rochester post World War II. My interest in public affairs first came from my parents. Neither had a college education, but they read a lot and promoted that goal for their children. I was also fortunate to have a number of good teachers over the years. I recall organizing a foreign affairs club in the eighth or ninth grade and being motivated to study in France by my high school French teacher. In my senior year [1952–53], one of my teachers taught a course in geopolitics. That was the year of the Soviet doctors' plot and Stalin's death. I wish I had saved my scrapbook on Stalin's funeral.

Q: College?

FELDMAN: My experience at Wesleyan University [Middletown Connecticut] [bachelor of arts 1957] was the most important influence on my intellectual development. Wesleyan set me on the path to lifelong learning. Originally, I planned to be a government major, but my freshman professors persuaded me to major in the humanities. As it turned out, I became a French major, because I wanted to spend my junior year in Paris, but wrote my senior dissertation on the Vichy regime for a government professor, Sigmund Neumann. In a sense, I pioneered the interdisciplinary major, but that was controversial in both departments at that time. Studying in Paris [1955–56] was a formidable experience that

left an indelible mark. That was the year of Pierre Mendes-France, the beginnings of the Algerian Revolution and the U.S. alliance with Adenauer's Germany, not to mention the riots between communists and Poujadists leading to Republican Guard emplacements on the left bank.

Q: There weren't very many American students in Paris back then. Were you in a specific program?

FELDMAN: I was in the Sweetbriar program, but didn't study with them. I had a French government scholarship and access to a literature program at L'Ecole Supérieure Pour la Préparation et Perfectionnement des Professeurs de Français à l'Étranger. I was the only Sweetbriar person there, so I had less contact with the group.

Q: What did you study there?

FELDMAN: Modern French literature: poetry, theater, the novel. Roland Barthes taught the novel, e.g., Flaubert, Zola. He was not famous back then, but he impressed me. When I tried to connect with him, he asked me: "Have you ever heard of Symbiotics?" I said, "No, but I'm interested to learn." Then, he said, "Never mind. I know what the American education system is like. You're going to grow up and be a lawyer or something, right?"

Q: (laughs) Pretty prophetic!

FELDMAN: He didn't want to waste his time on me.

Q: Ahh. (laughs)

FELDMAN: The year in France was very intense intellectually, but I was socially immature, lonely, and hungry.

Q: Were you living in a dorm or with a family?

FELDMAN: Oh, I lived with a family. They didn't feed me enough, and I lost thirty pounds. There was a lot of stress that year. But I spent good time with books, in churches and art museums, and I carried those interests forward my entire life. I became interested in the left-Gaullists and remember interviewing Pierre Clostermann, a member of Parliament who had been an ace pilot in World War II. He wore button down shirts and smoked Winston cigarettes—far from typical.

Q: And how did the dissertation on Vichy go?

FELDMAN: My thesis was "A War Within the War"—the French civil war within the German occupation of France. But my thesis was in the Government Department, and I majored in the French Department, so there was resistance. Professor Neumann told me later that he had to fight for me.

Q: And was that too sensitive a topic for them?

FELDMAN: I was told that one government professor was concerned that I hadn't used enough original sources. Well, at Wesleyan in those days of the New Criticism, the emphasis was on close reading of texts. No one told students to use outside sources, (*both laugh*) and that fit well with my Paris studies—"explication des textes." I wasn't really trained in research, of course, but my thesis was accepted, and I was appointed Valedictorian for graduation. In my senior year, I passed the written part of the Foreign Service exam and applied to law school. I asked the State Department if I could postpone the oral exam and received a negative response a year later.

Q: What year did you get to Harvard Law School?

FELDMAN: Fall of 1957. That put me in the class of 1960, which is recognized as one of the strongest classes to graduate from Harvard Law. That was a great experience. I was in a study group with Nino Scalia and knew many brilliant students in class and on the Law Review. A number of classmates became distinguished law professors [e.g., David Currie, Frank Michelman, Phil Heyman, Gary Bellow], judges [e.g., Richard Arnold] or public servants. My roommate, Gary Bellow, was one of the leaders in founding clinical legal education and the poverty law movement. David Barr became a life-long friend. Mike Dukakis, Paul Sarbanes, and William Ruckelshaus were classmates. There were many distinguished lawyers, e.g. Michael Cooper and Frederick A.O. Schwarz III, known as Fritz. In 1960, Fritz enlisted a number of us to picket Woolworth's in Cambridge in support of a lunch counter sit-in down South.

Q: Where did you practice law?

FELDMAN: I began in New York City with Kaye, Scholer, Fierman, Hays & Handler, 1960–1965; thereafter in DC with the State Department, 1965–1981; Donovan, Leisure, Newton & Irvine, 1981–1988; Feith & Zell, PC, 1988–2001; and Garvey Schubert Barer, 2001–2020.

Q: And when did you meet your wife?

FELDMAN: Thank you. I met my wife, Marcia Smith, in New York in 1962 when we both lived on the Upper West Side near Columbia. We were married in Long Beach, Long Island on November 23, 1963—the day after President Kennedy [JFK] was assassinated. We watched the murder of Lee Harvey Oswald on live TV the next morning in our honeymoon suite at the Waldorf Astoria. The Kennedy years and trauma colored both of our lives.

Q: In New York, was your wife studying or working?

FELDMAN: She was working as a journalist and copy editor. Marcia was a brand-new graduate looking to make a career in writing. Like so many female English majors in those days, she made very little money, but she progressed quickly in her career. Before

we moved to DC in 1965, she became the editor of the NYC edition of *Where* magazine, which became a nationwide publication distributed in hotels. In Washington, years later, she became a successful association executive, with the Holocaust Memorial Council and, then, the Association of Trial Lawyers of America. She was press spokesman for the Air Traffic Controllers during the 1981 strike.

Sadly, Marcia died young of breast cancer in 1996. Fortunately, I have another, wonderful woman in my life, Miriam [Mimi] Feinsilver. We have been together since 2001. She managed fulfillment for the Biblical Archeological Society.

Q: You have two daughters?

FELDMAN: Yes, one PhD [doctorate of philosophy] and one MD [doctor of medicine], and two grandchildren. My first born, Ilana Feldman, teaches in the Anthropology Department and the Elliott School at George Washington University [GWU]. She recently served as interim dean of the Elliott School. My younger daughter, Rachel Feldman, lives in Fort Collins Colorado where she practices internal medicine. Her son, Matan Birnbaum, is a freshman at Occidental College in LA; her daughter, Ariel Birnbaum, is a high school senior going to Vassar in September 2022.

Q: So, let's pause there. During your life, did you feel that there were limits on you because you were Jewish?

FELDMAN: There have been enormous changes in my lifetime, for women, for blacks, for Jews, for lots of people in America. When I was growing up in Rochester, New York, there were residential areas in Brighton barred to Jews as there were in DC. In 1976, I was able to buy a home in Spring Valley, a Miller development off Massachusetts Avenue, where the deeds still have restrictive covenants. Fortunately, they became unenforceable in 1954 thanks to the Supreme Court decision in *Shelley v. Kraemer*.

Prior to the 1960s, many American universities had quotas for Jews and some for Catholics, Wesleyan included. I experienced anti-Semitism as a child in upstate New York and some at Wesleyan, but the only time it affected me materially was in finding a legal position after law school. Jews were well represented on the Harvard Law Review, but many of the big firms interviewing students in 1959 and 1960 would not hire Jews. I wanted to practice in New York City [NYC], and there were not many positions in international private practice back then. The draft limited my options as well. I had made a preliminary commitment to eighteen months in the air force before learning that I was 4F [not likely to be drafted for medical reasons]. The bottom line was I couldn't find an international position in NYC and ended up practicing labor law with a Jewish firm, Kaye, Scholer, Fierman, Hays & Handler.

Q: So, it wasn't affecting you in Harvard per se, but as you started—

FELDMAN: Oh, at Harvard not at all.

Q: And were you like Ruth Bader Ginsburg, angry about those limitations at the major law firms, or was it just sort of what you have to do to get through?

FELDMAN: Ruth Bader Ginsburg was a phenomenon at the Harvard Law School. When I came to the Law Review, she had already moved on to Columbia, but she came back to visit. Was I angry? I suppose so. Anti-Semitism registers, and so did the Holocaust.

Q: So, you graduated in 1960, the year Kennedy was elected president.

FELDMAN: Yes. Harvard 1960 was the Kennedy class. JFK was a member of the Harvard University Board of Overseers and was on the platform at my graduation. He was running for president, and I couldn't take my eyes off of him. When JFK was elected, he brought a number of Law School faculty and students to Washington, doing all kinds of exciting work, ranging from the Peace Corps to domestic policy. One of my professors, Abram Chayes, became the legal adviser at the State Department, and two or three of my classmates went there with him.

Q: And Kennedy prompted the creation of USAID [United States Agency for International Development] as well as the Peace Corps at the same time in 1961?

FELDMAN: Right.

Q: So many people were touched at that time by the, "Ask not what your country can do for you." I expect you graduated with a great sense of wanting to do public service. Is that right?

FELDMAN: Yes. The JFK call to public service was key to my career. I discussed that calling—and my experience as a State Department lawyer—with Jeffrey H. Smith in a webinar hosted by the Washington Foreign Law Society on February 18, 2021: <https://wfls.org/event/inside-the-room-attorney-diplomats-at-work-on-u-s-foreign-relationships/>

Q: What made you decide to try to work for the State Department?

FELDMAN: Well, I had a life-long interest in foreign relations and kept in touch with friends at State who were working on the Cuban Missile Crisis, while I was doing factory arbitrations at Mack Trucks in Hagerstown, Maryland. One day in 1964, Lyndon Johnson announced on TV that one of my Harvard professors, John McNaughton, was now in charge of Vietnam policy as assistant secretary at the Department of Defense. McNaughton gave me an A plus in his course on agency at Harvard. So, I imagined he would remember me and together we would solve the Vietnam War.

Q: (laughs)

FELDMAN: I decided to visit Washington to see what positions might be available to me and did that in December 1964 during the Christmas holidays.

Q: Were you successful in getting in to see McNaughton in DC?

FELDMAN: Yes. Let me provide some context for my decision to come to Washington. In the 1950s and '60s, following the bloody Korean War, the United States was locked in a dangerous cold war with the Soviet Union that threatened to become a hot war, possibly involving nuclear weapons. The Berlin crisis caused JFK to mobilize reserves and deploy forces to Germany, and the Cuban Missile Crisis in October 1962 was a close brush with nuclear war. Vietnam was heating up and U.S. engagement there was becoming controversial, but few foresaw the morass it would become or the shattering impact it would have on American society. To my mind, the security implications of losing Vietnam to communism were not clear-cut, but I shared the Washington outlook that saw Vietnam in terms of the global conflict with the Soviet Union and China. From that perspective, I believed international peace depended on respect for the cease-fire lines established in divided states, including Korea, Germany, the Taiwan Straits, and Vietnam. I wanted to work on these issues and to make a difference.

Q: But let's go back to that day at the Pentagon, December 1964.

FELDMAN: As discussed in the Washington Foreign Law Society webinar, I met with McNaughton at the Pentagon briefly on a Saturday morning. The office was a madhouse, and he had little time for me. I learned that morning that President Johnson had decided to commit combat forces to Vietnam; DOD [Department of Defense] was being mobilized to carry out that mission. [Marine divisions were deployed in March 1965.] McNaughton handed me off to a uniformed officer who took me around the Pentagon that day, so I had a good view of the frenzied activity. My most memorable takeaway was the officer's angry perspective that the U.S. Army was not trained for counter-insurgency; the U.S. would not win; and the army would be blamed for the failure. [Sadly, John McNaughton died in an air crash on July 19, 1967.]

Q: Memorable, for sure. And so those meetings over Christmas led you to decide to talk to your friends at the State Department?

FELDMAN: By that time, Abram Chayes, Kennedy's legal adviser, had left the State Department; his deputy, Leonard Meeker, a brilliant career attorney, became the legal adviser.

Q: And did you know him?

FELDMAN: No, but I knew other members of the office [called L in State Department nomenclature] and had been Law Review at Harvard. Meeker offered me a job as a staff attorney in the Far East office, L/FE, at a GS-14 rank, and I accepted.

Q: So, that's a different route than joining the Foreign Service through the State Department exam, right?

FELDMAN: Right. Then, I had to tell my law firm, my wife, and her parents that we were moving to Washington. It took months to process the security clearance, and I started at State in May 1965. The transition to the State Department was a bit bumpy, to say the least. First, I had to take a pay cut.

Second, I had expected to work for Carl Salans, an inspiring leader in L, but Carl had been promoted to the Front Office. The new assistant legal adviser for Asia [L/FE], George Aldrich, was not yet on board. And there was no desk for me; this was a big problem in those days. There wasn't enough office space and not enough resources.

Q: I remember, even two decades later, having to go into these little hallway cubby holes for the lawyers that had been turned into office space for four and lots of papers stacked up, things like that.

FELDMAN: One of the more junior attorneys had to give up his office for me. That was not pleasant. It was a terrible way to begin. And the worst thing was that the senior deputy, a man named Dick Kearney, who was very highly regarded, said, "I've got a labor lawyer here. I want you to work on grievances."

Q: No!

FELDMAN: The case involved the Truman loyalty oath that was required due to the McCarthy anti-communist crusade. Apparently the department still had a few cases kicking around. I refused to do it, and paid a price for that—it delayed my promotion to GS-15, but I never regretted the decision.

Q: Can you explain what the legal adviser's office's job is relative to the geographic bureaus? You were in the Legal Office supporting the Far East Bureau [FE], which became EAP [Bureau of East Asian and Pacific Affairs] later. What was your job?

FELDMAN: The Office of the Legal Adviser [L] advises the secretary of state and all of the bureaus and offices in the department from the top down to the country desk. The office is generally organized on regional and functional lines parallel to that of the department's geographic and functional bureaus so as to afford a close attorney-client relationship with all elements of the department. The big changes, compared to my day, are one, the Legal Office is much larger now—over two hundred attorneys compared with around ninety, and two, we only had a few people working on administration. Today, I'm told, management is the largest group by far.

I began work as a staff attorney advising the Bureau of Far East Affairs then led by Assistant Secretary Marshall Green. A short time later Bill Bundy came over from the Pentagon to take on that job. L/FE was invited to the FE weekly staff meeting. At my first staff meeting, I was surprised to learn that senior department officials, including Green and Secretary Dean Rusk, then believed that China was responsible for initiating and powering the Vietnam War. I did not hear much about the Sino-Soviet split in those days.

Both China and the Soviet Union provided substantial supplies to Hanoi to support the war effort against the United States, but today most people understand Ho Chi Minh's role and the determination of the Vietnamese Communist Party to unify the country under their control. Ironically, I was on a U.S. mission to China in 1979 during a border war between China and communist Vietnam and later worked with a New York attorney, James Withrow, who spent time with Ho Chi Minh for the OSS [Office of Strategic Services] during World War II.

Early on, I went to the files to read about the history of U.S. engagement in East Asia. Among other things, I checked out Alger Hiss's handwritten notes on the drafting at Dumbarton Oaks of Article 51 of the United Nations charter on the right of self-defense [L/Treaty office's safe], the Treaty of Peace with Japan [1951] and the Truman administration's response to the invasion of Korea. These materials were then kept in boxes in the State Department basement. Truman and Dean Acheson thought the invasion was Stalin's enterprise and a prelude to an attack on Japan. I also looked for policy papers leading to our commitment in Vietnam. One of the most important was a study by Walter Rostow [then in the White House] and General Maxwell Taylor that predicted Hanoi would match each commitment that we made requiring escalation over time and leading to our bombing of North Vietnam with B-52 bombers [Operation Rolling Thunder]. Rostow and Taylor believed that Hanoi could not match the bombing and would quit.

L/FE [L/EA]: May 1965–Fall 1967

Vietnam

Q: Mark, let's talk about your early projects in the Office of the Legal Adviser.

FELDMAN: As a staff attorney in L/FE, serving under George Aldrich, I worked on a wide range of projects involving Japan, China, and Southeast Asia. Let's begin with the Vietnam War. My most important assignments in that area involved one, treatment of prisoners in North and South Vietnam, and two, rules of engagement for U.S. forces, including the use of riot control agents in Vietnam, targeting along the Ho Chi Minh trail in Laos, and Cambodian neutrality.

Q: Let's start with prisoners of war [POWs]. That was very important.

FELDMAN: As you know, the United States lost a lot of planes over North Vietnam. A number of pilots were killed, and the fate of those who were captured, like John McCain, became a major issue in the media and in U.S. diplomacy. Hanoi abused the prisoners, exploited them for propaganda purposes, and threatened war crimes trials. The Johnson administration was determined to protect the pilots as much as possible and pressed North Vietnam to provide humanitarian treatment in accord with the 1949 Geneva Conventions. Obviously, this effort also called attention to our treatment of NVN [North Vietnamese] and Viet Cong [VC] captured in South Vietnam. Averell Harriman was put in charge of these issues, and I was assigned to work with him on the legal aspects.

Q: Now, Averell Harriman was in his seventies at this point, right?

FELDMAN: He was not young. Averell Harriman was a remarkable individual, with a brilliant career. He had been Franklin Delano Roosevelt's ambassador to Moscow, governor of New York, and a presidential candidate. My recollection is that he first joined the Kennedy administration as assistant secretary for Far Eastern affairs. In the Johnson years, he had a special status in the State Department with the rank of ambassador. When I joined the department in May 1965, he was leading the U.S. response to diplomatic initiatives by developing countries to make their weight felt in the United Nations. Later, he led Lyndon Johnson's effort to negotiate peace in Vietnam before the 1968 elections.

My work with Ambassador Harriman related mainly to North Vietnamese maltreatment of captured American pilots. This was a big deal. *Life* magazine devoted a whole issue to that problem. One dimension of U.S. policy was to ensure that prisoners taken in combat by our side were treated well and to establish a firm legal and political posture for insisting that North Vietnam comply with the 1949 Geneva Conventions. U.S. forces were in Vietnam at the request of the Republic of Vietnam [South Vietnam] to participate in collective self-defense of a SEATO [Southeast Asia Treaty Organization] ally. Consistent with that position, U.S. forces transferred captured North Vietnamese and Vietcong to the ARVN [the South Vietnamese Army]. The U.S. role, through Embassy Saigon and the U.S. Army Command in Vietnam [MACV], was to guide and support South Vietnam in establishing procedures and facilities for detainees that would meet international standards represented by the International Committee of the Red Cross [ICRC].

Q: What were the issues?

FELDMAN: The sensitive issue that troubled JAG attorneys [Army Judge Advocate General's Corps] at the Pentagon was that the Viet Cong were a guerrilla force that did not comply with the requirements for prisoner of war status under the Third Geneva Convention; they didn't wear uniforms and did not comply with the rules of land warfare. In the normal course, they would not have been given POW status [this is the reason we did not give the Taliban POW status in the war in Afghanistan years later]. Nevertheless, I believed—and my superiors in L and Ambassador Harriman agreed—that it was in the U.S. interest to treat captured Viet Cong as POWs in order to ensure proper treatment by South Vietnam and to maximize our limited influence with Hanoi. After all, there was no doubt that the VC was an organized military force, supported by regular NVN troops, engaged in open conflict with U.S. and allied forces. I didn't think it tenable to treat their use of force as illegal activity for purposes of the humanitarian law of war. There was rising opposition to the war at home, and we did not need another issue that might further erode public support for the war effort. Accordingly, the decision was made—over the opposition of my JAG counterparts at DOD—to apply the Geneva Conventions to both NVN and VC detainees.

Q: How did you manage that?

FELDMAN: Well, the JAG lawyers at DOD take these issues very seriously, and they had theory on their side. But once I put this idea to Averell Harriman, he made it the policy. I don't remember any opposition in the State Department, but a great deal of interagency drafting was required to get the paperwork done. There was push-back, but we persisted. The ICRC was very pleased, and the JAG leadership enjoyed the success.

Q: Did this work take you to Vietnam?

FELDMAN: Yes, briefly. At one point, Frank Sieverts, who worked prisoner issues for Harriman, made arrangements with the Far East Bureau for a mission to Vietnam to look at a new POW camp being opened at Bien Hoa and to consult with the embassy and MACV. For some reason he decided not to go, but I was authorized to make the trip and spent a few days with the embassy in Saigon. That was a fascinating experience; it gave me a glimpse of Vietnamese life and some feel for the hectic situation in the rear echelon. There was still a hint of the French colonial past in Saigon then.

Everything at the Bien Hoa camp looked fine. The system was working as intended, but there was still a challenge protecting detainees after capture. I was told that the South Vietnamese army often would throw captured VC out of helicopters. Further, I was not allowed to visit the "tiger cages" where certain VC were detained for interrogation. I flagged these problems in a trip report for the legal adviser, Leonard Meeker, and he discussed them with Secretary Rusk, but I don't know that anything came of it. I should say that the embassy did everything necessary to support my mission, but Phil Habib, who was the political counselor at the time, made a point of telling me that the embassy did not like "visiting firemen."

Q: So, you had political cover, with Harriman involved in this?

FELDMAN: Yes, but this experience shows that government lawyers working technical aspects of foreign policy can make a difference. The circumstances in Afghanistan and Iraq following 9/11 were different, but the use of torture and the abuses at Abu Ghraib undermined support for the war at home and abroad. The Bush administration would have done better to follow our example in Vietnam.

Q: Did you want to say anything else about Averell Harriman?

FELDMAN: Just a couple of anecdotes. Averell Harriman, like Henry Kissinger and Elliot Richardson, was a magnetic personality who attracted cohorts of loyal aides, many of whom rose to important positions in government. They admired him greatly but also enjoyed his eccentricities. I observed two that were legendary. First, if he became bored at one of those long interagency meetings, he would turn off his hearing aid.

Q: (laughs)

FELDMAN: That was a signal that you should move on to something else. Second, as you know, Harriman was a wealthy man. But, famously, he never carried any money. So, if you were with him and had to get a cab, it was on you.

Q: That is a wonderful story. Are you ready to move on to riot control agents?

FELDMAN: Yes. I spent a lot of time on this issue.

Q: Why don't you explain what the issue was.

FELDMAN: Sure. I don't need to remind anyone that there was extremely active opposition to the Vietnam War in the United States. Everything the administration did was attacked, and everything the administration said was distrusted. Some of the criticisms were valid, but many were not—particularly the claims that U.S. intervention in Vietnam was unconstitutional and in violation of international law. One issue, among many, was the charge that the use of tear gas—domestic riot control agents such as CS and CN—against enemy forces in the field violated the 1925 Geneva Gas Protocol adopted after World War I to prohibit the use of poison gas in warfare. The United States had not yet become party to this treaty, but the charge that we were violating an important international norm damaged public support for the engagement. Moreover, the United States had a strong interest in maintaining the ban against the use of poison gas in international armed conflict and, potentially, in adhering to the Geneva Gas Protocol.

Q: Why was tear gas such a big issue?

FELDMAN: The tear gas controversy was a bit surprising as these agents were widely used domestically in the United States and worldwide. U.S. forces in Vietnam used napalm as well. Ironically, napalm was not generally attacked as a violation of international law at the time, and L was not asked to address that issue or the use of Agent Orange as a defoliant. Given the public controversy over tear gas, however, L/FE was asked to address the status of riot control agents under the Geneva Gas Protocol. In my time, State Department lawyers rarely had time to do serious legal research, but this issue required in-depth review of the negotiating history of the Geneva Gas Protocol to address, among other things, differences between the English and French texts. Based on that research—I was not permitted to spend additional time reviewing the negotiating records of the Treaty of Versailles—George Aldrich and I collaborated on a memorandum concluding that international law did not preclude use of riot control agents CS and CN in combat [DM, was treated differently], but recommending restrictions on use to avoid collateral violations of international law relating to the treatment of wounded or disabled combatants. See *International Law Restraints on the Use of Non-Lethal Gases in Combat*, September 27, 1965, National Archives, File R59 Agent Orange [Special collection] 1961–74, Box 1, Chemical and Biological Weapons, Vietnam 1965–66; Memorandum from Mark B. Feldman to George H. Aldrich, September 22, 1965. The State Department supported that approach and President Johnson approved new rules of engagement requiring high level case-by-case approval.

Q: So, that was significant.

FELDMAN: Well, that's just the beginning of the story.

Unbeknownst to the lawyers, General Westmoreland objected to case-by-case approval in October 1965, and General Wheeler, chairman of the Joint Chiefs, reopened the issue. Bottom line: Our research was used to support approval for tear gas without the recommended precautions. I did not learn of this reversal until much later. Some of the military correspondence has been declassified and is available at the archives. See Westmoreland to Wheeler, Wheeler to Westmoreland, October 25, 1965 [re Plei Me]. This issue remained controversial when the United States finally ratified the Geneva Gas Protocol in 1975. At that time, the Ford administration stated that presidential controls on the use of riot control agents were then in place:
<https://2009-2017.state.gov/t/isn/4784.htm> Based on my experience, I would question that.

Q: Did you want to talk about George Aldrich?

FELDMAN: George Aldrich was a superb lawyer and a very good boss. I learned a lot from him. If my legal advice was a bit too challenging, he would find a softer way of making the point. In 1981, I nominated him as a judge on the Iran Claims Tribunal. The incoming Reagan administration wanted to get him out of town because he was deeply involved in the ongoing negotiations of the Law of the Sea Treaty that they despised. George spent the rest of his long career with the Tribunal in The Hague and, sadly, passed away recently.

Q: Now, you also mentioned that Ambassador Lodge was concerned about U.S. contractor personnel in Saigon; they must have been doing bad things because at one point he wanted to arrest them. What was this issue?

FELDMAN: One night I was awakened by a call from the State Department Operations Center informing me that they had received a cable from Ambassador Lodge addressed to the "Secretary of State, Personal, Eyes Only, No Other Distribution." Ambassador Lodge was asking Secretary Rusk for authority to arrest U.S. civilian contractor personnel who were present in Saigon in huge numbers and were not subject to police authority by Vietnam or the U.S. military. Some of them were going wild and creating serious difficulties for the embassy. This was the '60s and we had a lot of young men in a war zone: drugs, booze, fights, and much else. You can imagine. I was asked to prepare a memorandum for the secretary addressing the ambassador's request. I had to tell him that the State Department had no legal authority to police American civilians in Vietnam. There was a serious gap in U.S. legal authority that required congressional action to fix. Congress did not act for decades, and significant gaps persist to this day.

Q: So, these are contractors paid for by DOD?

FELDMAN: Many were, but they could be working for any U.S. agency. We were doing all kinds of things in theater. There was an enormous amount of construction going on. USAID had a large presence. We were supporting troops from the international coalition, e.g., flying kimchi from South Korea for their forces, et cetera.

Q: Okay. Can you describe other times where you were proactive on Vietnam?

FELDMAN: Well, soon after my arrival at State in 1965, I happened to see a classified memorandum from Air Force General Curtis Le May recommending strategic bombing of North Vietnam on the lines of his strategic bomber command in World War II. I was horrified and new to the job—not schooled in bureaucratic procedure—so I wrote Assistant Secretary William Bundy a memorandum outlining my legal concerns and policy objections and classified it Top Secret. He must have been amused at my presumption. In due course, the legal adviser gently cautioned me to consult with the Front Office on matters of this kind.

Q: You were still learning your way.

FELDMAN: I was learning my way, and I carried that problem with me throughout my government service.

Q: (laughs) You cared a lot.

FELDMAN: While I'm on this theme, department regulations include an elaborate procedure [called Circular 175] requiring prior authorizing for negotiation of any international agreement. The action memorandum is to be accompanied by a memorandum from L analyzing the legal authority for the agreement and considering whether the agreement is to be made as a treaty or as an executive agreement. This is supposed to be done before—

Q: Before you negotiate.

FELDMAN: Yes. It doesn't always happen. One day early in my service, I saw cable traffic from the U.S. ambassador to Thailand, an experienced diplomat, telling the bureau that he needed authorization to sign an agreement with the Thai government the next day establishing a Voice of America station in that country. My first reaction was to look in the files for the Circular 175 authority. But there was no file on this subject. So I consulted with the bureau and drafted a cable for the senior DAS [deputy assistant secretary] telling the ambassador we have to do some paperwork to obtain approval by the secretary of state. The ambassador's response was to call the DAS in the middle of the night. Bottom line: the DAS authorized the agreement immediately without Circular 175 approval, and I got chewed out—a useful lesson for a young attorney.

Q: Well, I hope you'll be happy to know that throughout my career, every time I forgot the C-175 for even a little while, the lawyers would make sure that we slowed down and respected the need to get it. I learned over the years never to forget because you know,

when you end up with this problem at the very end of a negotiation it's uncomfortable. (laughs) Well, let's go back to rules of engagement. You mentioned in your webinar that rules of engagement are an important subject for government attorneys, civil and military.

FELDMAN: Yes. Rules of engagement are critical, as in the case of riot control agents. Let's begin with the American Friends plan to send a mission to North Vietnam by sea to demonstrate their opposition to the war. As I recall, the ship was named the Phoenix, and it was going to sail across the Pacific to Haiphong Harbor. At that time, the U.S. had a major naval presence in the area, bombing North Vietnam and engaging NVN [North Vietnamese Navy] ships carrying supplies to South Vietnam. Washington was not crazy about the Friends' anti-war propaganda, but was deeply concerned to avoid any harm to the Phoenix. That would have been a humanitarian and public relations disaster. The policy was to notify fleet commanders of the Phoenix mission and to instruct them to look out for the vessel and prevent harm to it. I was asked to draft rules of engagement for that purpose to be wired to fleet commanders through DOD channels. Of course, I felt good about that assignment, and I had the unusual opportunity to read those same instructions in real time at CincPacFleet [Commander in Chief, Pacific Fleet] in Pearl Harbor as I passed through Hawaii on my way to Japan for negotiations on Micronesian World War II claims. I got a big kick out of seeing my work product in action.

Q: How wonderful. But the war was spreading. Is there anything you want to say about your involvement with the war in Cambodia or Laos?

FELDMAN: Yes. Cambodian neutrality under Prince Sihanouk was a contentious issue in the department throughout the Vietnam War and exploded into public view in 1969 when the Nixon administration authorized the expansion of military operations into Cambodia to curtail NVN use of that area to carry out their operations in South Vietnam. During my service in L/FE [L/EA], 1965–1967, there was a lot of tension between the lawyers and the country desk. L was protective of Cambodia's position as a neutral state; the desk was inclined to regard Sihanouk as a pawn of North Vietnam. George Aldrich and I wrote a memorandum addressing the neutrality issue in September 1967, Summary excerpted here:

“Proposals to Inhibit NVA/VC Exploitation of Cambodian Territory.

The Joint State/DOD/CIA Study Group on Cambodia is presently considering proposals for certain diplomatic and/or military actions to inhibit or guard against enemy exploitation of Cambodian territory. L/EA has been asked a number of pertinent questions concerning the legal rights and obligations of so-called neutrals and belligerents under contemporary international law. These questions are answered in the memorandum attached at Tab A.² The basic conclusions are [1] a neutral is obligated to take measures within its power to prevent the movement of forces or the establishment of bases on its territory by the parties to the conflict; [2] violations of a state's neutrality and territorial integrity by one party to an international conflict do not justify violations by opposing parties; [3] participants in international conflict, including those who are

engaged in collective defense against armed attack, may not take military actions on the territory of a neutral third country except in self-defense against armed attack; and [4] pacific means of settlement must be exhausted before the conflict is extended to a “neutral” state.”

Mem. From Assistant Legal Adviser [Aldrich] to Assistant Secretary of State for East Asian and Pacific Affairs [Bundy], Doc. 208, FRU.S. 1964–1968, Vol. XXVII, Mainland Southeast Asia, Regional Affairs.

Later on, as NVN abuse of Cambodian territory increased, the Nixon administration relied on the principle of collective self-defense to attack enemy forces on the territory of a neutral state that is unwilling or unable to prevent ongoing use of its territory by a belligerent.

Q: What about Laos?

FELDMAN: Laos was interesting in that you had combat operations in country with the consent of the ruler, Souvana Phouma, who insisted on deniability—the so-called “secret war” in Laos. The Ho Chi Minh Trail through Laos was the major supply line for NVN/VC operations in South Vietnam. The U.S. bombed the trail intensively without stopping the flow. You could see images of our bombing on TV, but we had promised Souvana Phouma not to confirm U.S. actions in Laos. Our press guidance was to neither confirm nor deny.

State Department lawyers became involved, because the bombing in Laos was coordinated by the U.S. ambassador to Laos, William Sullivan. In my recollection, specific targeting was initiated in the field. Sullivan would cable FE for approval, and the bureau would bring L/FE into that process. I reviewed these missions with DAS Leonard Unger.

Q: So, the targeting would be against particular individuals or against particular villages or—?

FELDMAN: Military targets only. The main concern was to observe the humanitarian law of war, to minimize collateral damage to civilian populations and to medical, and humanitarian facilities. Sometimes this involved balancing the military importance of the target—e.g. a truck park or artillery battery—against the risk of hitting a civilian facility in the area. This was an early version of the elaborate targeting reviews developed in the Afghanistan and Iraq wars.

Q: Can we talk a bit about the lawyers’ role in defending the legality of the Vietnam War?

FELDMAN: Certainly. In my experience, State Department lawyers had limited influence on major presidential decisions to initiate military operations abroad. When lawyers were consulted, however, their job was to ensure that policy makers understood the legal implications—domestic and international. And the legal adviser has a major role

in shaping the legal rationale for the use of force abroad both to promote public support and to minimize negative impacts on the evolution of the international law of war, which is called *jus ad bellum*. In Vietnam, domestic authority was based on the SEATO Treaty, the Tonkin Gulf Resolution, and congressional appropriations; compliance with international law was based on the right of states to collective self-defense recognized in Article 51 of the UN Charter. These points were disputed by opponents of the war, and one dimension of our work was to participate in the public debate. I often helped with press guidance, congressional testimony and speeches. Also, I made a number of public presentations and sometimes met with opinion makers and critics.

Q: Are there any highlights you want to mention?

FELDMAN: Sure. Working with Arthur Hartman, then senior assistant to Under Secretary Nicholas Katzenbach, I added a sentence to a Katzenbach speech saying that “the Tonkin Gulf Resolution was the functional equivalent of a Declaration of War.” This was legally sound, but created a furor on the Hill. A lot of politicians wanted to forget they voted for the use of force in Vietnam.

And, I met a lot of interesting people, including Daniel Berrigan.

Q: Who is Daniel Berrigan?

FELDMAN: The Berrigan brothers, Phillip and Daniel, were both Jesuit priests and prominent opponents of the Vietnam War. Daniel Berrigan was an intense man with very strong feelings who was often in the forefront of aggressive public protests. He was deeply convinced that the war was morally wrong and he supported civil disobedience. I was asked to meet with him and was happy to do so because he was a serious person. To me, the issues were much more nuanced, and I wanted to engage with him intellectually.

We had a long discussion, and I shared my views concerning the rule of law and how policy is made in a democratic society. He said that my arguments were nonsense, nothing to do with rights and duties, just politics.

Q: (laughs)

FELDMAN: I didn’t expect to get anywhere with him, but I thought it was important to listen to American citizens with a different point of view and hoped he might appreciate that government servants also had principles.

Q: Before wrapping up on Vietnam, did you have a comment about the Tet Offensive?

FELDMAN: Yes. The Tet Offensive took place on January 30, 1968. Around that time, Leonard Meeker, the legal adviser, was invited to participate in a war game on Vietnam in the Joint Chiefs command center at the Pentagon, the “tank.” I was no longer working on Vietnam at the time, but he invited me to accompany him. As I recall, the topic that year was whether the United States and the Republic of Vietnam should enter into negotiations

with North Vietnam, if that should be put on offer. This was a live issue within the U.S. government with U.S. presidential elections coming up in November. Meeker was assigned to the red team [representing the enemy], and I was to back him up. What I remember most clearly is that the military officers on the blue team were confident of victory and strongly opposed negotiations at this stage. They thought we had the VC on the run and should keep the pressure on. In their view, negotiations would limit the force we could apply in Vietnam and allow the enemy to regroup. I remember Leonard Meeker saying to this group: “Well, if you are right and I’m the Viet Cong, what I do now is attack you everywhere as hard and as rapidly as I can.” I don’t think anybody took that seriously, but the next day the war game was terminated. The Tet Offensive was underway taking the United States completely by surprise.

Q: Life and simulation merge together at that point.

FELDMAN: The Tet Offensive was the turning point in the Vietnam War, undermining public support for the war, ending the Johnson presidency and leading inexorably to the withdrawal of U.S. forces and the end of the Republic of Vietnam. Many in the military stressed that our forces had repulsed the enemy and ultimately won the battle, but the damage was done. I should also say that Bill Colby, who led Operation Phoenix, the covert CIA [Central Intelligence Agency] war against Viet Cong cadres in the villages of South Vietnam, felt strongly that the U.S. had won the war with the VC.

One personal note about Vietnam: As a sophomore at Wesleyan University, 1954–55, I had an economics instructor named Nguyen Xuan Oanh. Following the murder of President Diem in 1963, Mr. Oanh twice became acting prime minister—for five days in September 1964 and nineteen days in February 1965. He was jailed after the fall of Saigon, but later became a member of parliament and an economics advisor to Hanoi.

Q: Okay. Looking back, what are your thoughts about Vietnam? You spoke to that in the webinar sponsored by the Washington Foreign Law Society on February 18, 2021: <https://wfls.org/event/inside-the-room-attorney-diplomats-at-work-on-u-s-foreign-relations/>

FELDMAN: There were a number of structural problems that led to our failure in Vietnam: one, the government in Saigon was increasingly weak, unpopular, and corrupt; two, the Viet Cong had considerable support in the countryside, and our tactics drove more people into their ranks; three, our military was not competent in counter-insurgency, and our tactics were reprehensible: a) using our troopers as targets to draw fire from the jungle cost thousands of lives; b) burning villages and forcing the population into strategic hamlets was morally wrong and counter-productive. We made similar mistakes in Afghanistan leading me, late in life, to develop doubts about the competence of the United States government/political system to deal with challenges like this in faraway lands.

Singapore

Q: We did a good overview of your work on the Vietnam War. I'd like to address a matter that you worked on early in your tenure—when Singapore split off from Malaysia.

FELDMAN: Sure. When I joined the department in May 1965, the city-state of Singapore was one part of the Malaysian Federation, a nation that had come to independence after a bitter guerilla war against the colonial power, Great Britain. Unfortunately, there were political and ethnic tensions between Singapore, an urban, economic powerhouse populated largely by ethnic Chinese, and the other Malaysian states, more rural with a Malay majority of Muslim faith. Following months of tension and riots, the Federation decided to separate from Singapore. After a week of hasty, secret negotiations Singapore became an independent state on August 9, 1965, pursuant to a separation agreement signed by the two governments. As I recall, the department was a bit surprised and initially unsure how Singapore would react. In short order, however, the decision was made to recognize Singapore as a new state, and I was asked to prepare the paperwork.

Q: How did you approach this task?

FELDMAN: Being new to the State Department, I had no idea what was appropriate. Looking at our files and at U.S. diplomatic practice as recorded in Whiteman's *Digest* [and prior], I found that generally the U.S. recognized a new state, as opposed to a new government of an existing state, by a formal communication at the head of state level, i.e., from the president to the foreign chief of state. That route was problematic in this case, because it involved working the White House bureaucracy. The FE Bureau wanted to act quickly to show support for Singapore's leader, Lee Kwan Yew, and there were questions about what actually had taken place. So, I drafted a first person note from the secretary of state to the Singapore minister of foreign affairs which was sent to Singapore for delivery and was read to the press in Washington on August 11, 1965. See *Department of State Bulletin*, August 30, 1965, p. 357. The note was well received, and no one questioned the protocol.

Japan: Return of Iwo Jima

Q: And then, you also worked on some bigger projects related to Japan, right?

FELDMAN: Yes. A major focus of my work in L/FE involved open issues arising under the 1951 Treaty of Peace with Japan, including the return of Iwo Jima to Japan, preliminary work on the return of Okinawa to Japan, and negotiation of an agreement with Japan on payment of Micronesian claims for damages during World War II. The Treaty of Peace with Japan is a remarkable instrument, and I did a lot of work with it in the early days of my service at State. The treaty granted the United States control of a number of island groups captured by our forces during the Pacific campaign, but Article III recognized that Japan retained residual sovereignty over those islands leaving open the possibility that they might be returned to Japan at some future date.

Q: What does that mean, residual sovereignty?

FELDMAN: It means that while the United States was granted plenary jurisdiction over these islands and exercised functional sovereignty there, the islands did not become U.S. territories under U.S. or international law. The same regime applied in the former Panama Canal Zone and at Guantanamo Bay. Japan, Panama, and Cuba each retained formal sovereignty, but the right to exercise any aspect of that sovereignty was suspended. In the case of Japan, the U.S. wisely allowed the conquered enemy to keep their Emperor and territorial integrity—at least symbolically.

Q: So, these are islands that the United States captured during the war?

FELDMAN: Correct.

Q: And some of those may have been originally Chinese that the Japanese had invaded during the earlier part of the war or before World War II began?

FELDMAN: Some islands involved are claimed by China; I'm not sure when they came under Japanese control. I was not involved in the decision to return Iwo Jima to Japan; no doubt that matter had been under negotiation for some time. The battle for Iwo Jima had tremendous emotional meaning for the American people and for the Japanese, so the decision was highly symbolic. When the decision was made, I was asked to draft an agreement between the two countries and became involved in negotiations with attorneys in the Gaimusho, the Japanese Foreign Ministry. The text was formalized in an exchange of diplomatic notes, "Nampo Shoto and other Islands," April 5, 1968, TIAS 6495.

Q: By executive agreement, not by treaty?

FELDMAN: My first task was to figure out how to accomplish the transfer of control under international law and U.S. constitutional practice. Could the executive do this on its own authority or would a treaty be required involving Senate advice and consent? Looking in the files, I found a precedent; some years before, President Eisenhower had returned the Amami Islands to Japan by executive agreement under the authority of Article Three of the Treaty of Peace with Japan. I adopted that model for Iwo Jima. Japan agreed, and the deal was done. I don't recall any challenge to the legal procedure at the time. Some months later, however, Senator Fulbright, chairman of the Foreign Relations Committee, wrote a stern letter to Secretary of State Dean Rusk saying that he was unhappy that we had not used the treaty power and given the committee the opportunity to have hearings. Fulbright warned the secretary not to use an executive agreement for the return of Okinawa when that issue came up.

Q: So, in the case of Iwo Jima, we thought Article Three of the Peace Treaty authorized the executive to return these islands without congressional action?

FELDMAN: Correct.

Q: But in the case of Okinawa, Senator Fulbright insisted that there should be a new treaty?

FELDMAN: Strongly.

Q: For which the Senate would obviously have right of approval, as with any new treaty?

FELDMAN: It would have to give advice and consent by two-thirds.

Q: Right. And in fact, it did happen with Okinawa?

FELDMAN: Correct. It did, after I moved on to other duties. I did some preliminary research on issues related to the Ryukyu reversion and remember the country director was Dick Snyder—a very competent, tough guy.

Q: Do you think that if there had been more consultation with the Senate around Iwo Jima that Fulbright would have been less stern? These days we consult on everything with Congress, you know, to make sure we don't have that problem later.

FELDMAN: Perhaps, but I expect there were some consultations on policy.

Micronesian World War II Damage Claims

Q: Let's move on to the Micronesian war damage claims?

FELDMAN: The Micronesian Claims Agreement was an important part of my portfolio in L/FE and a very important part of my training as an international lawyer. It also introduced me to Japan, triggering a lifelong interest in the bilateral relationship and in Japanese history and culture. I visited Japan twice with Steve Schwebel, the lead negotiator, for three week negotiation sessions.

Q: Please introduce the issue.

FELDMAN: The Pacific campaign was total war. Japanese forces fought MacArthur's island-hopping campaign to the death; they would not surrender. Many battles were fought in island groups, like the Marianas, Carolines, and Marshalls, that later came under U.S. authority in the Trust Territory of the Pacific Islands [TTPI]. Long before Pearl Harbor, Japan had occupied the major population centers, particularly Saipan, Tinian, and the city of Koror. [The planes that carried atomic bombs to Hiroshima and Nagasaki were based on Tinian in the Caroline group.] We bombed these islands heavily before invading them. A great deal of damage was done to urban centers and agricultural land.

Q: And we had liberated the populations.

FELDMAN: Exactly. Unlike Japan, where we had a military occupation of a conquered enemy, the newly formed United Nations gave the U.S. responsibility for these Pacific islands in trust for the inhabitants. They looked to the United States, as trustee, for compensation for the damages suffered in the war. As you can imagine, Congress was not inclined to spend taxpayer money for damages in a war forced on us by Japan. We were victims of Japanese aggression and we were the liberators. Understandably, Congress insisted that Japan pay. Not surprisingly, Japan was strongly resistant. The Japanese people had suffered a great deal as well, and the government argued that Japan had met all its obligations to the United States in the Treaty of Peace.

Q: How did you get involved?

FELDMAN: That is an interesting question. At this point, I need to digress a bit to discuss some tensions that existed in the relationship between the lawyers in the department and their Foreign Service clients. When I first joined L, I was told that the clients did not always consult the lawyers when they should, and that it was sometimes necessary to be assertive to obtain access to meetings, to action memos, and to instructions being cabled to our embassies. The philosophy was that the legal adviser had broad responsibility to advise the secretary of state directly and that the office had an interest in information and input independent of the bureaus. As you might expect, some Foreign Service officers [FSO] looked at this differently. Micronesian claims were a good example.

As I recall, the Japan desk in the Far East Bureau had the primary task of preparing the U.S. position for these negotiations; the Bureau of International Organizations [IO] was also involved because of the UN Trusteeship. The desk needed an L clearance to move ahead, but when I mentioned doing a legal study they asked me not to. As a trained attorney coming from private practice, it was inconceivable to me to take a position on a major claims issue without studying the matter and documenting my conclusions. So, I dug into the history and prepared a long memorandum analyzing the issues. The desk was not happy, but they sent my memo to the secretary as an attachment to the FE action memo. I don't think there were any policy differences between L and the bureaus, and my study proved to be valuable when L was assigned responsibility for the negotiations with Japan.

In that connection, I should also mention that the action officer in IO told me early on that he was worried about staffing the negotiation. He thought the assignment required an attorney, but didn't think anyone in L was up to the job. He had someone in private practice in mind. That attitude surprised me, because the office was staffed with good lawyers at every level. In the end, Steve Schwebel, an assistant legal adviser at the time—later president of the International Court of Justice, was assigned to negotiate in Tokyo, and he asked me to assist him. In passing, I should mention that the IO officer in question was my friend Donald McHenry, one of the finest Foreign Service officers I knew, who later became Jimmy Carter's ambassador to the United Nations. Don was one of the few minority FSOs at the time.

Q: Oh, that's so interesting. So, you looked at it as purely legal and not as a negotiation that the State Department would handle through diplomatic channels?

FELDMAN: No, the agreement had to be negotiated. But in my experience, lawyers conducted those kinds of negotiations for clients.

Q: Got it. Okay, let's get to the substance.

FELDMAN: The U.S. proposed and Japan finally agreed on an ex gratia payment of ten million dollars to be financed by both governments equally in settlement of all claims for damages to the Micronesian inhabitants of the TTPI caused by World War II. The U.S. would make a monetary payment of five million dollars to be matched by a Japanese contribution of goods and services worth five million dollars. 20 UST 2654, TIAS 6224, April 18, 1969. The U.S. payment was authorized by Congress in the Micronesian Claims Act of 1971, P.L. 92-39, July 1, 1971, 85 Stat. 92.

To put this in context, researching this project I found that in the 1940s a naval lieutenant stationed in the area had proposed that we settle this matter for twenty-five thousand dollars. The navy rejected the idea out of hand for political reasons. Many years later, the U.S. had proposed an ex gratia settlement of five million dollars to be financed jointly by the U.S. and Japan, but that effort did not succeed. In the mid-'60s, we doubled the amount, confident that would be enough. Times change. In the 1980s, the legal status of these islands—and others—became a serious human rights/political issue along with the issues raised by U.S. nuclear testing in the area. In the process, attorneys representing the islanders reopened the war claims issue and managed to persuade Congress to appropriate a huge sum—on the order of a hundred million dollars, if memory serves.

Q: What were your impressions of Japan in the mid-1960s?

FELDMAN: When I first visited Japan, twenty years after Hiroshima, there were few signs of the devastation and poverty of the Occupation era, but Japan was far from the economic power it became in the 1980s. I was intrigued by the contrast between the modern urban society I saw in Tokyo and the very different traditions persisting in family and social life and by the beauty of Japanese arts and crafts. I visited Kyoto, slept on a mat in a *ryokan* (a traditional Japanese inn) and enjoyed the beautiful shrines, temples, and gardens. On my second visit to Japan, I ventured further into the countryside where Caucasians were a novelty. One time, a school bus stopped so the girls could take pictures with me. When I reached a lakeside resort in the cold off-season, the large hotel was practically empty, but the desk placed me in a remote, uncomfortable room; the better rooms—all empty—were reserved for Japanese. This attitude towards foreigners was common at the time.

Q: Did you see changes in later years?

FELDMAN: I loved visiting Japan and had several opportunities to visit over the years, including a three-week mission organized by the USIA [United States Information

Agency] in the Reagan years to lobby a range of Japanese constituencies for “free and fair trade.” My last visit was in 1989, when I served on a Fujitsu proxy board with Admiral “Bud” Zumwalt and Fred Ikle. On that trip, not long before the collapse of the Japanese economy, I was shown a fully-automated Toshiba TV production line. By that time, there had been many changes in Japan, but I never lost the feeling that underneath the prosperous, industrial surface, there remained a way of life that was quite different from ours.

Q: Back to the 1960s. Who was our ambassador then?

FELDMAN: U. Alexis Johnson, a prominent member of the Foreign Service. The conference rooms had green felt tablecloths, wired bookcases, and fine furniture. I felt like I was back in the nineteenth century. Johnson succeeded Professor Edwin Reischauer as ambassador. I never met Reischauer, but learned a great deal about Japan from his writings.

Q: Where did you stay in Tokyo?

FELDMAN: At the Okura Hotel, near the old embassy. I ate a lot of exotic food in Japan; it was nice to have a breakfast that I recognized.

China

Q: Would you like to move on to work you did on China during that period?

FELDMAN: Happily. Even in those days of confrontation with the People’s Republic of China [PRC], when we were struggling to maintain the diplomatic viability of the nationalist government on Taiwan, there were people in the department who were thinking about the day when we might be able to make some small step toward a relationship with the PRC. One FSO who followed China issues in those days was a man named Paul Kreisberg. He was an impressive guy who, sadly, died young.

Q: Did you work on a China project?

FELDMAN: At one point, someone asked L to review U.S. defense commitments to the Republic of China—not just the Defense Treaty that later became so controversial, but all the commitments made by senior officials in communiques, diplomatic exchanges, and the like. It was a big task. The situation in the Taiwan Straits was so tense that whenever there was a new administration in Washington, and every time there was a significant official visit, there would be a request for reaffirmation of U.S. policy relating to the security of Taiwan. I looked at most of these, many formulated by John Foster Dulles, and concluded that the executive had done a good job in drafting strong political commitments without making binding legal undertakings that might raise constitutional questions concerning presidential war powers. My memorandum reviewing these materials was classified Top Secret at the time. That classification would be hard to justify today, but I doubt that it has been declassified. It is difficult to obtain legal memos

under FOIA [Freedom of Information Act] in any event; I couldn't find many in the archives.

Q: Is that it for China?

FELDMAN: For now. We'll come back to China when we get to the Carter years. As deputy legal adviser in 1979, I was on the mission led by Treasury Secretary Michael Blumenthal to establish formal diplomatic relations with Beijing.

L/SCA: September 1967–September 1968

Q: How long did you work on East Asia? What was your next position?

FELDMAN: Until 1967, when I was appointed assistant legal adviser for Security and Consular Affairs [L/SCA]. That was my first promotion to a supervisory position, GS-16.

Q: What was your portfolio in that office?

FELDMAN: A large part of that work involved coordination with the Department of Justice concerning extradition of persons to and from the United States and some other criminal matters. We also worked with Consular Affairs [CA] and the Passport Office on sensitive visa and passport matters; they had their own lawyers for routine matters. The most exciting matters I worked in that office involved the extradition of James Earl Ray from London for the murder of Martin Luther King, Jr in April 1968 and U.S. ratification of the 1967 UN Protocol on Refugees which had the effect of binding the United States to the substantive provisions of the 1951 UN Convention on Refugees.

Q: That sounds exciting. What was the State Department's role in extradition cases and what did you do in the case of James Earl Ray? How did you get involved in that?

Extradition of James Earl Ray

FELDMAN: My main involvement with James Earl Ray was one, to counsel the governor of Tennessee that the department needed him to formally ask the secretary of state to request HMG [Her Majesty's Government] to surrender Ray to U.S. authorities pursuant to the terms of the U.S.-UK Extradition Treaty, and two, to draft the telegram the governor sent to Secretary Rusk. As background, U.S. extradition procedure is based on a federal statute and requires a treaty [bilateral or multilateral] with the foreign state involved. All extradition requests made to foreign states are formally made by the secretary of state, and the secretary must approve the surrender of any person extradited from the United States after the required judicial process. In this case, the shooting took place in Memphis, and the accused had fled abroad.

Q: Did James Earl Ray flee immediately after the assassination? To England?

FELDMAN: I don't remember the exact timing. He first fled to Toronto, Canada and then went to Great Britain with a passport under an assumed name.

The way the process works, there has to be a warrant for his arrest and a demand for extradition. As the shooting took place in Memphis, the first charges were brought by Tennessee. Ultimately, I think, federal charges were brought. What I remember best, is that the Justice Department borrowed an air force plane to fly Ray home from London and the air force was not paid. That problem persisted for years. I don't know how it was resolved.

U.S. Ratification of the 1967 UN Refugee Protocol

Q: Let's turn to refugees. That is a big issue today. What did you do in this area?

FELDMAN: The 1967 UN Protocol on the Status of Refugees was another hallmark of the imprint of Lyndon Johnson on American life.

Q: That's a pretty broad statement.

FELDMAN: Well, Lyndon Johnson was responsible for Medicare, for the Civil Rights Act, the war on poverty, and the Immigration and Naturalization Act of 1965, which transformed America by allowing Asian and other disfavored nationalities to immigrate to the U.S.

Q: Okay. What did the Refugee Protocol do?

FELDMAN: The protocol was a multilateral treaty that expanded the reach of the historic 1951 UN Convention on the Status of Refugees. The convention applied only to people who had been displaced by events before January 1, 1951. The protocol did not change the terms of the 1951 Convention, but it expanded the time frame and geographic reach of the refugee regime making it relevant to the whole international community. The United States had not become party to the convention, but adopted the regime by acceding to the 1967 Protocol.

Q: How did you become involved in this issue?

FELDMAN: One day a gentleman appeared at the door to my office and introduced himself as Graham Martin, special representative of the secretary of state for refugees. Ambassador Martin told me that he was charged with obtaining U.S. ratification of the Refugee Protocol recently adopted by the United Nations and that he had been directed to me for legal assistance. The problem he presented was that the federal agencies reviewing the terms of the 1951 Convention had raised concerns about a number of provisions in terms of consistency with U.S. law and had proposed a large number of reservations [effectively amendments] and understandings [interpretations]—around two dozen, if memory serves. A package of that size and complexity would have weakened U.S.

compliance with the UN refugee regime and greatly complicated Senate approval of the treaty.

At the end of the day, with the help of the Justice Department, I was able to eliminate all but two, highly technical, reservations that did not raise foreign policy issues. The United States became party to the Refugee Protocol on November 1, 1968, TIAS 6577, 19 UST 6223. In retrospect, although my role was limited, this project was probably one of the most significant of my career.

Q: What are the main provisions of the convention that the United States accepted by becoming party to the protocol?

FELDMAN: There are many provisions—the most important being the principle of non-refoulement, which is foundation for the right of asylum: if a person meeting the convention definition of “refugee” makes it to the border of a state, that state may not return the person to a country where he/she would be subject to persecution for reasons of political belief, religion, ethnicity, or membership in a particular social group.

Q: What do you think was the most important part of your work?

FELDMAN: Persuading the agencies that they could implement the protocol without amending U.S. law. Although I thought the protocol could be construed as self-executing [become domestic law without implementing legislation], the administration decided, for political reasons, not to advance that view. I should add that I found an earlier memorandum in the L/T files [the L office of treaty affairs] that raised concerns about the convention that I believed were unfounded. My colleagues agreed with me. During the Senate hearings in 1968, Eleanor McDowell, a highly regarded career attorney in the Treaty Office, testified that the executive had sufficient authority under existing law to implement U.S. obligations under the protocol and, in particular, that the attorney general had discretionary authority to parole refugees into the United States as need be.

By the time of those Senate hearings, I had moved on to other responsibilities as assistant legal adviser for American Republic Affairs [L/ARA] and was no longer following refugee issues. I should add that the Congress amended the Immigration and Nationality Act in the 1980s to codify refugee law, and that U.S. asylum practice has evolved considerably over time.

Q: We'll take up Latin America next time.

L/ARA: September 1968–1973

Q: Good morning. So, we've come to September 1968, and you find yourself advising and supporting the ARA Bureau.

FELDMAN: Yes, I had two clients in that capacity: the Bureau for American Republic Affairs, which included Mexico, Central and South America, and the Caribbean [not Canada], and the U.S. mission to the Organization of American States [OAS]. This position presented some of the most exciting legal work of my professional life, but it also brought challenges, because I did not speak Spanish. This was a significant handicap, particularly in the OAS, because Latin diplomats often insisted on speaking Spanish with their English-speaking counterparts.

Q: How did you come to be in that situation?

FELDMAN: Good question. I did not seek the position, and I was not given much choice by the Front Office. I was told that they wanted me to move from L/SCA to L/ARA quickly and without much explanation. My guess is that Dick Frank wanted to move on to L/EB. Over time, I came to understand two things: first, L/ARA had a bumpy history dating back to 1965 when the incumbent, Marjorie Whiteman, distinguished editor of Whiteman's *Digest of International Law*, got crosswise with the legal adviser over the U.S. invasion of the Dominican Republic; second, the Front Office thought that ARA would be relatively quiet as several major issues, including the Panama Canal treaties and the IPC [International Petroleum Company] investment dispute in Peru, had been resolved. Wrong!

Soon after I moved to L/ARA, there were coups in Peru [October 3, 1968] and Panama [October 11, 1968]. The Panama Canal treaties negotiated with President Arias were repudiated by the Torrijos regime, and the IPC oilfields were expropriated by the Velasco junta in Peru. These became major matters for me, and many other dramatic issues followed, including aircraft hijacking to Cuba, terror attacks on U.S. diplomats, Chile [the Allende election, copper expropriations, and Pinochet coup], Jamaican bauxite expropriations, OPIC [Overseas Private Investment Corporation] insurance issues, act-of-state issues in litigation over Cuban claims, and negotiations with Mexico relating to protection of archeological sites and U.S. pollution of the Colorado River. I carried some of these interests forward through my career at State and into private practice as well.

Q: That's interesting that the work went with you even after you left the State Department.

FELDMAN: Yes. I now had substantive specialties. Expropriation policy and international claims became a central focus of my private law practice, including the Kalamazoo Spice litigation against Ethiopia and an arbitration against Mexico under NAFTA [North American Free Trade Agreement], Chapter 11. Also, cultural property: my work with Mexico protecting archeological sites led to my negotiating the 1970 UNESCO [United Nations Educational, Scientific and Cultural Organization] Cultural Property Convention and to my legacy in the rules governing illicit trade in cultural property.

Q: Did you want to mention your staff in L/ARA?

FELDMAN: Thank you. I was fortunate to have excellent support. Two staff attorneys merit special mention: David Gantz worked with me on many matters and carried the main burden in the late stages of two important issues before leaving State to teach at Arizona Law School in Tucson: one, working with Herbert Brownell on the resolution of the long standing dispute with Mexico over U.S. pollution of the Colorado River, see IBWC Minute No. 242, TIAS 7708, August 30, 1973; two, the Peru Claims Agreement, TIAS 6080 [1974]. Many years later, I appointed David as an arbitrator in my NAFTA arbitration; he did an excellent job. See *Marvin Feldman v. Mexico* [ICSID] [2001].

Michael Kozak came to L as a young man from Boalt Hall and helped me with Panama Canal issues for years. In time, he became the lead USG [United States government] legal expert on the Canal Treaties concluded by Jimmy Carter and a diplomat including service as ambassador to Belarus and acting assistant secretary for Inter-American Affairs. Mike was my protégé in L/ARA, and I recommended him for promotion to deputy legal adviser in 1981.

Panama Canal Treaties

Q: So, maybe we should start with Panama.

FELDMAN: Fine. I should mention that I searched my name in the ADST index; the first thing that came up was Brandon Grove, country director for Panama, who said that “Mark Feldman practically cohabited with us in those days, but we retained control of policy.” *(both laugh)* The way he did that was to substitute his name for mine as drafter of sensitive cables.

The Panama Canal was an active issue throughout my years in the department and a major piece of my portfolio in L/ARA. The Torrijos regime, supported by all of Latin America, insisted on return of the Canal and the Canal Zone to Panama, and there was strong opposition in Congress. As Senator Hayakawa said: “We stole it, fair and square.” Treaty negotiations were reopened in the Nixon years, and we did a lot of interagency work on issues relating to canal operations and security. But no progress was made until Jimmy Carter was elected.

Q: Was there a legal argument against returning the Canal Zone to Panama?

FELDMAN: Congressional opponents argued that the Canal Zone was sovereign U.S. territory pursuant to the 1903 Panama Canal Treaty and that the executive lacked constitutional authority to transfer the Canal Zone by treaty. The theory was that Congress was responsible for U.S. territory under Article IV of the Constitution, and that legislation by both houses of Congress was required to dispose of it. As stipulated in the 1903 Treaty, however:

“The Republic of Panama grants to the United States *all the rights, power and authority within the zone* mentioned and described in Article II of this agreement, and within the limits of all auxiliary lands and waters mentioned and described in said Article II *which*

the United States would possess and exercise, if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.” [Article III]

The State Department always maintained that this grant of plenary jurisdiction did not transfer sovereignty itself. As in the Japan Peace Treaty, discussed earlier, Panama retained residual sovereignty. I testified to that effect before the House Merchant Marine and Fisheries Committee, 92 Cong., November 30, 1971, Serial 92-30 [1972] at 39-45, 80-83. The constitutionality of the Panama Canal Treaty was sustained, without reaching the sovereignty issue, when members of Congress sued President Carter in 1978, on grounds that congressional power under Article IV was not exclusive. See *Edwards v. Carter*, 580 F. 2d 1055 [DC Cir.].

Q: Interesting. Was there also an issue relating to the neutrality of the Panama Canal?

FELDMAN: Oh, yes. Now you’re coming to the end game. President Carter appointed two distinguished diplomats, Sol Linowitz and Ellsworth Bunker, as special representatives to negotiate a new regime for the canal with Panama. After intense negotiations, with significant support from William Jordan, U.S. ambassador to Panama, and Deputy Secretary Warren Christopher, they succeeded in negotiating one, the Panama Canal Treaty providing for U.S. operation of the canal until December 31, 1999, and two, the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal ensuring the security of the canal after return to Panama.

Linowitz brought his own team to staff his mission, but once negotiations began in earnest, Mike Kozak went to Panama and played a key role in the drafting. As a deputy legal adviser to Herb Hansell in the Carter years, I was less involved with Panama than before, but I was brought in when key senators questioned the adequacy of U.S. rights to defend the canal after control transitioned to Panama.

Q: How did that go?

FELDMAN: Senate consultations were well managed by Warren Christopher, but it was a heavy lift with many challenges. This process is described in detail by Bill Jordan in his book, *Panama Odyssey* [Texas 1984]. In broad terms, Senate concerns about the U.S. right to protect the canal forced renegotiation of this issue in real time as Senate consultations on the treaty package proceeded. This was an extremely sensitive issue for General Torrijos as the Panamanians had deep concerns about potential U.S. interference in their internal affairs in case of a perceived threat to U.S. security interests from within Panama. I was asked to chair an interagency legal group to develop options that could bridge the difference while protecting U.S. security interests. Our language, as reviewed by the Joint Chiefs, was included as an amendment to Article IV of the Neutrality Treaty. “It was, in fact, the heart of that agreement.” Jordan at page 369.

“The correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any

threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal. This does not mean, nor shall it be interpreted as the right of intervention in the internal affairs of Panama.”

Ambassador Sol Linowitz

FELDMAN: Perhaps, I should mention something personal about Ambassador Sol Linowitz.

Q: Please, go ahead.

FELDMAN: Ironically, Sol Linowitz was a hero of mine as a teenager growing up in Rochester, NY. I had become a news addict at a time when he appeared on a local TV current affairs program. I was impressed by him and later became aware of his success as Xerox’s patent lawyer. Xerox grew out of a Rochester company called Haloid and was prominent in my home town until it moved its national headquarters to Connecticut. So, I was thrilled, when I took charge of L/ARA in the closing months of the Johnson administration, to find that one of my principal clients was Sol Linowitz, U.S. ambassador to the Organization of American States.

Unfortunately, I had an experience with him early on that clouded the relationship. I was never able to establish the trust that I wanted. This relates to Peru’s expropriation of the IPC oilfields in October 1968. [We’ll discuss IPC at length later; it was one of my most exciting experiences at State, including a meeting with President Nixon.] One day I was discussing IPC with John Crimmins, the senior DAS in ARA, and he mentioned that the White House was appointing John Irwin as special emissary to Peru to negotiate compensation. [I knew nothing about Irwin at that time but was told that he was married to a member of the Watson family, major stockholders in IBM.]

Later that day, I happened to be in Linowitz’ office and mentioned the Irwin appointment to him. To my astonishment, he exploded in anger, saying Irwin was not up to the job, and questioning our concern about IPC. Naturally, I was embarrassed and upset. Crimmins and Linowitz were both my clients, and I had naively assumed that Linowitz knew about Irwin. Now, I realized that I had spoken out-of-turn and broken a confidence.

Q: (laughs)

FELDMAN: So, I hitched up my pants and trotted down to John Crimmins’s office to tell him about this. And he says, “Oh, my God, Mark, Sol will blab.” *(both laugh)*

Q: Right. Because there’s a protocol, you’re not supposed to talk about nominations until they’re public.

FELDMAN: So, Crimmins runs right down and has a chat with Linowitz. Later, Sol says to me, no doubt with mixed feelings: “It took a lot of guts on your part to tell Crimmins that.” *(both laugh)*

Ambassador John Hugh Crimmins

Q: Who was John Crimmins?

FELDMAN: John Crimmins was U.S. ambassador to the Dominican Republic [1966–69] and Brazil [1973–78]. In between, John was my mentor in ARA and one of the most impressive people I knew in government. He held ARA together in those days. One of my fondest memories of him was the night we spent in his office monitoring the “soccer war” unfolding between El Salvador and Honduras. That was July 20, 1969, the night Neil Armstrong set foot on the Moon. We watched the great moment on a small black and white TV in Crimmins’ office. What a thrill.

Q: For all of us.

Mexico

Q: Good. Let’s go on to Mexico. You had a rich experience with Mexico. Where do you want to begin?

FELDMAN: Let’s begin with the Chiefs of Mission Meeting in Mexico City, December 10-13, 1969, which I attended thanks to Under Secretary of State Elliot Richardson, and his aide, Wilmot Hastings. This may have been my first visit to Mexico; it was certainly one of the most exciting.

Elliot Richardson

FELDMAN: One of the pleasures being in L/ARA in the early Nixon years was that Elliot Richardson came to State as undersecretary and took a strong interest in Latin America. It was fun working with Richardson; he would regularly invite staff to his seventh floor office for evening drinks, cigars, and policy chatter. Life was a lot more relaxed before 9/11, and that was a great way to build a team. Unfortunately, Richardson served at State for only a few months before moving on. I think Elliot held four Cabinet positions after leaving State. As attorney general during Watergate, he became a national hero by refusing to fire Special Prosecutor Archibald Cox in the Saturday Night Massacre. Richardson, like Kissinger and Harriman, attracted a large cadre of loyal staff who rose to important positions in government, including Ambassador Mort Abramowitz. In the ’70s, I worked with Dick Darman and J.T. Smith on bribery of foreign officials when Richardson served as commerce secretary in the Ford administration.

Q: Chiefs of Mission?

FELDMAN: In December 1969, Richardson organized a meeting of all U.S. ambassadors in the ARA region together with a large contingent of senior officers from the department [e.g., Buzz Macomber, Frank Shakespeare, John Richardson], ARA executives, and NSC [National Security Council] staff. The Washington group flew down with Richardson on an air force jet. Frankly, I don't remember much of the agenda, but this was a unique event and I was excited to be part of it. U.S. relations with Mexico during the Diaz Ortiz administration were seen to be very close. The landmark U.S.-Mexican Boundary Treaty was signed on November 23, 1970—days before Luis Echeverria took office as president.

FELDMAN: Coincidentally, the meeting fell on the Mexican Festival of Our Lady of Guadalupe. I took the opportunity to attend the celebration. That was a spectacular introduction to Mexico. Thousands of people came from all over the country to parade their religious icons in traditional dress with spirited music. The bands were great. I had never seen anything like it.

Q: This festival is one of those massive pilgrimages. Everybody walks twenty-six miles to go see it.

FELDMAN: And I remember with pleasure the trips that followed. In those days, you could have dinner or attend shows in restored haciendas and colonial churches. In Cuernavaca, there was a hotel and swimming pools in the ruins of a sugar plantation. Sadly, when Echeverria came in, he shut down a lot of that activity for reasons of national dignity.

Colorado River Salinity

Q: What was the issue concerning Colorado River salinity?

FELDMAN: The salinity issue became a major bilateral problem during the Echeverria administration. Mexico threatened to file a complaint against the United States with the International Court of Justice at The Hague. Robert Hurwitch was the DAS in charge. I spent time on the matter with Foreign Minister Emilio Rabasa and negotiated with his father, Oscar Rabasa, who happened to be legal adviser of the Mexican Foreign Ministry.

Q: So, we have a treaty with Mexico over use of the water from the Colorado River. Is that true?

FELDMAN: Yes, dating from 1944. Then, as now, water was a scarce resource in the West. Seven U.S. states and Mexico depend on the Colorado River for agriculture and urban development. The U.S. treaty commitment to Mexico is to allow 1,500,000 acre feet to flow to Mexico. Unfortunately, to get the treaty through the Senate over the objections of the Colorado Basin states, then Assistant Secretary Dean Acheson was compelled to assure the Senate that the treaty did not provide Mexico any assurances regarding water quality that might constrain upstream use in the United States.

The problem that provoked Echeverria, a famously difficult neighbor, was an irrigation project established by Arizona to grow Bermuda grass on the border with Mexico—the Wellton-Mohawk Water District. Apparently, soil conditions were such that the irrigation discharges were extremely saline leading Arizona to pour highly saline water into the Colorado just above the international boundary—to the detriment of downstream Mexican farmers who found the water increasingly toxic to their crops. This issue had been festering for years before Echeverria decided to make it a cause célèbre. There have been many disputes with Mexico over the Rio Grande, the Colorado, and the use of shared ground water resources. To manage these matters, the two nations established a bilateral International Boundary and Water Commission [IBWC] that was kept busy. In my day, Joe Friedkin was the U.S. commissioner—an able and pleasant man. But, there was little the IBWC could do about Wellton-Mohawk. Arizona was unmovable and had strong congressional support.

As I recall, the issue came to a head in 1971 when Echeverria moved to put it on the agenda of a state visit with President Nixon in Washington, and Foreign Minister Emilio Rabasa told Assistant Secretary Charles Meyer that Mexico would bring the matter before the World Court if the issue was not quickly resolved. At the same time, Mexico proposed negotiations between lawyers, and the Foreign Ministry asked for me, by name. That came as a big surprise to me and to ARA. Robert Hurwitch would have preferred to handle this matter himself.

Q: Why did Mexico ask for you?

FELDMAN: Discussions between lawyers was consistent with Mexican interest in third-party resolution. And I expect that Oscar Rabasa saw me as a friend of Mexico because of the bilateral treaty I negotiated with Mexico in 1970 for U.S. assistance in recovering looted cultural property removed to the United States. We can discuss that treaty and related actions next. In any event, I went down to Mexico with Joe Friedkin to negotiate with Oscar Rabasa and his team under strict instructions from Hurwitch not to agree to resolution by the World Court in any circumstances. We did not make a deal, because the U.S. could not meet Mexico's demands. This was a high profile issue in both countries. State governors and senators were looking over our shoulders, and Friedkin had little room for maneuver. The discussions went on for a few days until, one morning, Oscar Rabasa announced that he had been instructed to adjourn the negotiations *sine die*—full stop, end of game, go home. My report to Washington included the following:

“WE MISSED BY A HAIR A SATISFACTORY SIX-YEAR AGREEMENT AND CAN TAKE COMFORT NOW ONLY IN THE APPARENT DECISION OF THE GOM NOT TO FOLLOW UP THE LEGAL TALKS. I WOULD NOT COUNT ON THAT, HOWEVER, IF WE FAIL TO MAKE FURTHER PROGRESS DURING THE YEAR.”

FRU.S. Doc. 471, 1969–1976, Volume E-10, Documents On American Republics, 1969–1972, Tel. 6304 From Emb Mex [Feldman] to DOS, November 12, 1971.

Q: So, how was the problem resolved?

FELDMAN: When it became clear that this problem had to be fixed and that nothing could be done for Mexico without going to Congress, President Nixon appointed Herbert Brownell, a former attorney general, as special representative to conduct the negotiation. Samuel Eaton and David Gantz did the work, and agreement was reached on a scheme that would not interfere with the Arizona farmers. Instead, the federal government would build a desalination plant to improve the water before it was returned to the river for downstream use. The agreement was embodied in IBWC Minute No. 242, TIAS 7708, August 30, 1973.

Q: And the reason this was important to the president and the secretary was that we didn't want the Mexicans to challenge us in international court because we were not sure we would win?

FELDMAN: Henry Kissinger made that point in an action memo to President Nixon. Doc. 477. Memorandum From the President's Assistant for National Security Affairs [Kissinger] to President Nixon, Washington, May 6, 1972, FRUS, 1969–1976, Vol. E-10, 1969–1972. [I think he used my talking points.] As a matter of foreign policy, we didn't want the U.S. relationship with Latin America to be defined by polluting Mexican water.

Q: So, it was actually an ethics issue. (laughs)

FELDMAN: As I saw it, the need to spend taxpayer money for water treatment showed the untoward influence of a few American farmers on the edge of a major international river.

Q: Right.

FELDMAN: After the deal was made, David Gantz drafted a legal memorandum to support the final approval package. I added a sentence that the United States had an obligation under customary international law not to pollute water at the point of entry into Mexico. I couldn't say there was a treaty obligation because of the Acheson Senate testimony, but Kissinger was right to say that Mexico did not bargain for U.S. delivery of unusable water. Hopefully, the L memo will be released one day; I couldn't find it in the archives when I looked a few years ago.

Q: When I came on as head of the Office of Mexican Affairs years later, the experts all told me: We don't do foreign policy with Mexico. It's all domestic policy, and they coined the term intermestic: because the foreign and domestic interests are so great and so intertwined, you can't really call it foreign policy per se. And this is a great example, so thank you very much.

Protecting Archeological Sites: Mexico, Latin America, and the United Nations

Q: So, I wanted to ask about your work on cultural property, particularly vis-à-vis Mexico. Could you talk a little bit about what that work entailed?

FELDMAN: My pleasure. Protecting the cultural heritage of mankind from looting became a calling for me; my work with Mexico gave me the opportunity to change U.S. policy and to help shape a new international framework.

Q: You know, I always heard about this issue in terms of the Elgin marbles that were looted from the Parthenon in Athens and ended up in the British Museum. I know about Mexico's rich pre-Columbian heritage, of course, but I didn't realize that theft Mexico was an instigator for the UNESCO Convention.

FELDMAN: Let me begin by mentioning a book that documents a good part of my story: *Governing Guns, Preventing Plunder: International Cooperation Against Illicit Trade* by Asif Efra. He writes about international norm-building in three or four areas—one of them being illicit trade in archeological objects and ancient art. He interviewed me at length for his doctoral thesis, and the book provides a good account of the evolution of U.S. policy.

When I became assistant legal adviser for ARA, one of the papers I found in my inbox was a diplomatic note from Mexico, drafted by Oscar Rabasa, requesting U.S. cooperation in recovering pre-Columbian artifacts and other cultural property that had been looted in Mexico and exported illicitly to the United States. The Mexican ask was demanding and comprehensive: the United States should take legal action to recover and return a wide range of cultural property stolen from Mexico and trafficked to the United States. The note explained Mexico's problem and linked U.S. cooperation to continued Mexican help in recovering stolen automobiles trafficked across the southern border.

This was a new issue for me. I soon found that American archeologists were deeply concerned about the severe damage being done to archeological sites in Mexico, Guatemala, and other countries south of the border. Not only were looters excavating unknown tombs and buildings, preempting any scientific study, they were also cutting up well-documented sculptures, facades, and other irreplaceable artistic treasures. Clemency Coggins was a strong advocate for reform, as was Ian Graham, a photographer who demonstrated the despoliation of known Mayan sites including the precious glyphs that held the key to the mysterious Mayan language. And I remember a major story in the *New York Times* about a gorgeous, multi-colored wall of a Mayan temple that had been carved into pieces and brought into New York City for sale on the art market.

Q: And this issue transcended Mexico, right?

FELDMAN: Right. I also learned that looting was a global problem that was on the UNESCO agenda in Paris. A number of countries, including Mexico, Egypt, and Italy were working on a treaty to control illicit trade in cultural property, broadly defined. When I started, the U.S. did not support this effort on grounds that it was not U.S. policy to enforce the criminal laws of other nations. There was a deep divide among American stakeholders: archeologists generally favored strict controls on trade in ancient art whereas museums, collectors, and dealers argued that free movement of cultural material

was important for artistic and educational purposes and to preserve the objects themselves from war, indifference, and pervasive corruption in many places. There was also great anxiety that UNESCO action would lead to demands for the repatriation of the great collections of ancient art in the United States and Europe. One positive sign, though, was that the International Council of Museums [ICOM] and the American Association of Museums [AAM] were moving towards new guidelines concerning acquisition of objects of questionable provenance.

Q: How did you respond to the diplomatic note?

FELDMAN: Once I learned what was at stake, I wanted the United States to help Mexico and to support UNESCO working towards a balanced program that would limit market incentives for looting while recognizing the positive value of international movement of cultural property. It was not hard to persuade the State Department and other agencies, but no progress was possible without support from stakeholders in the American art world. Fortunately, the American Society of International Law [ASIL] agreed in 1969 to host a panel of stakeholders to advise the State Department, represented by me. The panel included archeologists, art museums, antiquities dealers, and attorneys with William D. Rogers as chairman and Professor Paul Bator as secretary.

They were both outstanding men and became good friends. William D. Rogers was a partner in Arnold & Porter who had an important career in government service, including in the Kennedy Alliance for Progress and, later, as assistant secretary of state for Western Hemisphere Affairs and under secretary under Henry Kissinger. Ironically, in 1970 a political hack planted in L by the Nixon White House blocked Rogers from serving on my delegation to the UNESCO drafting committee.

Paul Bator was a distinguished law professor at Harvard and Stanford and principal deputy solicitor general. He was a member of my UNESCO delegation and wrote a marvelous article describing the eccentric proceedings that produced the convention. Must read: Paul Bator, Essay on the International Trade in Art, 34 *Stanford Law Review*, 275 [1982].

Thanks to Rogers and Bator, the ASIL panel was able to bridge the gap between sharply conflicting interests. It produced a report which allowed me to pursue three interrelated objectives: one, a bilateral treaty with Mexico; two, an Act of Congress prohibiting importation of pre-Columbian sculptures from Latin America without permission of the country of origin; and three, a multilateral UNESCO Convention based on the principle of non-retroactivity with import controls on archeological materials threatened by pillage. I'll describe each measure in turn. Unfortunately, I have no records of the ASIL proceedings. I am relying on memory and State Department documents.

Q: Let's start with the treaty.

U.S.-Mexico Treaty for Recovery and Return of Stolen, Archeological, Historical and Cultural Properties, July 17, 1970, TIAS 7088.

FELDMAN: This was an exciting experience from start to finish. First, the Mexicans and the embassy were wonderful hosts. This project gave me an opportunity to visit a number of important archeological sites, e.g., Teotihuacan, Oaxaca, and Monte Alban, as well as the spectacular new Museum of Archeology and Ethnology, and to explore Mexico City on foot in an era before pollution and drug gangs changed the landscape from charming to dangerous. I enjoyed the Saturday crafts market and returned there many times over the years. My primary guide was Ignacio Bernal, a distinguished archeologist and the founding director of the new museum who taught me a lot about Mexico's pre-Columbian heritage. Sadly, the museum collection was looted a few years later and many priceless objects were lost; I still remember some of them.

Q: Who negotiated for Mexico?

FELDMAN: Oscar Rabasa appointed Jesus Angel Arroyo, secretary-general, Instituto Nacional de Antropología e Historia, to negotiate the treaty with me. We got along well, enjoyed a dinner together, and had no major substantive problems, but language and legal culture were a challenge. Jesus did not speak English, and I did not speak Spanish. Fortunately, both of us spoke decent French; we negotiated the treaty in French and had it translated into Spanish and English. [I majored in French at Wesleyan, studied in Paris and was more fluent in 1969–70 than I am today.]

Q: (laughs) You didn't have anybody from the embassy helping you?

FELDMAN: They did help—I remember a reception in Ambassador McBride's home—but this was a legal document and negotiations were one-on-one.

The best part was the signing ceremony. I was able to bring my wife, Marcia Feldman, to Mexico for a lovely diplomatic event and holiday in July 1970. The Foreign Ministry hosted a wonderful dinner featuring pigeon mole that made an impression on me. We left an eight-month old infant behind with her dear nanny for a few days only to learn on our return that the hot water system had failed. Fortunately, we had friends looking in on them. That daughter became interim dean of the Elliott School at GWU.

Q: Thank you, that's a lovely story. What did the treaty provide for?

FELDMAN: The treaty was an important symbolic commitment at the time. It was the first step by any art importing country to address illicit trade in stolen cultural property, but the reciprocal obligations “to recover and return” were limited to pre-Columbian and colonial objects “of outstanding importance” [and official archives] that had become government property in the other country. The key feature was that the Justice Department would represent Mexico in court, if need be. In practice, the treaty was one-off and has been superseded by more aggressive actions by U.S. agencies.

Q: So, did the Mexicans continue to help us with stolen cars?

FELDMAN: Yes.

Q: And did the Senate ratify the treaty?

FELDMAN: The Senate gave “advice and consent” to ratification by the president.

Q: Right. I knew that.

FELDMAN: Senator Joe Biden used to make that mistake.

Q: So, this was the beginning. What was the next step?

Statutory Restriction of Imports of Pre-Columbian Sculpture or Murals, 19 U.S.C. 2091–95 [1972]

FELDMAN: This measure prohibits importation of pre-Columbian monumental or architectural sculpture or murals, to be designated by regulation, absent export approval by the country of origin or proof of export before the date of the statute. This unilateral action by the United States, which effectively closed the U.S. market to large pre-Columbian stone carvings or fragments, was endorsed by all members of the ASIL panel—a major step not replicated, to my knowledge, by any other art market. I developed this approach for the State Department and was proud of it, but it didn’t satisfy some archeologists because it did not apply to tomb furnishings. As far as I know, there was no opposition in Congress, but it took some doing to get action on the Hill.

Fortunately, my friend Michael Stern, then legislative assistant to Russel Long, chairman of the Senate Finance Committee, was willing to pitch-in. Working with Sam Gibbons, chairman of the House Ways and Means Committee, they tacked the State Department bill onto a private tax break Senator Herman Talmadge [Georgia] wanted for a constituent. That measure passed both houses by unanimous consent. That was the way Congress worked in the old days.

Q: Going back to the panel of stakeholders, were there any particular museums that were very helpful?

FELDMAN: Good question. I remember that the Metropolitan, the Smithsonian, and the University of Pennsylvania were engaged, and I recall speaking at a conference of the Association of Art Museum Directors in Cleveland and at the Walters Gallery in Baltimore.

Q: I think that Harvard is the owner of the Dumbarton estate in DC, and its museum includes a collection of Byzantine and Pre-Columbian art.

FELDMAN: Well, Clemency Coggins was at Harvard’s Peabody Museum. She played a major role in publicizing this problem and was not satisfied with our response. On the other side, Dumbarton Oaks has a fascinating collection of Pre-Columbian art, including

masks, axes, and jade. Many students visit there to study these objects and draw them. Seeing them at work reminded me how important museums are for American life and for appreciation of foreign cultures.

The 1970 UNESCO Convention on Cultural Property—The Paris Convention

Q: I'd like to ask you now about the UNESCO Convention.

FELDMAN: To set the stage, UNESCO convened a Special Committee of Governmental Experts at Paris in April 1970 to consider a draft convention prepared by the Secretariat based on the suggestions of interested Member States, e.g., Egypt, Pakistan, Mexico, and some African countries. Responsive to their demands, the Secretariat proposed a comprehensive scheme, brutal but coherent, that would have required all parties to refuse import of any cultural property, broadly defined, not accompanied by an export certificate from the country of origin. As few art-rich countries authorize export of cultural property, particularly developing countries, this concept aimed to terminate international trade in cultural property. In consequence, no art importing state supported the UNESCO project and important market states, e.g., the United Kingdom and Switzerland, did not attend the meeting.

The United States was the first market state to support international controls on illicit trade in cultural property, and our participation was decisive for this project. It took a long time, but today one hundred forty-one countries are party to the 1970 Convention, and most Western institutions require proof of provenance. The first step was to persuade the Paris conference to change course. The U.S. delegation prepared an alternative draft convention that we hoped would be broadly acceptable to art-importing and exporting countries. The most fundamental points were one, the convention would not be retroactive; acquisition guidelines would be forward looking, and two, import controls would be limited to cultural property stolen from museums and to specific categories of archeological interest threatened by pillage to be determined by agreement among the countries concerned. Our aim was to dampen market incentives for looting that threatened the cultural heritage of mankind, not to enforce other countries' export controls.

Q: How did that go?

FELDMAN: We expected to present the draft to the committee for consideration along with the Secretariat draft, but were not permitted to do so. In consequence, we had to present amendments to address each problem in this lengthy, complex text. There were dozens of votes. With help from the Mexican, German, and French delegations, we won some votes and lost others, sometimes by one vote. The convention that resulted from this madhouse [45-0] is a jumble with broad definitions, high principles and a few tight obligations with considerable national discretion. This process has been well documented in Paul Bator's excellent article, 34 *Stanford Law Review* 275 [1982]; my Statement to the Special Committee, April 13, 1970 [which lays out the new U.S. policy and rationale], *State Department Bulletin*, July 6, 1970, pp. 22-24; and the U.S. Delegation

Report, Feldman and Bettauer, Report of the United States Delegation to the Special Committee of Governmental Experts to Examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done at UNESCO House, Paris [April 13-24, 1970], dated July 27, 1970. The report includes a detailed summary of the preparatory work, including votes on key provisions.

Q: And how did U.S. stakeholders react?

FELDMAN: We had no difficulty obtaining Senate advice and consent [1972], because the department proposed a reservation relating to export controls and a number of understandings [interpretations] clarifying treaty language, and agreed that the convention was not self-executing. Implementing legislation would be required before U.S. accession. I testified twice on bills prepared by State: Convention on Cultural Property Implementation Act [CCPIA], Subcomm. Int. Trade, Senate Finance Committee, 95 Cong., 2d, Sess., February 8, 1978; CCPIA, Subcomm. Int. Trade, House Ways and Means Committee, 96 Cong., 1st Sess., September 27, 1979. But it took thirteen years to obtain that legislation. Convention on Cultural Property Implementing Act [CCPIA], P.L. 97-446, 19 U.S.C. 2601 et seq. [1983]. By then, I had left the department for private practice.

Q: What were the problems?

FELDMAN: There were two problems: one, the antiquities dealers, always doubtful about the convention, opposed import controls because they feared the State Department would use that authority as a bargaining chip for diplomatic purposes unrelated to protecting the cultural heritage. They found an ally in Senator Patrick Moynihan. Two, UNESCO policy towards Israel infuriated many policy makers, leading Senator Ribicoff to block action on the legislation for years. For my exchanges with Moynihan and Ribicoff, see Hearings on H.R. 5643 and S. 2261 Before the Subcom. On Int'l Trade, Sen. Finance Comm. 95th Cong. 2d Sess 23 [1978].

Q: What import controls were at issue?

FELDMAN: Convention Article 9 calls on States Party, upon request by a State Party whose “cultural patrimony is in jeopardy from pillage of archeological or ethnological materials,” “to participate in *a concerted international effort* to...carry out the necessary concrete measures...[including import controls, and provisional measures] to prevent irremediable injury to the cultural heritage of the requesting State.” [emphasis added] The art community was understandably concerned that other market states would be slow to adhere to the convention and that trade lost to the U.S. would be diverted elsewhere. I believed that the U.S. should lead these reforms, but worried that we might find ourselves in a difficult position in collective negotiations pursuant to Article 9 as the sole art market state facing demands by groups of states with a common goal to limit art exports to the U.S. market.

Q: What did you propose?

FELDMAN: My solution was to ask Congress to authorize the State Department to make bilateral agreements for import controls with countries damaged by pillage of their cultural heritage. I added that provision to the revised bill State sent to the Hill in 1977. The bill also gave the executive emergency authority to establish import controls unilaterally in crisis situations. Malcolm Wiener, then general counsel of the Archaeological Institute of America [AIA], helped me draft the latter. Critics of the program pointed out correctly that the convention did not specify bilateral agreements. That was my innovation.

Q: What did Congress do?

FELDMAN: Having moved to private practice, I was not involved in the end game. In 1983, Assistant Legal Adviser Ely Maurer [L/ECP] succeeded in resurrecting the legislative process, and the antiquities dealers, well represented by James Fitzpatrick of Arnold & Porter, persuaded Congress to add a number of safeguards, including a Cultural Property Advisory Committee [CPAC], to protect art interests.

Over the years, the State Department has negotiated dozens of bilateral agreements and there have been numerous complaints that State has abused the process for diplomatic reasons as the dealers originally feared. Moreover, a great deal has changed since 1970. It took decades, but the norms established at Paris are widely recognized. In the West, at least, collecting institutions and auction houses generally will not accept objects with uncertain provenance absent proof they were exported before 1970. Moreover, federal agencies, including the Justice Department, have invoked other authorities, e.g., the National Stolen Property Act, 18 USC 2311-2318, to prosecute dealers, seize imports, and force repatriation of looted antiquities. See William Pearlstein, <https://culturalpropertynews.org/reform-of-u-s-cultural-property-policy-accountability-transparency-and-legal-certainty/>

Ironically, I'm now seen as a friend of the collector community. Someone opposing current U.S. practice may say: "This is not the deal we negotiated with Mark Feldman" or, more precisely, "This policy is contrary to the U.S. position negotiated with UNESCO in 1970 and adopted by Congress in 1983."

For researchers interested in my perspective on these developments, see presentations I made to:

1. the ABA International Law Section: Mark B. Feldman, The UNESCO Convention on Cultural Property: A Drafter's Perspective, Art & Culture Heritage Law Committee Newsletter, Vol. 11, Issue No. 1, Summer 2010, <https://www.hunterslaw.com/wp-content/uploads/2019/03/ABA-Newsletter-Winter-2018.pdf> (scroll to page 2 for article)

2. a Symposium organized by Cardozo Law School and the Committee on Cultural Property: Mark B. Feldman, Reform of Cultural Property Policy, April 10, 2014.
<https://culturalpropertynews.org/mark-b-feldman-reform-of-u-s-cultural-property-policy/>

Q: Did you practice in this area after you left government?

FELDMAN: The matters that came my way were extremely interesting. In the 1980s, when Arnold & Porter had a conflict regarding a proposed bilateral with Canada, Jim Fitzpatrick asked me to represent the dealers to the State Department. Later, I represented an American family seeking restitution from the Netherlands of Dutch masters seized by the Nazis. I also represented Sigrid Biow, the daughter of August Sander, the great German photographer, in a transnational family dispute over his cultural estate. We were able to recover some vintage photographs by negotiation in America and compensation by litigation in Germany. Beginning with the fortieth anniversary of the 1970 Convention, I have written a number of articles and briefs addressing, mainly, cultural property cases arising under the Foreign Sovereign Immunities Act [FSIA]. The FSIA was one of my major projects in government. See, e.g., Brief of Amicus Curiae Mark B. Feldman, *Cassirer v. TBC Foundation*, U.S. [2021]
https://www.supremecourt.gov/DocketPDF/20/20-1566/201021/20211122172713542_41636%20pdf%20Kethro.pdf

***Marvin Feldman v. Mexico* [ICSID]**

Q: Is there anything else you would like to mention about Mexico?

FELDMAN: To sum up, my professional engagement with Mexico began at State in the 1970s with cultural property and Colorado River water, north-south economic issues, and maritime boundaries, and ended in private practice with an expropriation claim I brought against Mexico under NAFTA, Chapter 11 in the last years of the millennium.

The NAFTA case involved an interesting legal question regarding state responsibility for regulatory takings, but it had two quirky features: one, my client's name was Marvin Feldman—no relation, so the case in which Mark B. Feldman acted as counsel was styled, *Feldman v. Mexico*; and two, the person behind the Mexican government's action was Carlos Slim, then believed to be the richest man in the world.

Q: What kind of investment did Marvin Feldman have?

FELDMAN: Marvin was an expat entrepreneur living in Mexico City. His company, CEMSA, was trading Marlboro cigarettes manufactured in Mexico by Carlos Slim to foreign buyers in the so-called "gray market." Mexican authorities denied my client the benefit of an export subsidy even though the Supreme Court of Mexico had confirmed his entitlement. A lot of money was involved. Eventually, we won a modest award for

violation of national treatment. See *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB[AF]/99/1, Final Award [Dec. 16, 2002]

Q: And the Mexicans were not happy.

FELDMAN: Very unhappy. And I was unhappy with what I learned about the pervasive corruption in Mexican governance, including the legal system.

Let me give two examples. First, when Mexican officials visited their counterparts at the U.S. Treasury Department seeking to block the complaint under NAFTA, they dismissed the Mexican court decision as due to judicial corruption. Second, when we were well into the case, a Mexican attorney esteemed by his peers told my client he could fix the problem for a large lump-sum payment. On my advice, Marvin demurred. Subsequently, a different actor in this drama was jailed on bribery charges. As we speak, the situation in Mexico has become much worse.

Cuba

Q: So, Mark, I think we're now up to talking about the work you did on Cuba, which must have been intense.

FELDMAN: The Cuban work was sensitive politically and dramatic at times. Cuba loomed large in my decision to come to the State Department. I was in New York practicing law when the Cuban Missile Crisis went down and was in touch with friends at State working on the crisis. That was a motivator to come down to Washington, although I didn't expect to be working on Latin America. My personal history with Fidel Castro goes back to 1959 when he visited the Harvard Law School on his ill-fated trip to meet with President Eisenhower. Thousands of people came to see him outdoors in Cambridge. Castro and his colleagues wore military fatigues, and he delivered one of his typical ranting harangues. Then, Castro took questions, and the situation became tense. Students challenged him on the execution of Batista people, double jeopardy, and the rule of law. I think some air force officers had been acquitted, retried, and then executed. Castro became furious. He had no patience for challenges to his form of revolutionary justice.

Q: What Cuban issues did you handle at the department?

FELDMAN: I worked on a number of Cuban issues at State, including the trade embargo, a bilateral hijacking agreement, the maritime boundary, and Cuban expropriation cases in U.S. courts.

The Cuban embargo presented my first encounter with the extraterritorial application of U.S. law that became a major issue in my years in L, and led me to offer a course at Georgetown Law on International Conflicts of National Jurisdiction. The U.S. embargo of Cuba promoted in the OAS was a divisive issue in the hemisphere, particularly with Mexico, which refused to go along. In 1968–69, ARA was receiving strong objections from several countries, including Canada and Argentina, that U.S. restrictions on Cuban

trade by foreign subsidiaries of U.S. multinationals was a violation of their sovereignty. As I recall, Pete Vaky, then acting assistant secretary, asked me to help get that changed. Working with the Treasury Office of Foreign Asset Controls [OFAC], we eliminated the restriction imposed on foreign subsidiaries while continuing to bar American parent companies from direct involvement. It was a fine line, but it worked until the Clinton years when the Helms-Burton Act reinstated the broad embargo.

Q: You said last time that Mexico did not cooperate with the embargo. How did we deal with that?

FELDMAN: I was told that President Kennedy recognized their situation and gave Mexico a pass. Nonetheless, U.S. Cuban policy was still a sore point with Mexico in the 1960s and 1970s. Foreign Minister Jorge Castaneda and his son-in-law, Andres Rosenthal, with whom I negotiated the maritime boundary, were both sympathetic to Cuba in those days.

The Federal Act of State Doctrine

Q: You also mentioned Cuban litigation in U.S. courts?

FELDMAN: Yes. The Cuban litigation nourished an interest in foreign relations law that I pursued in practice and my teaching career. Following the Cuban revolution, Castro nationalized the large American investments in Cuba without compensation. In response, the U.S. froze Cuban assets in this country including substantial deposits in U.S. banks. This precipitated a lot of litigation by American investors and by Cuba seeking return of its deposits. In a case involving competing claims to proceeds from the sale of Cuban sugar, American investors challenged Cuba's title on grounds that the seizure violated international law. The Supreme Court ruled in Cuba's favor holding that the *federal act of state doctrine* barred a U.S. court from reviewing the legality of a foreign sovereign's expropriation of property within its territory, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 [1964]. The Sabbatino decision enraged American business, led to a congressional override narrowed by the courts, and became a cause célèbre among lawyers lasting for years.

Q: How did you become involved?

FELDMAN: Early in the Nixon administration, I received a call from counsel for Citibank—Henry Harfield of Shearman & Sterling, informing us that Cuba had sued the bank demanding return of its blocked deposits. Citibank filed a counterclaim seeking compensation for seized assets and urged the department to have the Justice Department file a Statement of Interest with the Supreme Court asking it to overrule Sabbatino. I was sympathetic to Citibank's equities, but, aware that the Johnson administration had supported the act of state doctrine in Sabbatino, I was wary of promoting outright repeal that could lead to litigation impacting U.S. foreign relations in a wide range of circumstances. Accordingly, I recommended that the legal adviser, John R. Stevenson, write a letter for submission to the Supreme Court advising that the department had no

foreign policy objection to judicial decision of the bank's counterclaim against Cuba—a "Bernstein" letter in legal parlance.

Q: Was your idea accepted?

FELDMAN: Yes. I drafted a letter for Stevenson's signature with input from Deputy Legal Adviser Carl Salans, dated November 17, 1970.

<https://markfeldmaninternational.squarespace.com/act-of-state-doctrine> The department filed similar letters in other Cuban cases. In time, I became disenchanted with the act of state doctrine and, working with the American Bar Association, drafted an amendment to the Federal Arbitration Act that bars application of that doctrine in actions to enforce foreign arbitral awards, 9 U.S.C. 15. Although greatly weakened over the years, the act of state doctrine is still an obstacle in some cases.

Aircraft Hijacking

Q: If we want to stick with Cuba, should we move to the hijacking agreement?

FELDMAN: Yes, let's do that. Aircraft hijacking by terrorist groups in Europe and the mid-East became a threat to civil aviation in the Johnson years and was being addressed in a UN specialized agency called the International Civil Aviation Organization [usually referred to as ICAO]. By the time I joined L/ARA, hijacking of American aircraft to Cuba had become a major issue being worked on by Frank Loy and others. One of my most sensitive assignments was to draft an action memorandum from Assistant Secretary Covey Oliver [ARA] to Secretary Rusk requesting authority to propose a bilateral agreement with Cuba for the reciprocal surrender of hijackers. I also drafted the diplomatic note presented by the Swiss embassy in Havana inviting negotiations. FRUS 1964–1968, Vol. XXXIV, Doc. 309 [Dec. 6, 1968], Doc. 311 [December 11, 1968]. [At that time, the Swiss acted as protecting power for U.S. interests in Cuba.]

The attorney general's concurrence in that initiative was addressed to me by letter from Assistant Attorney General Fred Vinson. Id. n 4.

Q: Why was this memorandum sensitive?

FELDMAN: The memo confirmed—and applied to communist Cuba—a major change in U.S. asylum policy that had been floated informally in multilateral anti-hijacking negotiations in ICAO. Since Stalin imposed the iron curtain, the U.S. had welcomed fugitives from communist countries, including some who hijacked trains to get free. When aircraft hijacking became rampant, the Johnson administration gave priority to deterrence. The Oliver memo re Cuba stated: "We have concluded that... [asylum] should not be applied to hijackers of airliners because of the disproportionate hazard."

Q: Did President Johnson make the decision to adopt the new policy in bilateral relations with Cuba?

FELDMAN: I assume so, but there may not be a record. The Oliver memo reminded Secretary Rusk that he had approved the change in multilateral talks, and the note would not have been sent to Havana without the secretary's approval. Still, the historian did not find a copy of the Oliver memo signed by Rusk, and DOJ did not send us an approval signed by the attorney general. Looking back on this procedure, it seems likely that someone upstairs decided that putting the lawyers in the middle would add a layer of protection in case of damaging blowback.

Q: How did Cuba respond?

FELDMAN: I don't think there was any movement until the Nixon administration. The breakthrough came when Cuba published a new anti-hijacking law on September 19, 1969. That decree seemed to contemplate bilateral agreements, and the department was quick to respond. Nixon hated Castro, but the administration did not delay. The White House asked me to brief Attorney General John Mitchell at his sumptuous office in early October. [Pete Vaky was working with Kissinger at the time.] I remember this meeting vividly, because my wife was waiting for me at GW [George Washington] Hospital with a brand new baby girl—our first child. Ilana was born early morning, October 6, so this could have been October 8.

Mitchell was not yet tainted with Watergate, but I worried about going into enemy territory.

Q: And you couldn't say no. (laughs)

FELDMAN: In the event, he was very nice and agreed that we should try to work something out with Castro. I drafted an agreement and assisted Bob Hurwitch in the negotiations that were carried out in Havana through the good offices of the Swiss ambassador. We did not meet with the Cubans, but Bob took me to a meeting with the Swiss ambassador in Miami. What I remember best about that trip was the ambassador offering us Cuban cigars. We were not allowed to buy Cuban products, but there was no legal bar to smoking them. Naturally, I waited for Hurwitch to accept before following suit.

Q: How did Castro respond?

FELDMAN: Negotiations were difficult. The main problem being Castro's insistence that the agreement cover vessels as well as aircraft. This was a huge political problem, because Cubans fleeing the island frequently brought boats of all kinds to Florida. An agreement was concluded, however, on February 15, 1973, TIAS 7579, requiring return or prosecution of hijackers of aircraft or vessels except in the case of minor offenses. The agreement didn't last long, but it served its purpose. Coupled with deployment of federal marshals on American planes, hijackings to Cuba petered out.

Q: Why did Castro terminate the agreement?

FELDMAN: I don't remember the specific circumstances, but problems with U.S. compliance were likely a factor. I had dramatic exposure to that issue. One night, soon after the agreement was made, I was called by the Operations Center in the middle of the night to join a conference call with Secretary Rogers and Under Secretary Ken Rush.

Q: (laughs) You don't get calls from the secretary very often.

FELDMAN: The coast guard had just intercepted a vessel coming from Cuba and was requesting the secretary's guidance on whether to arrest two Cuban refugees who had seized the boat in Cuba. Everyone understood that Cuba would demand prosecution of these folks and that an arrest would create enormous political problems in Florida. I was not prepared to tell the secretary what to do. I read him the language of the agreement and began to review the facts and circumstances that were relevant. At this point, Rogers asked: "Do I have to make this decision?" Rush responded: "Mr. Secretary, I'll take care of this." The secretary hung up, and Rush terminated the call. The next morning I learned that the men had not been arrested. Somehow the vessel had entered port, and the two men jumped ship. I have no evidence, and no doubt, that this was a very practical solution worked out by Ken Rush with the White House. Of course, Castro was furious. No one asked L for a legal opinion. It was very bumpy trying to get Cuban cooperation after that.

Q: Are there any other matters with Cuba that you would like to discuss?

FELDMAN: The maritime boundary agreement between Cuba and Florida that we made in 1977 after Congress extended U.S. fisheries jurisdiction out to two hundred miles. Cuba lies ninety miles off our coast. I signed that treaty for the United States; no political appointee wanted the honor. But we can discuss that when we get to the Carter years.

OAS Convention on Terrorism

Q: Mark, I think we are in the early 1970s, and we were talking about terrorism in the context of Cuba, but I think you also worked on the OAS convention on terrorism. Can you talk a little bit about that?

FELDMAN: In addition to aircraft hijacking, the United States and other countries were very concerned about threats to diplomatic personnel. In Latin America, as I recall, there were attacks on our people in Brazil and Guatemala. One ambassador was killed, and one kidnapped. When I visited Guatemala in connection with the archeology issue, the embassy took me around by jeep with a guard armed with a machine gun. The situation was tense there. I also remember when traveling to Europe in the 1970s, we would be briefed about threats from Gaddafi. And I remember shattered windows in London from IRA [Irish Republican Army] bombings.

Q: In Uruguay there were Tupamaro guerrillas and in Mexico there were problems as well.

FELDMAN: One response in the West was to promote an international consensus that attacks on “protected persons” for political reasons were acts of terrorism that should be prosecuted, not “political crimes” eligible for asylum. The U.S. proposed new treaties in the OAS and the UN modeled after The Hague Hijacking Convention requiring states parties to “prosecute or extradite” offenders. The main opposition came from countries supporting armed rebellion against the apartheid regime in South Africa and militant Arabs condoning terrorist acts against Israel. Eventually, treaties were negotiated in both the UN and the OAS, but some compromises were made in the UN that weakened the norm. The OAS Convention, TIAS 8413, was signed on February 2, 1971. I was one of four U.S. signatories, but I did not enjoy the process.

Q: Why not?

FELDMAN: The problem was that I was asked to substitute for the legal adviser, John R. Stevenson, as the sole U.S. representative at a special OAS meeting in January 1971. The proceedings were conducted informally between foreign ministers in Spanish; I was not a minister and I did not speak Spanish.

Q: Why wasn't there someone from ARA or the U.S. mission to the OAS?

FELDMAN: Good question. Very surprising. All I know is that John Stevenson was assigned, and he could not make the first [evening] meeting because of compelling personal reasons. His wife was suffering from terminal illness. John was a prince of a man and a fine lawyer. He asked me to cover for him. I was happy to do so, but had no idea what I was getting into.

The meeting began in the usual way in formal session with simultaneous translation with earphones. As I recall, the U.S. had circulated a proposal before the meeting, but other delegations had different ideas reflecting diverse domestic politics. The first session was dominated by a dialogue between the foreign ministers of Brazil and Venezuela—polite and flowery in Latin style, but deeply adversarial. At some point, speaking in English, I tried to call attention to the U.S. approach. The immediate response was to adjourn the proceeding. The two leaders took their dialogue into a small conference room with no translation. I was in the room but not the conversation.

And, it gets worse. The next morning, the newspaper *Newsday* published a piece criticizing the State Department for the low level of representation and for sending someone who did not speak Spanish—a valid critique in my view. The next evening, and thereafter, the U.S. was represented by Under Secretary John Irwin. I continued to participate and did the legal work. We achieved our objective and the OAS Convention was signed by John Irwin, Assistant Secretary Charles Meyer, Ambassador John Jova, and yours truly. All's well that ends well, I guess.

Q: Was this treaty helpful?

FELDMAN: I believe it was the first multilateral treaty to apply the “prosecute or extradite formula” to “protected persons.” There is a larger question of how much international norms influence human behavior.

Foreign Expropriation Cases: Peru [IPC] and Chile [Copper]

Q: Should we move on to expropriation?

FELDMAN: Yes. As a consequence of my experience in L/ARA, legal standards and remedies relating to foreign expropriation became a major focus of my legal career at State and in private practice. These issues were high on the UN agenda and the U.S. legislative agenda in the 1970s. We’ll talk about the OECD Declaration on International Investment and the Iran Claims Agreement later on. As acting legal adviser in 1981, I established a new office in L for International Claims and Investment Disputes [L/CID]. After NAFTA was negotiated in the Clinton years, that office managed claims brought against the U.S. under NAFTA. At some point, a younger Mark Feldman, whom I have never met, worked in L/CID leading to some confusion in the digital world.

Q: Quite a coincidence. Okay, let’s start with the IPC case in Peru.

Peru-IPC Oilfields

FELDMAN: As I mentioned before, one of the first acts of the Velasco junta following the coup on October 3, 1968 was to nationalize the IPC oilfields without compensation. The political controversy over this investment had a long history in Peru, and the taking was popular. Further, I would say that it was the signature act of the new, nationalist, military government. Prospects for settlement were dim from the outset, and the atmosphere was fraught. Peru was one of the first foreign policy challenges for the new Nixon administration, and the junta was fearful that the U.S. would promote a counter-coup to protect U.S. oil interests and restore the elected government of President Fernando Belaunde.

Q: What was the action forcing event?

FELDMAN: President Nixon was inaugurated on January 20, 1969, only a few weeks before the April 9 deadline to suspend foreign aid to Peru imposed by the Hickenlooper Amendment unless Peru took “appropriate steps” to provide compensation to IPC as required by international law. See 22 USC 2370[e] [1]. The new administration was strongly pro-business, but it wanted to replace the Kennedy Alliance for Progress with a fresh relationship with Latin America. Cuba and the Canal were pressing issues, and a confrontation with Peru would give fodder to anti-American forces in Latin America and the Caribbean.

“Aside from the expectable consequences already noted, application of U.S. sanctions will surely precipitate widespread and vehement criticism of the U.S. throughout Latin America. The larger Latin American countries especially would view such action as “intervention,” and would see the power to sanction in this way as threatening to themselves. In short, it would almost surely provide impetus toward unifying the now fractionated anti-U.S. sentiment that exists in the region.”

DOS Memorandum for the President’s Assistant for National Security Affairs [Kissinger], January 28, 1969. FRU.S. Doc. 576, 1969–1976, VOL. E–10, Documents On American Republics, 1969–1972

Q: So, there was an April 9 deadline. Was there pressure from the business community?

FELDMAN: Oh yes, a great deal, led by the Rule of Law Committee, a lobbying group of oil companies and other American multinationals who feared for their investments overseas. Monroe Leigh, my future boss as legal adviser, was their counsel. But business was divided. Charles Robinson, head of Marcona Mining, opposed triggering Hickenlooper, because he feared expropriation of the firm’s iron mine in Peru. [Robinson later came to State as an under secretary in the Nixon administration.]

Given the limited time frame, Nixon appointed John Irwin as special ambassador to negotiate a settlement with the Velasco regime. There was one other issue on the U.S. agenda; we wanted Peru to stop interfering with U.S. tuna boats fishing within Peru’s declared two hundred mile zone. At that time, this was a hot issue in the Law of the Sea; in 1976 Congress followed the trend, extending U.S. fishing jurisdiction to two hundred miles over the objections of DOD and State.

I was asked to accompany Irwin as legal adviser, along with John Shumate, the Peru desk officer. The three of us flew to Lima on a White House jet in mid-March. The Velasco junta was so concerned about an American intervention that they housed us, at first, in an isolated country villa away from the press and under close surveillance. There were plain clothes guards in place and a lurking European in white suit and Panama hat. [I didn’t know then that Klaus Barbie, the Butcher of Lyon, was running Velasco’s security. More later.] I roomed with John Shumate—a colorful guy—for a couple of nights. He had no doubt our rooms were bugged and made a point of shouting very nasty things about the foreign minister, General Mercado. The day after those rants the Peruvians declared Shumate *persona non grata* [PNG], he returned to Washington at once.

Q: What was that about?

FELDMAN: I have no idea, but John was no dummy. He was being deliberately provocative.

Q: You don’t usually have a visiting delegation member PNGed. It’s usually somebody working in the embassy.

FELDMAN: He was sent home.

Q: Okay. How did the negotiations go?

FELDMAN: Very slowly. A lot of talk; a lot of socializing. I remember Irwin dancing late into the night at one party hosted by Velasco. The ambassador was a good dancer, but he didn't realize the hosts had to stay until he said goodnight. All during our stay, there was considerable back-and-forth with Washington. Both teams were reviewing options. As time ran out, a consensus emerged that Irwin and Secretary Rogers would recommend that the president defer formal invocation of Hickenlooper to allow exhaustion of Peruvian administrative remedies. Quiet economic pressure was in place already; as I recall, aid flows to Peru had been suspended de facto since the coup.

Q: So, the aid was halted because of both the coup and IPC?

FELDMAN: You could say so. To my knowledge, however, there was no discussion of reversing the coup.

As the deadline approached, Irwin decided to return to Washington over Easter weekend 1969 for final consultations with the secretary, and to meet personally with the president before returning to Lima. Flying to Washington from Lima, we flew on a large air force plane—just a couple of us in this cavernous aircraft. A friendly pilot invited me to use the cockpit phone to call home; it was great fun talking to my wife flying high over the Andes.

Would this be a good time to share some of my personal experience in Peru?

Q: Please do.

FELDMAN: I really enjoyed being in Peru for this mission—not just the drama of the negotiations and the strangeness of socializing with the military junta, but learning something about the country, including its archeological heritage and Quechua population. Downtown Lima seemed a little drab, but the museums were interesting, and there was sunshine and good food up on the hillsides. I remember having a wonderful fried chicken lunch outdoors at the Gran Azul and tasting ceviche for the first time. I was excited to see a flock of small parrots in a residential neighborhood, but I was told they were not native. Thanks to the embassy, I enjoyed the Passover Seder meal with a local family. That was a special experience, heightened when the meal was interrupted by a tremor—a small one, but unsettling to me as it was my first.

Back to business. By the time we got to Washington, an interagency decision had been made to hold-off invoking Hickenlooper, to continue quiet economic pressure and to negotiate further. Everyone recognized that the legal rationale for “appropriate steps” was weak. We had low expectations that Peruvian administrative procedures would provide meaningful progress, but the costs of open confrontation would be high.

Q: Did you meet with President Nixon?

FELDMAN: Yes, on the way back to Lima. I accompanied Irwin and Ernie Siracusa, our DCM in Lima, to the meeting with the president at Bebe Rebozo's house at Key Biscayne. We flew to Eglin Air Force Base near Miami on a presidential jet star and to Key Biscayne on a presidential helicopter. That was cool. President Nixon met with the three of us for a long time. The decision was already made, but Irwin wanted to be sure the president was on board. Nixon seemed to be well briefed. Mainly, he mused about what happened in Egypt when he was vice president. Nixon told us that Nasser had asked for U.S. funding for the Aswan Dam. John Foster Dulles was against it, and President Eisenhower refused. Nasser threw us out of Egypt and the Soviets came in. Nixon said he didn't want a problem like that in Latin America over aid.

Q: If I recall correctly, when he was vice president and visited Venezuela, there had been massive demonstrations, so he probably had some sense of how angry they could get.

FELDMAN: I don't doubt it.

Q: What was Nixon like?

FELDMAN: Nixon was a very small person. I didn't realize how short he was. He sat in an armchair with his feet propped on an ottoman. His most memorable comment to me was, "Pshaw." I never heard another person say that.

Anyway, we then flew back to Lima in the jet star. On arrival, I realized that I had left my passport at home. Very embarrassing. Our hosts were not impressed. But of course, they let me in. We made one last effort with the junta, but made no progress.

Q: Was the IPC case ever settled?

FELDMAN: There was another Irwin Mission to Peru in 1969 that did not accomplish much. I did not attend. My wife was having a difficult pregnancy and wanted me at home. In 1974, there was a general claims settlement with Peru, but I think IPC was treated as a special case.

Meanwhile, there was major backlash in the U.S. among those who felt Nixon should have invoked the Hickenlooper amendment and formally suspended assistance to Peru. Foreign expropriations multiplied, and Treasury Secretary John Connolly persuaded the White House to issue a formal Policy Statement announcing a new organization to administer a strong U.S. expropriation policy. See *Economic Assistance and Investment Security in Developing Nations*, 11 ILM 239 [1972]. Some said that the State Department had won the battle, but lost the war. Jessica Einhorn, *Expropriation Politics* [Lexington 1974].

Q: How did that affect you?

FELDMAN: Well, it put the State Department on the defensive. A White House committee coordinated U.S. policy, and Treasury had more influence. One positive for U.S. policy, and for me, was the establishment in the Economics Bureau [EB] of a new Office of Foreign Investment supervised by DAS Elinor Constable and staffed with strong people, e.g., Dick Smith and Mike Kennedy, who later became a hostage in Tehran. I worked very closely with these folks and enjoyed the relationships.

Q: What's next on your list of topics? Chile?

FELDMAN: Yes. Chile was a major chapter in my L/ARA experience. Before leaving Peru, however, let's talk about Klaus Barbie.

Klaus Barbie—The Butcher of Lyon

Q: Fine. Who was Klaus Barbie?

FELDMAN: Barbie was the Gestapo head in Lyon, France responsible for killing thousands of Jews, communists, and resistance fighters, including the prominent resistance leader, Jean Moulin. Barbie fled Europe after World War II with some help from the Occupying Army. The French were eager to find Barbie and try him.

This is a story in three parts: Part One in Lima; Part Two in Washington; Part Three in La Paz.

Part One: As I mentioned earlier, the first nights the Irwin team was in Lima, the junta secured us in a villa out-of-town under tight surveillance. Walking around the first morning, I noticed a European gentleman who seemed out of place; he was dressed in a white linen suit and Panama hat. I must have stared, because he smirked at me. My first reaction was that this guy was kind of a caricature of a Nazi war criminal hiding in Latin America. Folks like Adolph Eichmann and Josef Mengele were well received in countries such as Argentina and Paraguay.

Q: You could tell that's what he was?

FELDMAN: Just my reaction.

Q: And you were right, I guess.

FELDMAN: As it turned out.

Part Two: A few years later, the legal adviser received a communication from Ladreit de Lacharriere, legal adviser of the French Foreign Ministry [Quai D'Orsay], stating that France believed Klaus Barbie was living in Bolivia and requesting U.S. assistance in locating him. The Front Office sent the letter to me for action. I wanted to help France, both as a Jew deeply concerned about the Holocaust and as a former French student familiar with the Nazi occupation during World War II. Moreover, it was well known

that the Allies helped many Nazis after the war, including rocket scientists and Nazi intelligence; there was competition with the Russians for the services of these rogues in the cold war. The Adenauer regime was full of former Nazis, and the Allies used Gestapo alumni to track down Russian agents.

Q: What did you do?

FELDMAN: Like always, my first move was to check the files. To my surprise, L/ARA had a thin file on Klaus Barbie. There was little information, but there was some indication that the U.S. Army had been interested in Barbie after the war. There was no reference to Peru, so I wasn't thinking that Barbie was the man I had seen in Lima. But the image of the man in the white suit certainly came to mind. The seed was planted.

My next step was to take the French request and the L/ARA file to John Irwin, by then an under secretary. He looked at the file and immediately picked up the phone and dialed a person I knew. They had a brief conversation while I sat across the desk from Irwin. Then, John put down the phone and told me that we couldn't do anything for France, because of U.S. commitments made for services rendered. I was familiar with that policy and was not surprised, but given what I had learned about Barbie's actions in Lyon during the German occupation, the decision was hard to take. It never occurred to me to breach security, but I did wonder whether I should resign from the department. Frankly, it was just a passing thought. I was too committed to the work I was doing.

Q: What did you say to the French?

FELDMAN: I don't recall precisely, but I'm sure I drafted a brief, bland response that said nothing of substance but was clearly understood. A few years later, I had some business with de Lacharriere in Geneva and met with him at the Quai d'Orsay concerning foreign bribery issues. He was surprisingly helpful. I was impressed by him, but we never discussed Barbie.

Q: What about Part Three?

FELDMAN: Right, La Paz.

Part III: Fast forward thirty years to when friends told me that the U.S. had cooperated with the French when they kidnapped Barbie in Bolivia and brought him back to Lyon for trial. Barbie was tried in 1987, convicted, and died in prison non-repentant. My friends also believed that the man I saw in Lima in 1969 likely was Klaus Barbie; they knew Barbie had lived in Peru before Bolivia. I was fascinated to hear that, but remained uncertain until I watched the Paul Ophul film, *Hotel Terminus: The Life and Times of Klaus Barbie*. WOW! I recognized Barbie.

Q: So, your suspicions were right.

FELDMAN: Not only was Barbie in Peru in 1969, he was in charge of Velasco's security.

Q: (laughs)

FELDMAN: After watching the film, there is no doubt in my mind that Klaus Barbie was keeping an eye on us in Lima and enjoying the irony as he did it. The film tells us that Barbie moved to Bolivia when he was tracked to Peru by the famous Nazi hunters, Serge and Beate Klarsfeld.

Chile 1970: The Allende Election—Copper Negotiations

Q: Mark, I think we are up to 1970 and I wanted to ask you about the Allende appropriation of American copper mines.

FELDMAN: The Marxist candidate, Salvador Allende, was elected president of Chile on September 4, 1970, initiating one of the most dramatic episodes of my career. Allende's win came as something of a surprise, embarrassed Ambassador Edward M. Korry and stunned the Nixon administration. The U.S. had supported outgoing President Eduardo Frei as a force for democracy in the hemisphere, but he did not run for another term. So, the election was mainly between former President Alessandri, an elderly man seen to represent the wealthy, and a coalition of Marxist factions led by Allende, leader of the Socialist Party. Allende was pro-Castro and hostile to the United States; he ran on a promise to nationalize the copper mines and other foreign investment without compensation and to establish a socialist state.

Q: Why was the Allende election a surprise?

FELDMAN: I remember discussions before the election as to what the U.S. might do to help our friends in country. In the end, the U.S. did little but spend some money on advertising. As I recall, no one in Washington had great confidence in Alessandri, but Allende was not respected and was seen as a long shot. As the campaign proceeded, however, folks in ARA became apprehensive. I don't recall the White House being particularly engaged before the election, but when Allende won, they blamed Ambassador Ed Korry for not warning them of the threat.

Edward M. Korry

Q: What was Korry like?

FELDMAN: Ambassador Korry was a bright, colorful envoy who had made a career in journalism before becoming an ambassador. Prior to the Allende election, Ambassador Korry had a solid record of service in Ethiopia and Chile. He was an activist and had personally mediated an earlier nationalization dispute between the Frei regime and the U.S. copper companies.

Q: Do you remember if we had many copper companies or just one or two?

FELDMAN: There were two major ones, Kennecott and Southern Peru Copper.

The Allende election created shockwaves. Nixon was furious. It was the beginning of the end of Korry's career in the U.S. government, and he knew it.

Q: Because he hadn't predicted it or because he hadn't stopped it?

FELDMAN: Both. Ambassador Korry came back to Washington for consultations, and there were intense deliberations about what the United States could do to avert the inauguration of Allende or to mitigate his policies. Much has been written about what followed, but there is one short story that has not been told. Korry decided he would try to persuade the Allende government, before the inauguration, to pre-negotiate the expropriation issues that were at the top of the Allende agenda. He was hoping to obtain some commitment to compensation. Korry had been successful negotiating copper issues with the Frei government. He knew the terrain extremely well and all the players. I was assistant legal adviser for ARA when Korry was in DC, and I'd been involved in a lot of expropriation work for the bureau. So Korry asked me to go to Santiago with him to assist.

Q: When was the inauguration?

FELDMAN: The inauguration was scheduled for November 3, 1970. Korry and I flew to Santiago on October 23. I had never been to Chile before. And it was a very tense, fraught environment. I remember landing early in the morning, October 24. It was a damp, cloudy day and there was a huge press corps waiting on the tarmac to interview Chilean Foreign Minister Gabriel Valdez, who was on our plane. More important, the papers were reporting an armed attack on General Rene Schneider, commander of the Chilean Army. He was shot the day before and died on October 25. To complete the picture, Allende was formally elected president by Parliament the day we arrived, October 24.

Q: Chileans and others blame U.S. involvement.

FELDMAN: I have no personal knowledge, but a great deal has been written about this event. Best I remember, this was an attempted kidnapping by Chilean rightists that went bad. Allegations were made that Kissinger approved some contacts with those involved; he denied the charges. I'll leave this to the historians. But this development did not bode well for Korry's negotiations.

Korry did not tell me a great deal about his plans, and I don't remember much. But he asked me to have lunch with a man named Mario Valenzuela whom I understood to be an outside advisor to the incoming Allende government on financial matters. Someone set up the lunch, and I had a nice meal and talk with Valenzuela. I recall suggesting that a reasonable dialogue about the future of U.S. investments in Chile might help smooth the way for a better relationship between the Nixon administration and the new government. When I came back from the lunch, Korry was ashen. He had received a message from

Kissinger that this mission was disapproved of by the White House. It was to be aborted. We were to return immediately to Washington. Now, I'm sure Korry believed that he had White House authorization for this enterprise. But whether he did or not, the mission was terminated abruptly. When I started telling Korry about my lunch, he said, "Whoa, you exceeded your brief." And for years, I wondered what Korry really thought and whether he mentioned me in his reports to Washington. I never found anything.

After a while, the Nixon administration did open negotiations with the Allende team on compensation for American investments seized without payment. I have vivid memories of a secret meeting we had with senior Chilean officials in Lima under cover of an OAS meeting in May 1972. Ambassador Orlando Letelier was there as was Jose Toha, Allende's interior minister. Both were killed by the Pinochet regime after the 1973 coup: Toha by torture in 1974; Letelier by bomb planted at Sheridan Circle in 1976. The U.S. delegation in Lima was headed by Assistant Secretary Jack Kubisch. It was a tense meeting with some recriminations, but we had serious, substantive discussions, and the U.S. floated a proposal for arbitration under the 1914 U.S.-Chile Treaty for Settlement of Disputes. There were follow-up meetings, but the effort to reach agreement failed because Chile was not prepared to make the arbitration binding as the U.S. insisted.

Q: Were these negotiations superseded by the military coup of September 11, 1973?

FELDMAN: Yes. I have no information about the coup, as such, but I would like to say a word about the Church Committee Hearings on alleged U.S. intervention in Chile, because I became involved in those as counsel to Assistant Secretary Charles Meyer when he testified on March 29, 1973. Sometime later, the Justice Department interviewed me concerning Meyer's testimony. That was not comfortable, but there were no problems.

I worked with DAS John Crimmins to prepare the testimony and follow-on Qs and As for the Church hearings. From the outset, Crimmins' instruction to all concerned was that we would not lie. Well, the sensitive question we expected was: "Did the United States intervene in the 1970 Chilean election?" In fact, we had done practically nothing by comparison to prior years, but we had spent some money for political advertising for parties opposing Allende. Still, we couldn't answer. If we said no, that would be taken as lying. To say, yes would be misleading and would be incendiary in Latin America. The OAS Charter prohibits foreign intervention in internal affairs. ARA didn't want to answer this question or to discuss the details. So, we decided that the witness would not answer that question, and would invoke executive privilege, if pressed to the wall.

Q: How does that work?

FELDMAN: Under our system—notwithstanding Trump—a witness is required to answer questions from Congress unless the president formally invokes executive privilege. So I reached out to Fred Fielding in the White House Counsel's office to prepare the ground in advance of the hearing. He gave State the green light.

Q: How did the hearing go?

FELDMAN: Not well. Charlie Meyer didn't want me sitting by his side. It reminded him of the McCarthy hearings. So, I sat behind him while he tried to fend off questions that were awkward for the administration. I remember, once, leaning forward and saying, not very helpfully, "Don't answer that." Meyer had been briefed and knew he was authorized to invoke executive privilege, but he didn't do it. He must have felt that would just escalate the issue. We never discussed this afterward. So, it didn't go well. In that environment, I worried there could be a problem.

Q: What did Meyer say, exactly?

FELDMAN: I don't remember his exact words. He was not very clear, but I worried that someone might question his veracity. I was surprised, however, sometime later, to receive a call from a DOJ prosecutor, Peter Clark, asking to come see me. Peter and a colleague came to my office, sat down, and Peter said, "We've been looking into this Charlie Meyer testimony, and all fingers point to you. Tell us what's going on here." And I said, "Not a problem. I drafted the talking points. You have seen them. John Crimmins directed our preparation, and the first thing that he told us was: 'Under no circumstances is anybody going to lie to Congress.'" That stopped them. Peter asked: "Just like that?" And I answered, "Just like that." Then, they relaxed a little bit; Peter said—in some form of words: "Well, tell us, off the record, was Meyer lying or was he just confused?" I couldn't answer that question. That was my first [hostile] interview by the Justice Department, and that's the end of my Chile story.

Q: Were you questioned by DOJ again?

FELDMAN: Yes when I was in private practice. My firm, Feith & Zell, P.C., acted as counsel to an American satellite company being investigated for alleged violations of export control regulations during a Chinese satellite launch failure review. First, I was questioned by the FBI [Federal Bureau of Investigation] concerning contacts I had with NSC staff. That was easy. Second, the law firm representing the client in grand jury proceedings decided to waive my attorney-client privilege, so I could testify before the grand jury. That was very uncomfortable. Fortunately, no criminal charges were filed. The company was fined by the State Department, however.

Promotion to Deputy Legal Adviser 1973–1974—Working with Henry Kissinger

Q: Mark, I believe that we are in the year 1973, and you were serving de facto as deputy and, sometimes, acting legal adviser.

FELDMAN: Yes, Charles N. Brower was acting legal adviser during the Nixon-Ford transition—when Watergate was unfolding. John Stevenson had moved on to lead the Law of the Sea negotiations. Charlie asked me to move up to be his deputy. When I

arrived in the Front Office, Charlie and I were alone there. [George Aldrich must have been the senior deputy then, but George was often abroad doing extended multilateral negotiations, e.g., Law of War.] This was the most important promotion of my career, but it was temporary until a new legal adviser was confirmed, and informal at first. Due to political sensitivities at the White House, Charlie delayed circulating a notice for a while.

Q: Why was that?

FELDMAN: I can only speculate that I was on Nixon's reported second-term hit list.

Q: How was that resolved?

FELDMAN: For context: Charlie Brower was a political appointee as deputy, an accomplished lawyer, and a strong, energetic leader. He deserved to become legal adviser, but got crosswise with Deputy Secretary Ken Rush over Berlin issues. After a while, Secretary Rogers selected another New York lawyer, Stuart Scott, for the position, but Scott was never appointed. He sat in a cubbyhole in our suite for months without a Senate hearing while, unbeknownst to us, Dr. Kissinger engineered Rogers' departure and his own appointment as secretary. Eventually, Kissinger was sworn in and brought in Carlyle Maw, his personal attorney, as legal adviser. During that interlude, I often served as acting legal adviser. [Eventually other deputies were appointed, including my friend Stephen Schwebel.]

Q: Is that when you had face time with Kissinger?

FELDMAN: My interactions with Secretary Kissinger were mainly in his staff meetings; sometimes in policy conferences. Let me mention one personal encounter that kind of defined our relationship.

One evening after Carlyle Maw joined L, he invited some of the lawyers to his Watergate apartment to meet Kissinger. When Maw began to introduce me to Kissinger, the secretary said, "I know him. He's the guy who gives everyone a rough time."

Q: Oh, my.

FELDMAN: Carl Maw came to my defense, saying, "Well, he's a lawyer. That's what he is supposed to do." And Kissinger said, "Well, he's doing it very well." After that, some of Kissinger's cronies would remind me, "You're the guy who gives everybody a tough time."

Q: (laughs) Not a bad epitaph.

FELDMAN: And I remember one time, Kissinger yelled at me in the corridor. When I mentioned that to friends the other night, a former FSO commented that Henry Kissinger yelled at everybody.

Q: Right. (laughs) Tell more about Henry Kissinger's impact on the department as you saw it from the L Front Office.

FELDMAN: As you know, Henry Kissinger [HAK] was a dynamic leader. He was a scholar who gained prominence through his writings on European history and nuclear strategy. He was also a charismatic intellectual who knew how to charm the press and became an international celebrity. It was exciting to have a secretary of state who was close to the president, who dominated foreign policy in Washington, and was the moving force in Western diplomacy. He was also highly competitive, controlling, and, sometimes, duplicitous. When Kissinger was national security adviser, he kept the State Department busy writing lengthy policy reviews while he conducted relations with key allies and adversaries from the White House. It was better to have him in the building.

One of the first changes I noticed on Kissinger's arrival was the change in information flow. Before he became secretary, the legal adviser received regular agency briefings, and we saw daily reports on current events. At that time, I was following the run-up to the Yom Kippur war with close attention. Shortly after Kissinger took charge, that flow dried up. Not surprising, considering the "plumbers" and wiretapping scandals in the Nixon White House. HAK lived by the code that access to information meant power.

Q: Do you have any anecdotes to share?

FELDMAN: I have a story illustrating HAK's control issues. We'll discuss the Foreign Sovereign Immunities Act at length later on. In 1974, when I had a draft ready for interagency coordination, I sent it upstairs, through Carlyle Maw, for the secretary's approval. I wanted Kissinger to confirm the decision the Nixon administration had previously made to transfer immunity determinations from the department to the courts. That was kind of a big deal and a loss of control. But nothing happened. The action memo sat on the secretary's desk. So, one day I went back to the legal adviser for advice: "What can we do to get Kissinger to focus on this issue?" Maw told me, "Don't send it to him. Send it to someone else on the seventh floor. The Operations Center will send Henry a copy; if it's sent to somebody else for decision, he'll read it." *(both laugh)*

I did that, and Kissinger did as Maw predicted. We had his approval in no time. Coming from Kissinger's personal attorney, I thought this was revealing. Apart from foreign policy, Kissinger presented a number of new issues for the lawyers because of his unique position as an historian and an international celebrity.

Q: For example?

FELDMAN: For one thing, it took some doing to persuade Secretary Kissinger that the copious notes he took on meetings with foreign leaders—and other papers of historical interest—were government documents, not personal papers. He expected to use them for his books and wanted total control. The issue came to a head over notes he took on meetings with the Syrian leader, Hafez al-Assad. As I recall, the Justice Department was called in to settle that question.

And when Secretary Kissinger married Nancy Maginess, the happy couple received hundreds of valuable gifts from foreign officials and other personalities. This caused a sensation that led Congress to enact legislation, for the first time, governing gifts to federal officials—not members of Congress, of course. Executive Branch personnel could no longer accept any gift over a minimal amount; gifts had to be returned or assigned to the government.

Kissinger often spoke to the press “on background,” which meant the press could use the information but not attribute it to the speaker. Whenever you read a story in the paper attributed to a “senior official accompanying the secretary” or the like, you would know that Kissinger was the source. Further, as you know, he had the reputation of being a master leaker.

Another feature of Kissinger’s *modus operandi* was to force action by speech or press conference, sometimes without interagency coordination. Often that worked, but it sometimes got HAK into trouble. I recall one episode where Kissinger briefed the press on background about SALT [Strategic Arms Limitation Talks] negotiations with Russia and said something about the Soviet Backfire bomber that infuriated Secretary of Defense Schlesinger. The controversy led to an FOIA request for the transcript of the briefing. HAK responded by asking George Vest to classify the transcript after the fact. That led to a difficult court challenge that I’ll discuss later on.

Q: Give me a hint.

FELDMAN: Okay, here is the short version. This involved Morton Halperin, a friend, who had been a close aide to Kissinger at the NSC, but left after being wiretapped along with Tony Lake and others. In brief, Mort sued the department on behalf of the National Security Foundation under the Freedom of Information Act to obtain a copy of the press briefing that had been classified after the fact. It was hard to justify classifying information that the secretary had put in the public domain, but the administration was concerned that official confirmation of the “background” briefing would damage our position in the SALT negotiations by elevating a press report to an official statement by the Secretary of State. We lost in the district court and appealed to the Court of Appeals for the DC Circuit. That court did something unique in my experience. Essentially, they said: You lose, but a federal court has inherent equitable powers, and we are going to exercise that power to ask the foundation [Mort Halperin] to defer enforcing our disclosure order for a period of time to be negotiated with the State Department. Halperin accepted that request and agreed to defer disclosure for, I think, five years. Amazing. And I take no credit. Mort Halperin, a non-lawyer, out-lawyered us.

Perhaps this example will be interesting as well. During the world food crisis in 1974, there was a serious grain shortage due to crop failures in several important areas. Kissinger made a speech announcing a dramatic new U.S. initiative on international food security. The problem was that he had not coordinated the program with the Agriculture Department or other agencies. There was strong opposition to some of his ideas that

absorbed a lot of interagency energy. I'll talk later about the 1974 World Food Conference in Rome and the 1975 grain negotiations in Moscow.

Q: Can you say more about Kissinger thinking you were "giving everyone a hard time?" What was Kissinger's attitude towards legal advice?

FELDMAN: Like many clients, Kissinger did not do well with legal advice that told him that he couldn't do something he wanted to do. That was a problem in our relations, and he did not attach the same importance, as lawyers do, to words included in UN resolutions or, sometimes, in agreements. He was a very practical man.

I got crosswise with Secretary Kissinger early on when he launched an important dialogue with Latin American foreign ministers leading to the Declaration of Tlatelolco, 13 I.L.M. 465 [1974]. One of the issues on the agenda was the deep divide between the U.S. and developing countries over state responsibility to compensate foreign investors for expropriated property. This was the issue I worked in Peru and Chile. The U.S. government had a well-established position dating back to the Mexican Revolution that was central to the North-South dialogue and an irritant in our relations with Latin America. L prepared a substantial briefing package on these issues, but it became clear at the first meeting on this initiative that Kissinger was not interested in what L was telling him. He didn't even mention our concerns. Then, I made the mistake of challenging him in public.

And I paid a price for that. Carlyle Maw was not particularly eager to confirm my promotion to deputy legal adviser. Eventually he did, on condition that I waive my civil service protections. I took that risk. Fortunately, the position was never reclassified as "political."

I can tell you another story that illustrates Kissinger's tension with lawyers. This involved Stephen Schwebel, my colleague in L who became president of the International Court of Justice. Steve told me this story and authorized me to repeat it. Steve represented the U.S., and I worked with him in negotiations on UNGA [United Nations General Assembly] Resolutions relating to the "New International Economic Order" and the "Charter of Economic Rights and Duties of States." The U.S. and like-minded countries opposed numerous points in these resolutions, including the asserted right of states to expropriate natural resources owned by foreign investors without compensation or international accountability.

We did not have the votes to block the resolutions, but Steve had forged a coalition to vote against them. A no vote was critical to maintain the viability of the classic international law principles at issue, and U.S. abstention would have betrayed our partners. At the last minute, however, Kissinger, without consulting L, authorized the U.S. Mission to the UN to abstain. When Steve learned this, he called Charles Percy, chairman of the Senate Foreign Relations Committee. Percy called Kissinger and talked him down.

Q: He backed off?

FELDMAN: Kissinger backed down, but I don't think he loved the experience.

Q: Let's look at the big picture for a moment. How would you assess Kissinger's foreign policy?

FELDMAN: History will judge. I was very impressed, of course, with his China policy, the détente policy with the Soviet Union, and his shuttle diplomacy in the mid-East. The Reagan team disparaged détente, but I think East-West rapprochement was an essential step to Gorbachev and the reunification of Germany. By the way, the Germans credit Kissinger with paving the way for reunification in the West, particularly with London. There were problems, of course, in Vietnam, Cambodia, Angola, and Bangladesh. Most of all, I was unhappy with Kissinger's indifference to international human rights and the wiretapping of his White House staff. My father often said my phone was tapped, but I assured him that I was not important enough.

Q: Are there any other episodes you want to comment on?

Jackson-Vanik Amendment [1974]

FELDMAN: A few. Let's begin with Jackson-Vanik. With my family background, I was very sympathetic to the plight of Jews in the Soviet Union and supported the Free Soviet Jewry movement.

Scoop Jackson and Charlie Vanik persuaded Congress to adopt legislation incentivizing the release of Soviet Jewry by blocking important trade and financial benefits for the USSR [Union of Soviet Socialist Republics]. Congress also authorized an annual presidential waiver based on specified findings, and the waiver became an issue in U.S. politics and in foreign relations. The Soviets regarded this measure as interference in their internal affairs, and Kissinger strongly opposed it. He saw Jackson-Vanik as an attack on détente and predicted it would move the Russians to shut down Jewish emigration. For Kissinger, who prioritized international peace based on a balance of power respecting the interests of all the powers, this was an affront to realpolitik.

There are two sides to this story. Initially, the Soviets did respond to the pressure, and there was significant Jewish emigration to Israel and some to the United States. But there came a moment when Congress went a bridge too far. The Soviets exploded and shut down emigration entirely. [I recall a Stevenson amendment that restricted financing, I think.] I happened to be in the room with Kissinger when that was happening. He was not happy.

Conference on Security and Cooperation in Europe [CSCE]—Helsinki Accords [1975]

FELDMAN: I was also present in staff meetings where Kissinger talked about the CSCE negotiations, and was surprised to hear him tell George Vest that he had serious concerns about this initiative. He seemed to think this was a Soviet move to perpetuate the political division of Europe into spheres of influence. I remember him saying that the U.S. delegation could attend the next meetings, but should not say anything. George Vest does not mention this exchange in his oral history, but he makes it clear that Kissinger gave him a rough time over Helsinki. Kissinger was opposed to the human rights basket in the Helsinki Accords, which was the primary interest of the Congress and was a great success for the West. Helsinki contributed to the liberation of Eastern Europe—the opposite of what Kissinger feared. And Vest makes a big point about how Kissinger said different things to different folks. Martin Indyk makes the same point in his new book, *Master of the Game*.

George Vest was the State Department Press person for a while; his oral history is fascinating.

Q: I was just looking up what position George Vest had at this time. He was head of the Press Office and went on to be the assistant secretary for Political-Military Affairs.

Angola

FELDMAN: One episode that has been much discussed publicly was the rough time Kissinger gave Nat Davis, assistant secretary for African Affairs, over the armed conflict in Angola. I attended that staff meeting and remember Kissinger dressing Nat down: “Why aren’t we involved?” “Tell me which side we should be on.” Later, people criticized Kissinger for pushing the U.S. into a protracted proxy war with Cuba over power in Angola. I did not work on this issue and have no opinion. But I was put off by Kissinger’s treatment of Davis.

Q: It sounds as if Kissinger’s negotiations would have taken a lot of lawyers’ time. Were there particular initiatives or negotiations that you ended up working on because of his initiatives?

FELDMAN: Like everyone at State, I was caught up in the whirlwind of activity HAK generated. In 1974–76, I traveled to Paris frequently for negotiations in the OECD, and to New York, Geneva, Rome, and Moscow on other assignments. At times, there were thirty officials from Washington agencies in Paris at the same time for meetings in the OECD, IAEA, and other organizations. There was competition for rooms with baths in the hotel many of us used at La Muette. I loved being back in Paris in the 1970s and saved my per diem for two star dinners that were then affordable, spending little on Hotel de la Poste et cetera.

Q: What were you working on in Paris?

OECD Declaration on International Investment [1976]

FELDMAN: Mainly, the OECD Declaration on International Investment, adopted in 1976, but also foreign bribery [a major matter to be discussed later] and some follow-up to the UNESCO Cultural Property Convention.

The declaration was generated by European labor governments concerned about the growing power of multinational corporations, often based in the U.S., which were seen as escaping national regulation. [During the same period, developing countries pursued a Code of Conduct for multinational enterprises in the UN.] The OECD Declaration addressed: guidelines for MNEs, national treatment, and investment incentives. Paul Boeker, a super FSO, represented the U.S. in the OECD Committee on International Investment, which set policy, and I represented the U.S. in the Legal Committee that drafted the texts. I was particularly pleased that the guidelines recognized the right of every state “*to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and to the international agreements to which it has subscribed.*” [Art. 7]

Q: Was that important to American business?

FELDMAN: The formal reference to international law was very important. This statement in a multilateral declaration was a signal success for U.S. diplomacy. I’m not sure it was ever repeated. As we discussed before, protection of American investments abroad and the role of MNEs were major foreign policy issues for the U.S. in the 1960s and ’70s, a hot topic in bilateral relations and multilateral diplomacy, and a subject of intense interest in Congress and the Bar.

See Amicus Brief, Mark B. Feldman in *Republic of Hungary v. Simon* [2021]
https://www.supremecourt.gov/DocketPDF/18/18-1447/158878/20201027121548624_40183%20Feldman%2010-26-20%20235%20pm%20Brief%20Rev%20October%2026%20-%20pdf-a.pdf

In those days, international law and the rule of law generally were values supported across the political spectrum in America, by business on the right—to protect foreign investments, and by human rights and peace advocates on the left. The exceptions were states’ rights nationalists and protectionists—disfavored in those days.

The most important development in this field was the negotiation of hundreds of bilateral investment treaties [BITs] between investor and capital importing states establishing impartial arbitration procedures for the resolution of investment disputes. Historically, the U.S. had included investor protections in Freedom, Navigation, and Commerce treaties, but that program had lapsed. I don’t know why. The U.S. had long supported the World Bank program for investment arbitration [ICSID], but Europeans pioneered the BIT. The U.S. BIT program was started on my watch. I encouraged it, but the action was in Treasury. This work culminated in NAFTA in the Clinton administration and was rolled back by Trump with bipartisan support.

World Food Conference [Rome 1974]

Q: Okay. We have covered investment policy. I'm curious about the 1974 World Food Conference and what the big issues were then. I worked on food security twenty years later, but I'm sure the issues were different.

FELDMAN: All right. This was a huge deal in 1972–75, because there had been two bad years of failed grain harvests in South Asia and the Soviet Union; there were serious food shortages. There was also a scandal in the United States when the Russians quietly purchased most of our grain surplus at subsidized prices leaving little for our international food aid programs. I remember being told that the Soviets got the jump on the trade by wiretapping the Federal Reserve. True or false? I don't know. Anyway, they bought U.S. food reserves at a bargain price and left us little to export. Congress was in an uproar.

Q: So that led to the grain negotiations in Moscow?

FELDMAN: Yes, in 1975. But let's start with the World Food Conference [WFC] organized by the UN in 1974. In September 1973, Secretary Kissinger, in his maiden address to the UNGA, called for a World Food Congress aiming to eliminate child hunger in ten years. The Rome Conference, convened in November 1974, was a three ring circus with large delegations from dozens of countries; a separate, parallel conference of NGOs [nongovernmental organizations]; flying visits by senior leaders and celebrities from around the world with attendant ceremony and press conferences; and a tone-deaf Papal address opposing birth control. This was also a grand platform for developing countries to pursue their agenda in other UN bodies.

Spoiler alert: While the WFC recommended a number of useful actions, e.g., strengthening the Food and Agriculture Organization [FAO], the threat of famine was soon averted by the “green revolution” in agricultural technology and practices in India and other countries.

Q: Who attended for the United States?

FELDMAN: As I recall, Agriculture Secretary Earl Butz was the U.S. representative, but the work of the delegation was organized by the coordinator, Ambassador Edward Martin. A slew of senior officials from the WH and the agencies attended for varying periods of time. I remember, particularly, the charming Anne Armstrong, then counselor to the president, who was an asset in Rome and a flying visit by Senator Hubert Humphrey. Butz was infamous for his off-color jokes and indiscreet remarks, better not repeated here.

Q: What did you do?

FELDMAN: As legal adviser to the U.S. delegation, I was busy with paper, but Martin reserved negotiations for the Foreign Service. No matter. The Rome Conference was a fascinating experience. We worked long hours for three weeks with two delegation

meetings a day—one early in the morning; the other, around 11 p.m. after a good Italian dinner. There were often prominent guests at the morning meeting. I had half a day off that entire time which I used looking for parts for my aging Fiat station wagon.

All kinds of people dropped in on the delegation. One evening, an attractive woman approached me, introduced herself as Tippi Hedren, and appointed me as her escort.

Q: Oh, the beautiful actress.

FELDMAN: Hitchcock's star in *The Birds*. I don't know why she picked me. Perhaps, she could see that I was not overworked.

Q: (laughs)

FELDMAN: We ended up discussing problems of child raising over dinner. Melanie Griffith was her daughter. She also told me something about her problems with Hitchcock, but not all she told on camera years later. Apparently, there was abuse. That was the highlight of my conference; it makes a great story.

Q: What about the substance?

FELDMAN: After extended debates, the Rome Conference produced a voluminous report, dozens of recommendations, and some important institutional changes. I don't recall much of the details, but I do recall being sent back to Rome a couple of years later to review progress in the FAO.

1975 Grain/Energy Negotiations in Moscow

Q: Okay. Is it time to talk about the 1975 multi-year Grains Agreement with the Soviet Union?

FELDMAN: Yes. The Moscow negotiations in October 1975 were a U.S. initiative against the background of serious food shortages and an energy crisis precipitated by formation of the OPEC cartel and the OPEC oil embargo after the 1973 Yom Kippur War. Washington was furious over Soviet manipulation of the U.S. grain markets and wanted a bilateral agreement on grain sales and petroleum supplies.

Q: Did we get an energy agreement with the USSR?

FELDMAN: No. We were anxious to have one, but the Russians refused to talk about energy and kept the U.S. delegation waiting in Moscow for several days until we caved on that demand.

Q: Without meetings?

FELDMAN: Yes. We twiddled our thumbs in the Ministry of Foreign Trade while our minder entertained us with “Odessa stories” about characters who were colorful, shady, and sometimes comic. It took me a couple of days to realize that these were anti-Semitic tropes. All that time, interagency disputes over economic policies persisted, and agency delegates were talking to their bosses in Washington over open phone lines. As I saw it, the more they talked, the more Moscow kept us waiting.

Q: What were some of the issues?

FELDMAN: I can’t recall the details, but economic policy was a huge issue in the Nixon-Ford years. The pressures were enormous, and Nixon took drastic action including moving the country off the gold standard and blocking implementation of soybean contracts so American farmers could exploit fast-increasing prices. The very idea of a multi-year agreement on grain purchases was heresy in some quarters as it interfered with free markets. Not to mention the shocking increase in gasoline prices. Before OPEC, no one dreamed that gas prices would rise to a dollar a gallon.

Q: Did you work on energy issues as well?

FELDMAN: Not really, but I was asked to be in the room and take notes when the Nixon administration summoned the U.S. oil companies to a meeting in the State Department. This was a high-level meeting of senior corporate executives chaired by John J. McCloy. The oil barons were concerned not to be seen as violating antitrust laws, e.g., by price-fixing, and wanted an outside observer as cover.

Q: This was during the first oil crisis?

FELDMAN: Yes.

Q: Okay. Back to Moscow. Who was on the U.S. delegation?

FELDMAN: It was a big, interagency team led by Under Secretary of State Charles W. Robinson and Dean Hinton, a senior FSO assigned to the White House. I was the delegation legal adviser. Hinton entertained us with anti-French comments to the point that our Russian host objected.

We eventually got down to business. On October 20, 1975, Robinson signed an agreement providing for Russian purchases of six to eight million metric tons of U.S. wheat and corn annually for five years, 1976–1981, TIAS 8206. That deal made the trip worthwhile.

Q: What was Moscow like in 1975?

FELDMAN: We had little free time, but what we saw was fascinating. The highlight was a wonderful performance of Don Quixote by the Bolshoi Ballet at the Kremlin Palace of Congresses. Walking around the Kremlin grounds was like being in Oz. We were also

given passes for dinner one night at the Praga, a multi-story, art deco building used to reward Russian workers with a night on the town. The private dining rooms were crowded with men slumped over tables with bottles of vodka. The large, two-tier public restaurant was nearly empty. We were handed a thick, leather menu-book, with dozens of items. After a few false starts, we were told that only a couple of items were available. The stuffed chicken Kiev was marvelous as was the Georgian brandy.

Q: Did you go shopping?

FELDMAN: What you would expect in Moscow 1975: hardship, empty shelves, long food lines, light traffic, impressive subways. The vast GUM store was mostly empty, but I was able to buy a few wooden toys for my daughters.

Q: Were you followed on the street?

FELDMAN: Not that I noticed, but in the hotel, a woman sat at a desk in front of our door. Also, when we visited the ambassador's residence, Ambassador Stoessel warned us that the pretty young woman answering the phone was KGB [Soviet Committee for State Security]. I didn't understand that arrangement, but never had a chance to ask him. I should also mention that the ambassador lent me his office in the Chancery while we were in Moscow. Can you guess why? I learned later that Ambassador Stoessel, who I liked a lot, had some medical problems and had vacated his office a few weeks before to avoid exposure to radiation by our hosts. Back in Washington, I found myself reviewing medical claims by department employees not unlike those being processed by various agencies today. I read the stories about Havana Syndrome with anxiety.

Foreign Sovereign Immunity

Q: Mark, I know that you did quite a bit of work on foreign sovereign immunity. Please tell us what that issue is and how you got started working on it.

FELDMAN: Thank you, Robin. This is a very important subject in my career as an attorney. My interest began in 1973 when I became acting deputy legal adviser and continues to this day. In recent years, my law practice has concentrated increasingly on foreign sovereign immunity. During the pandemic, I have filed three amicus briefs on this subject—two in the Supreme Court—and organized several webinars for the Washington Foreign Law Society.

Let's begin with terminology. The U.S. statute dealing with the immunity of foreign states from the jurisdiction of U.S. courts that I worked on in the department is titled the Foreign Sovereign Immunities Act of 1976 [FSIA]. In current discourse, however, "sovereign immunity" generally refers to the immunity of the federal government, or of state governments, in domestic litigation inherited from the immunity of the Royal Sovereign in past times. The immunity of one nation state in the courts of another is

generally called “foreign state immunity.” There are separate doctrines relating to the immunity of diplomats, consuls, special missions, heads of state, and government officials from the jurisdiction of the courts of other nations. My contributions at the State Department relate to the FSIA and foreign official immunity.

Q: Why did we say “sovereign immunity” in the FSIA?

FELDMAN: I’m not sure. The United States was the first nation to codify the law of foreign state immunity in legislation. The first draft was done in the Johnson administration; the title was used then and carried over in the bills submitted to Congress in 1973 and 1975. A number of countries enacted immunity legislation inspired by our example; all use the phrase “foreign state immunity.”

Q: Okay. Why did the U.S. adopt the FSIA? Why was it needed?

FELDMAN: The main reason was to transfer immunity determinations from the State Department to the courts. The explanation requires a bit of history. See Mark B. Feldman: The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View, 35 *International and Comparative Law Quarterly* 302 [April 1986]; Amending the Foreign Sovereign Immunities Act: The ABA Position, 20 *International Lawyer* 1289 [1986]; Foreign Sovereign Immunity in the United States Courts 1976–1986, 19 *Vanderbilt Journal of Transnational Law* 19 [Winter 1986].

Leaving aside admiralty jurisdiction, prior to the Russian Revolution it was generally recognized that every nation was immune from the jurisdiction of the national courts of another country. This theory of absolute immunity derived from the historic immunity of the Royal Sovereign and the international law doctrine of equality of states. But absolute immunity became problematic when national governments began to engage in commercial activities and international trade. Courts in a number of continental countries began to distinguish between governmental acts, *jure imperii*—which were immune, and commercial activities, *jure gestionis*—which were not. This is called the “restrictive theory” of immunity. The United States continued to follow absolute immunity for foreign states until 1952 when the State Department adopted the restrictive theory. After that, the courts applied the restrictive theory and generally deferred to the State Department when it “allowed” immunity at the request of the foreign government.

Q: What were the criteria the State Department used to make these determinations on whether the issue in question was a government act or a commercial activity?

FELDMAN: Aye, there’s the rub. State Department attorneys tried to apply the restrictive theory objectively as best they could, but there were difficult cases. The office was not well equipped to develop the facts at issue, and foreign governments increasingly brought diplomatic pressure on the department to decide their way. As the case load grew, there were more foreign relations problems when we did not allow immunity and more complaints from the private sector when we did.

Q: Do you have an example?

FELDMAN: I remember a dramatic case when Kissinger was secretary. One day I was called in by the legal adviser, Carlyle Maw. He was on the telephone with the secretary. Kissinger was discussing Middle Eastern policy with the Soviet ambassador and the ambassador had raised his government's serious concern over the attachment of a Russian vessel by a U.S. court in the Panama Canal Zone. The ambassador asked the secretary to have the U.S. intervene with the court to release the vessel. So, Kissinger called the legal adviser, who asked me, "Do we have the authority to do that?"

As best I remember, I indicated that we probably did not have the authority. It would be better to tell the ambassador: "That may be difficult. We'll look into it." I think the dispute was settled and the vessel released. But this is a graphic example of diplomatic pressure on a matter that should be decided by judicial process.

Q: So, the Johnson administration initiated work on legislation, but it took ten years before the FSIA became law?

FELDMAN: Yes. At first, the department responded to claimants' concerns about process by holding hearings where the two parties could present their cases. As deputy legal adviser, I presided over a few of those hearings; typically the plaintiff would be represented by counsel, the foreign state by its ambassador. No one was happy with this process.

Drafting legislation to codify the restrictive theory was a complex process requiring major input from the Department of Justice and lengthy consultation with the stakeholders. A bill was first sent to Congress by the Nixon administration in January 1973 and hearings were held. Charlie Brower testified for the department as acting legal adviser. Bruno Ristau, one of the prime drafters of the legislation, testified for Justice. There was broad support for the basic legislation, but concern about some provisions, particularly maritime cases, banking, and service of process. Congressional staff told the department that Congress could not process a bill of this complexity with so many different interests unless the administration was able to put together a consensus draft supported by all the stakeholders.

Q: Enter Mark Feldman?

FELDMAN: Right. One of the first tasks Charlie Brower assigned me when I moved up to the Front Office in 1973 was to organize consultations with the stakeholders to produce a consensus draft as requested by congressional staff. We accomplished that in 1974, obtained Kissinger's approval, and sent the bill to DOJ and OMB [Office of Management and Budget] for formal interagency review. For some reason, we heard nothing from Justice for many months, until Nixon had left office, Gerald Ford was president, and Monroe Leigh had become legal adviser.

Q: How much of the drafting of the FSIA did you do?

FELDMAN: The bill was drafted by State and Justice in consultation with the private sector over three administrations. I coordinated the revisions made in the Ford bill submitted to Congress on October 31, 1975. Monroe Leigh took charge when hearings were held in 1976. Some further changes were made in the bill, and the act was signed into law by President Ford on October 22, 1976.

Q: Were your colleagues in the Justice Department collaborative in this effort?

FELDMAN: Yes. The FSIA is a complex and innovative law. The Justice Department did most of the technical work in the Nixon years when the basic structure of the act was being developed. One of the issues that I worked on in the Ford round was the question of “service of process.” The original bill provided for service to the foreign state through its embassy in Washington. This approach was popular with the private bar but controversial with our trading partners. I remember, particularly, formal diplomatic notes from Japan and the United Kingdom protesting that procedure. We dropped service on embassies, but the notice procedure was not finalized until Congress adjusted the bill in 1976.

Q: For example, in the case there’s a commercial dispute with British Airways, which at one point was owned by the British government, then the notice would go to British Airways as opposed to the embassy?

FELDMAN: It would not go to the embassy. There are a series of possibilities, and there’s a hierarchy. If an international agreement applies, that would be the required procedure. Ultimately, if notice cannot be served another way, the statute provides for notice to the Ministry of Foreign Affairs. Litigators tell me that service can be very difficult in some countries. See *Opati v. Republic of Sudan*, 140 S. Ct. 1601 [2020].

Q: Can you give us a brief summary of what the FSIA says?

FELDMAN: Brief is hard. Without getting into detail, every action brought against a foreign state in the United States must be brought under the FSIA. The act provides criteria for judicial determination of immunity and establishes a comprehensive regime for litigation against foreign states covering jurisdiction, notice and execution of judgment. “Foreign state” is broadly defined to include government agencies and state-owned enterprises. In retrospect, I have come to regret that broad scope; other states do not extend immunity to separate agencies or enterprises.

This legislation has generated an enormous volume of cases due to its breadth and complexity. The drafters left many details to be developed by the courts, but we never imagined the volume of cases that have been brought to court. In recent years, the Supreme Court has docketed one or two FSIA cases annually. And, contrary to the drafters’ expectation, the court frequently asks the solicitor general for the executive’s views on questions of law and policy.

Q: Mark, for the benefit of the lay reader, I want to ask you about the film, A Woman in Gold, which involved title to a Klimt painting seized from a Jewish family during the Holocaust. The family was able to obtain jurisdiction against Austria under the FSIA. Did the drafters of the legislation expect cases like this to arise?

FELDMAN: I don't think so. We were not thinking about claims to cultural property or about museums' commercial activities. But even the State Department lawyers were excited to see one of their cases become a feature film. As it turned out, *Republic of Austria v. Altmann*, 541 U.S. 67 [2004] is one of the most important FSIA decisions, holding that the act applies to claims arising many years prior to its enactment. This case arose under Section 1605[a][3] of the act which allows actions in cases of foreign expropriation in violation of international law that have a specified commercial nexus with U.S. territory. In the 1960s and 1970s, when the FSIA was being drafted, there were dozens of expropriations of American investments abroad without compensation. Expropriation became an important foreign policy issue and a matter of intense congressional interest.

Q: How does this square with the restrictive theory?

FELDMAN: There are two areas where the Act pushed beyond established practice in 1976: one, jurisdiction over foreign expropriations where there was a commercial nexus to the United States; two, a limited provision for execution of judgment against foreign state assets. For the interested reader, I have written a number of articles and briefs explaining the reasons for the expropriation exception to immunity and its scope. See Cultural Property Litigation and the Foreign Sovereign Immunities Act of 1976: American Bar Association Section of International Law, *Art & Cultural Heritage Law Committee Newsletter*, Vol. III, Issue No. 2, pp 9-13, Summer 2011; A Drafter's Interpretation of the FSIA, *Art & Cultural Heritage Committee Newsletter* [March 2018] at p. 2; Amicus Brief Mark B. Feldman, *Republic of Hungary v Simon*, 592 U.S. ___ [2021].
https://www.supremecourt.gov/DocketPDF/18/18-1447/158878/20201027121548624_40183%20Feldman%2010-26-20%20235%20pm%20Brief%20Rev%20October%2026%20-%20pdf-a.pdf

Q: Were there surprising questions concerning the coverage of the FSIA?

FELDMAN: Yes. There were three important issues that troubled the courts for years that the department thought were clear:

1. Do suits against foreign officials in their personal capacity fall under the FSIA?
Answer: No. The Act defines "foreign state" in Section 1603. Official acts immunity is a matter of common law informed by international practice. *Samantar v. Yousuf*, 560 U.S. 305 [2010]. The question of judicial deference to the State Department has not been resolved.

2. Are international organizations subject to the same immunity rules as foreign states are under the FSIA? Answer: Yes. International Organizations Act, 22 U.S.C. 288a [b]; *Jam v. International Finance Corporation*, 141 S. Ct. 1608 [2019].

3. Does the FSIA apply to criminal matters in U.S. courts? Answer: TBD USG: Definitely not. Foreign state enterprises would not have been included in the FSIA definition of foreign state, if the act applied to criminal matters.

Q: It must have been extremely exciting to be involved in the creation of a new body of law for the U.S.; to go first and to be working with many countries over the years afterward. Sounds like a very exciting venture that had a lot of importance.

FELDMAN: You're right. Of all the things that I worked on in government, it's given me the highest profile in the legal community.

Q: Did I understand you correctly that you've been involved in Supreme Court cases on this?

FELDMAN: During the pandemic, I submitted pro bono amicus briefs in three Holocaust cases involving the FSIA expropriation exception—two in the Supreme Court. Years ago, I submitted an amicus brief in the famous Bancec case, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 [1983] on behalf of a client whose property had been confiscated in Ethiopia, See *Kalamazoo Spice Extraction Company v. PMGSE*, 729 F. 2d 422 [6 Cir. 1984].

Q: And, with all the ambiguities and gaps, my sense from what you're saying is that the law did achieve its principle goal of moving this important set of disputes from the State Department to the courts.

FELDMAN: Yes. Even the State Department lawyers of today, who have no affection for the expropriation exception, are happy that this responsibility has been given to the courts. Foreign policy problems would be much greater if these issues had been left to the department.

Let me conclude on sovereign immunity by saying that after leaving the department I continued to work on improving the FSIA. Again, at Charlie Brower's suggestion, I became chairman of an American Bar Association committee that developed a set of proposed amendments to the FSIA. The most important one, adopted by Congress in 1988 as Section 1605 [a][6], confirms that immunity is not a defense to an action brought to enforce an agreement to arbitrate or an arbitral award made pursuant to a U.S. treaty. A complementary amendment to the Federal Arbitration Act, 9 U.S.C. 15, made clear that the act of state doctrine cannot be invoked to block enforcement of an international arbitration award. I drafted both of these to correct judicial decisions the department regarded as erroneous.

Q: Judges don't always have the last word?

FELDMAN: They usually do. Judges have a hard job to do, but some judicial actions can be surprising.

Are you familiar with Raoul Wallenberg, the Swedish diplomat who helped thousands of Hungarian Jews escape from the Nazis? He was taken prisoner by the invading Russian Army and never seen again.

When I left State in 1981, the Russians had not acknowledged his death in their custody. The family wanted to sue the USSR under the FSIA and invited me to Sweden to discuss the matter. I was eager to take that case, but I had to decline. There was no basis for U.S. jurisdiction under the statute I had helped draft. Later, the family found another lawyer willing to try. When the USSR refused to appear, Judge Barrington Parker ruled that Russia had waived its immunity by not coming to court. This was a preposterous decision under the law, and the case went nowhere, but I was embarrassed.

Q: Many say, hard cases make bad law.

FELDMAN: They have a point.

Foreign Official Immunity

Q: When did the State Department begin allowing functional immunity to foreign officials sued in their personal capacity?

FELDMAN: I initiated the modern State Department practice of issuing Suggestions of Immunity on behalf of foreign officials sued personally for actions in the conduct of their official duties in 1976 when the FSIA was still pending. The case involved a commercial claim brought against officials of Newfoundland. The Justice Department submitted my letter to the federal district court, and the court accepted the Suggestion. See *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 [SDNY November 23, 1976], 1976 *U.S. Digest Practice in International Law* 328-29.

When the Canadian embassy requested the Suggestion, I was surprised to learn that there was no established practice. Diplomatic, consular, and international organization immunity were well established and recognized in legal instruments. The department recognized common law immunity for heads of state and foreign officials engaged in special missions to the U.S., but apparently had not addressed immunity for other foreign officials. Some of my staff questioned whether there was sufficient authority to support a Suggestion of Immunity. Well, I had been deeply immersed in providing a remedy against the foreign state in cases like this and had no doubt that the United States had a strong interest in confirming that claims for official action should be brought against the state, not individual officials. Today, the U.S. practice is well established. The department takes the position that its views are binding on the courts, but some courts disagree.

U.S. Maritime Boundaries: Canada, Mexico, Cuba, Russia

Q: Today, Mark, we're going to talk about your work on maritime boundaries. Why don't you tell us how congressional action and the Law of the Sea led the U.S. into boundary negotiations with neighboring states.

FELDMAN: Fine. The negotiation of new U.S. maritime boundaries with neighboring states was one of my major responsibilities in government and one of the most interesting matters in my career. My engagement began with interagency formulation of U.S. boundary positions and included a World Court case with Canada to determine the maritime boundary in the Gulf of Maine. There are many tales in-between; it's going to take some time to go through all these.

Q: Let's walk through one by one. This is an important topic.

FELDMAN: You're very kind. In 1976 Congress enacted the Fishery Management and Conservation Act extending U.S. maritime jurisdiction out to two hundred nautical miles.

Q: Did U.S. jurisdiction include the seabed?

FELDMAN: Not in 1976. The U.S. changed to an exclusive economic zone [EEZ] in 1983 after the new Law of the Sea Convention was finalized. Traditionally, the international community only recognized a three-mile territorial sea. The first expansion was international recognition of coastal state jurisdiction over the adjacent continental shelf. This historic step was initiated by the United States in 1945 with President Truman's Proclamation on the Continental Shelf.

There had always been international competition, and conflict, over foreign fishing in coastal waters. In the 1960s, the pressure from foreign fishing fleets expanded dramatically leading some coastal states to declare national fisheries jurisdiction out to two hundred miles. For many years, the U.S. resisted this development. The State and Defense departments prioritized freedom of navigation over coastal fisheries. But the hand-writing was on the wall. When UN negotiations for the Third Convention on the Law of the Sea began in 1973, many nations supported creation of two-hundred-mile Exclusive Economic Zones. By 1976, pressure from U.S. coastal states had increased to the point that Congress enacted the Fisheries and Conservation Act of 1976. President Ford vetoed the first version, but signed the second.

Two hundred mile jurisdiction created overlapping boundary claims for numerous coastal states around the world. The U.S. has maritime boundaries with Canada [four], Mexico [two], Russia, Cuba, the Bahamas, and Venezuela, among others. Puerto Rico has a boundary with the Dominican Republic; as does the U.S. Virgin Islands with the UK V.I. The geographic coordinates of the new U.S. Fishery Conservation Zone were published on March 1, 1977, 42 Fed. Reg. 12937-40. [I signed that Notice.] The State Department press briefing that day commented further on the Gulf of Maine, the Bahamas, and the North Pacific where "the limits of the fishery conservation zone follow the line established by the Convention of 1867 between the United States and Russia concerning

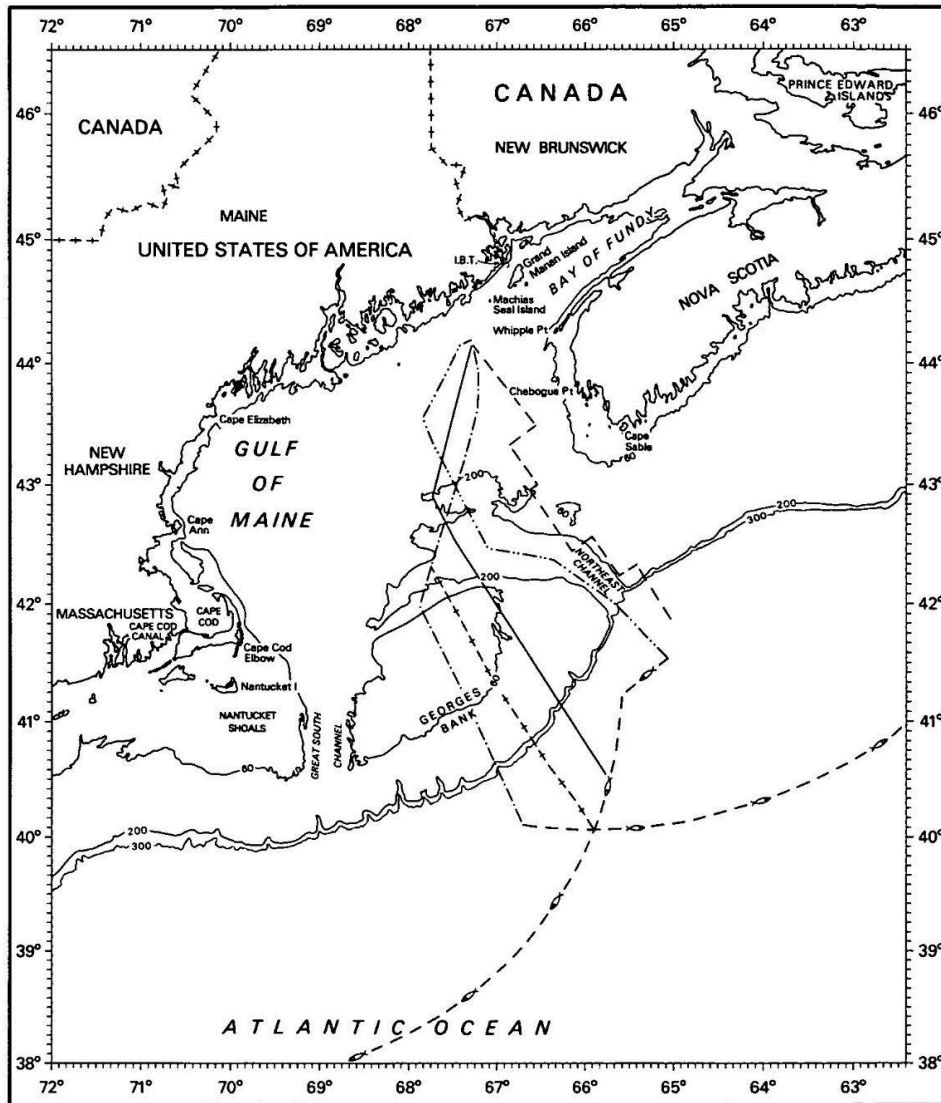
the cession of Alaska—where that line is within 200 nautical miles of the U.S. coast.” See 1977 *U.S. Digest Practice in International Law* 557.

Q: That sounds like a lot of work.

FELDMAN: Yes, by many people. For this history, I plan to focus on the Atlantic boundary with Canada in the Gulf Maine, Mexico, Cuba, and the Soviet Union. A lot of work had been done before March 1, 1977, including provisional boundaries with Mexico and diplomatic exchanges with the Soviet Union. A modus vivendi was established with Cuba on April 27, 1977. The Legal Adviser had the lead on boundary matters, and I chaired an interagency task force to establish the limits of the new U.S. Fishery Conservation Zone and the U.S. position for boundary negotiations. I had a strong team starring David Colson, assistant legal adviser for Oceans, Environment, and Science [L/OES, Bureau of Oceans and International Environmental and Scientific Affairs] and Professor Bernard Oxman, our expert on the Law of the Sea. Both men became prominent in this field. I should also mention Robert D. Hodgson, the State Department geographer, whose work informed everything we did. Bob was an extraordinary asset and, sadly, died young. David Colson and I describe this chapter in U.S. legal history in the *American Journal of International Law*. See Feldman and Colson, *The Maritime Boundaries of the United States*, 74 AJIL 729 [October 1981].

Gulf of Maine

The Gulf of Maine was the most pressing matter because of the rich fisheries on Georges Bank. The U.S. and Canada had defined competing boundary claims re Georges Bank before I became involved; my introduction was a trip to Maine with Monroe Leigh for consultations with U.S. fisherman and to Ottawa for preliminary talks with Canada.



- LEGEND**
- 200-mile Fishing Zone
 - - - - - Canadian Claim (1977)
 - . - . - . United States Claim (1977)
 - - - - - Canadian Claim (1979)
 - . - . - . United States Claim (1982)
 - Boundary Drawn by the Chamber

Legault, L. & McRae, D., The Gulf of Maine Case,
 22 Canadian Yearbook of International Law 267, 277
 (University British Columbia Press 1985)

Negotiations with Canada were very difficult. The competition over Georges Bank fisheries [lobster, scallop, cod, et cetera.] was intense. We could not agree on a boundary and eventually submitted the boundary dispute to a Special Chamber of the International Court of Justice [ICJ]. A fisheries agreement was negotiated in the Carter years, but it was opposed by U.S. fishing interests and rejected in the Senate. For many good reasons—historical, geographical, and legal—the U.S. believed it had a solid claim to Georges Bank. Understandably, this was unacceptable to Canada. Also, both sides thought there might be hydrocarbons in the Gulf of Maine. I remember hiring young Bob Ballard—of Titanic fame—at Woods Hole to do seismic work in the area. In the end, energy resources were not found in the Gulf of Maine.

Q: So the dispute was really about fish?

FELDMAN: That's right. Boundary and fisheries issues were closely linked. I'm going to talk about the boundary, but fisheries drove the negotiations. David Colson, a fisheries maven, understood that and made fisheries the lead argument in the U.S. brief in the Gulf of Maine Case. Unfortunately, the tribunal did not see it that way. At a reception following the Judgment in October 1984, Judge Ago, president of the Chamber, made a point of telling everyone that the real issue was hydrocarbons.

Q: Was the OES Bureau responsible for fisheries issues in the State Department?

FELDMAN: Yes. Rozanne Ridgway had the action. [At some point she was appointed special assistant to the secretary.] When the U.S. and Canadian fishery zones came into force in March 1977 with no agreed boundary, Roz had to deal with the chaos that followed. American boats were fishing in Canadian waters and vice versa. Both sides were overfishing stocks in the disputed area. She had to negotiate reciprocal fishing rights with the Canadians.

I'll share one fish story that you may find enlightening. At one point, Roz became so frustrated with the Canadians that she seriously considered breaking off negotiations and excluding Canadian boats from the American zone. In that scenario, American boats would be barred from the Canadian zone as well. Based on the data, however, it seemed that Canadians were taking more fish from American waters than the reverse. Why were the Canadians being so difficult? There was a secret: swordfish. One day, Ridgeway had a call from Congressman Gerry Studds, representing Barnstable County, Massachusetts, that unlocked the mystery. In those days, because of health concerns relating to mercury, swordfish were barred from the U.S. market unless they had been taken in state waters, i.e., within three miles. It so happened that large quantities of swordfish landed in America by our fisherman were reported as caught in Massachusetts waters, but were actually being taken off the Canadian coast. When the American industry learned that U.S. boats might be barred from the Canadian zone, they called their congressman and he called the department. Bottom line: the Canadian fishery was worth more to American industry than the reverse. Negotiations resumed. No one seemed concerned about the false reporting.

Q: Fascinating.

FELDMAN: To make matters worse, Canada escalated the conflict by expanding its boundary claim while the two countries were negotiating, amidst high tensions on the disputed fishing grounds. The new Canadian claim embraced an additional 15 percent of Georges Bank, fifteen hundred square miles. That infuriated our fisherman and raised the stakes. Both sides prepared for adjudication. At the time, we decided not to reciprocate for a couple of reasons. One, I did not think the U.S. could make a credible claim to fisheries close to Nova Scotia and, two, I hoped the ICJ would disregard a move that escalated international conflict in the midst of negotiations. As it turned out, I was right on the first point and disappointed in the second. I'll come back to this when we get to the Reagan years and the ICJ litigation with Canada.

To recap, we didn't get anywhere with Canada in the Ford years. In August 1977, Jimmy Carter appointed Lloyd Cutler, a prominent Washington lawyer, as special representative to negotiate the Gulf of Maine issues with the Canadian representative, Marcel Cadieux. Cutler did not waste any time. The two sides decided to negotiate a package of two treaties; a fishery agreement and a separate boundary agreement. The fishery agreement included provisions for joint management of the stocks in order to conserve the resource. To break the impasse, Cutler decided to accept the Canadian position on the boundary, i.e., an equidistant line dividing Georges Bank. Naturally, our team objected strongly to this concession. I was given the opportunity to argue the issue with Lloyd Cutler before Deputy Secretary Warren Christopher, but that was an unequal match. Unsurprisingly, Chris ruled in favor of the president's representative.

Q: What was Cutler's argument?

FELDMAN: He said Canada would win in the ICJ, so we weren't giving up anything. This was an awkward moment for Chris and for me. I didn't win any points with the Carter team. But Cutler's idea was shot down by the American fishing industry. The New England fisherman were not about to voluntarily cede the grounds they had fished for three hundred years.

Q: Drama. What happened next?

FELDMAN: More drama. The two sides agreed to submit their continental shelf and fisheries boundary in the Gulf of Maine to a Special Chamber of the ICJ and worked out the terms of a separate treaty on fisheries. The two treaties were signed on March 29, 1979 and submitted to the Senate. The Senate Foreign Relations Committee held hearings on April 15, 1980. Our fisherman opposed the Fisheries Treaty, and many senators spoke against it. After Ronald Reagan became president on January 20, 1981, the new administration decided to uncouple the two agreements. It endorsed the boundary agreement and withdrew from the fishery treaty. Roz Ridgway and I testified in favor of the boundary treaty, Hearing, Senate Foreign Relations Comm., 97 Cong., 1st Sess., March 18, 1981, DOS Bulletin, May 1981 at 22. Canada was not happy with this unilateral uncoupling, but eventually agreed. The Treaty to Submit to Binding Dispute

Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, T.I.A.S. No. 10204, entered into force November 21, 1981. In the end, Canada got a favorable result, and our fisherman had to live with it.

I want to get one more point on the record. Lloyd Cutler offered to bet me a dinner that we would not improve our position in the ICJ over the boundary line he had proposed to negotiate with Canada. Well, we did do better. Although the result was not a happy one from the point of view of the U.S., it was better than what he had proposed. But he never acknowledged that he lost that bet.

Q: He never gave you dinner? (laughs)

FELDMAN: No. I had known Lloyd Cutler for years, and I worked closely with him on the Iran Hostage Crisis in 1979–81 and in private practice. We both represented Loral on satellite issues in the 1990s. I respected his considerable talents, and we became friends. But I think it should be known that he did not pay his debts.

Q: Oh, now we know. (laughs)

Delimitation of the Maritime Boundary in the Gulf of Maine Area, *Canada v. United States*, 1984 ICJ Rep 165

Q: Let's move to the World Court proceedings.

FELDMAN: Of course. To remind, I left government for private practice in May 1981. Davis Robinson became legal adviser in July and, later, U.S. agent in the ICJ proceedings at The Hague. I am grateful to Davis and David Colson for including me on the U.S. team when the Gulf of Maine Case was argued in the spring of 1984.

Q: Where were you practicing in 1984?

FELDMAN: I joined the Washington office of a New York firm, Donovan, Leisure, Newton & Irvine as Counsel in 1981. By 1984, I was a partner struggling to develop clients, and the firm generously allowed me time off to represent the United States at The Hague.

Q: Okay. Tell us how things went in The Hague.

FELDMAN: To begin with, the State Department would not have agreed to binding third-party resolution if we had not believed that one, the U.S. had a strong legal claim to Georges Bank, and two, it was more important to settle the dispute with Canada than to vindicate our full boundary claim. Second, the boundary treaty invoked a special ICJ procedure, never used before, that allowed the parties to establish a Special Chamber of the Court composed of ICJ members designated by the parties.

Q: Why do that?

FELDMAN: It is a serious decision for any government to submit an important national interest to resolution by an international tribunal, and that kind of undertaking has always been controversial in the United States. Moreover, the composition of the International Court of Justice—popularly known as the World Court—is representative of the international community, so there is always a majority of judges from countries that have different values from ours. And it is a fact of life, admitted or not, that one cannot count on judges from many nations to act independently of their governments. Further, one cannot ignore the politicking that takes place among the judges that can sometimes influence the decision process. Finally, the powerful United States has to expect a certain amount of skepticism from less fortunate governments. We thought it would be safer if Canada and the United States could agree on a panel of respected jurists that would decide the case impartially.

Q: How did that work out for you?

FELDMAN: Not well. The tribunal drew a line that basically split-the-difference between the two claims, giving Canada more of Georges Bank than it was entitled to. Judge Gros [France] was disposed to give Canada even more. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area [Can. v. U.S.]*, ICJ Rep. 165 [October 12, 1984]. The American judge, Stephen Schwebel, wrote a concurring opinion criticizing the tribunal's reasoning on the critical proportionality issue and proposing a line more favorable to the United States, but he did not dissent. The U.S. team was very disappointed in the result, but we were glad to have the dispute settled.

Q: How did the U.S. team feel about Judge Schwebel concurring in the judgment?

FELDMAN: Well, we were stunned by the judgment. The chamber paid little attention to our strong fisheries interests on Georges Bank, and we could not believe that the judgment counted the long Canadian coasts facing each other across the narrow Bay of Fundy as relevant to delimitation of Georges Bank. So, there was disappointment that Judge Schwebel did not dissent. The fact that he concurred gave the judgment more legitimacy than it deserved. Steve and I were good friends, so I asked him about it. He said there was no settled law in the delimitation area, and that a dissent would not have changed the result. As time passed, my feelings softened, and I came to appreciate his strong objections to the tribunal's reasoning on coastal fronts. Later, when Steve became president of the ICJ, I understood some of the dynamics involved from his perspective.

Ultimately, the most important issue in the Gulf of Maine has been over-fishing the stocks by fishermen of both countries and their resistance to management of the fishery. Now, we have climate change. Gulf waters are warming rapidly; fisheries are moving north, and the future is uncertain.

Q: Do you have any thoughts on why the Special Chamber drew the line it did? Are there any things you would have done differently?

FELDMAN: I'll try to address both questions. Speaking broadly, I think it was fated that the two countries would have to share the Georges Bank fisheries. To my mind, placement of the line was the only issue, and that mattered. Also, in retrospect, I think using a Special Chamber caused as many problems as it solved. ICJ judges excluded from the Special Chamber were offended, and two judges strongly dissented from the order authorizing the procedure.

Further, a number of things changed after I left government that did not help the cause. I want to discuss four: one, in 1982, the ICJ handed down a new decision that changed the legal terrain for maritime boundary determination; two, the U.S. expanded its boundary claim to include areas north of Georges Bank; three, the original panel agreed by the parties had to be reconstituted; four, while our case was being heard in The Hague, Nicaragua sued the United States for mining its harbors, and the U.S. came into conflict with the court.

Q: What was the new ICJ precedent?

FELDMAN: Without getting into too much detail, the original U.S. legal argument, based on a 1969 ICJ decision, emphasized the geology of the Gulf of Maine and placed the boundary at the Northeast channel, which divided the [shallow] fishing banks off Nova Scotia from Georges Bank off Massachusetts. We had other strong arguments based on the length of coastal fronts facing the area in dispute, but did not emphasize those originally. In 1982, the World Court decision in the Tunisia/Libya Continental Shelf Case rejected the natural prolongation theory the court had applied in 1969. Recognizing that challenge, I published a law review article on the new decision emphasizing the principle of proportionality based on the relative length of national coasts facing the area in dispute. The U.S. had a strong advantage in that area. See, Mark B. Feldman, *The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?* 77 *American Journal of International Law* 219 [April 1983].

Q: Why did the U.S. expand its claim?

FELDMAN: In many areas, the Reagan administration pursued a more aggressive foreign policy than prior administrations. And there was resentment that Canada had expanded its claim in the midst of tense fisheries negotiations. Above all, though, I think Davis Robinson understood that the U.S. could not expect to be awarded 100 percent of its claim by an international tribunal. He was persuaded that we should have claimed more than Georges Bank and hoped to rectify what he regarded as a mistake. Perhaps, we should have acted when Canada did, but the late change did not help. The new claim was weak on its face, and Judge Schwebel told me after judgment that expanding the claim hurt our case.

Q: Who were the judges on the panel?

FELDMAN: The original panel of five included: Sir Humphrey Waldock [UK], Hermann Mosler [FRG], Shigeru Oda [Japan], Stephen Schwebel [U.S.] and Maxwell Cohen,

appointed ad hoc by Canada. When Waldock died on August 15, 1981, Canada and the U.S. had to agree on a replacement. I don't remember all the considerations, but Robert Ago [Italy] replaced Waldock as president and Andre Gros [France] replaced Oda.

Q: Did the change make a difference?

FELDMAN: We'll never know. As I see it, Ago and Gros turned out to be bad for our side, but Leonard Legault, the Canadian agent, told me after the judgment that Canada would have done even better with the original panel. I have my doubts. Ago taunted us after the judgment and adopted the Canadian proportionality argument presented to the tribunal by his countryman, Professor Antonio Malintoppi. I argued proportionality for the United States. Malintoppi was a good lawyer and very flattering to me in private conversation. I don't think he expected the chamber to accept his argument. The Canadian theory was absurd, as demonstrated by Judge Schwebel in his concurring opinion. Sadly, Malintoppi died a few days after the proceedings concluded.

Q: Are you suggesting that Ago may have been influenced by personal considerations?

FELDMAN: I don't know. But the Canadian selection of an Italian lawyer was tactical and consistent with practice before the court. We were not as proficient in that game. In retrospect, it seems likely that some ICJ Judges can be partial to lawyers appearing before them. Judge Gros approached me after the judgment to say the U.S. should have retained Professor Herbert Briggs to represent us. Gros sat with Briggs on the arbitration tribunal that decided the Anglo-French Continental Shelf Case in 1978. I recall visiting Briggs with Steve Schwebel long before the Gulf of Maine proceedings in an effort to explore how that tribunal thought about "special circumstances"; in other words, how they rationalized the deal cut with England and France to modify the equidistance line. I was testing how we might fare using the equidistance/special circumstances formula of the 1958 Continental Shelf Convention. Briggs would not be drawn and was clearly irritated with us; he was so rude I didn't think of retaining him. Of course, Gros was not on the original panel.

I was amazed at Gros' comment and could not help wondering if he was prejudiced by Briggs. Ironically, Gros' dissenting opinion was a rant against the split-the-difference decision as ignoring legal principles. Gros didn't even answer the question put to the tribunal by the parties. He attached a map presenting an illustrative equidistance line from base points he considered relevant that ran west of the range framed by the parties in the submission. That told me that the way the U.S. team framed the submission was critical.

Q: How did Nicaragua affect the outcome?

FELDMAN: As I mentioned earlier, ICJ judges excluded from the Special Chamber were offended. The question remains: was the chamber influenced by the attitude of judges not seated on the tribunal? My concern on that score was compounded when Nicaragua brought proceedings against the United States in the ICJ claiming violations of the UN Charter, See Case Concerning Military and Paramilitary Activities In and Against

Nicaragua [*Nicaragua v. United States of America*]; Merits, International Court of Justice [ICJ], 27 June 1986, available at: <https://www.refworld.org/cases,ICJ,4023a44d2.html>

Q: Did the two cases overlap?

FELDMAN: Very much so. Oral proceedings in the Gulf of Maine Case began on April 2, 1984. Nicaragua filed its case against the United States on April 9, and the first oral arguments in that case were held on April 25 and 27, with Davis Robinson arguing as agent for the United States. Three judges sitting in our case also heard the Nicaragua Case, and the two cases proceeded in parallel through the fall of 1984. The court held hearings in the Nicaragua case the week we went back to The Hague to listen to the judgment in the Gulf of Maine case—October 12, 1984, and the court issued its order affirming jurisdiction in the Nicaragua Case on November 26. The U.S. responded by withdrawing from the general jurisdiction of the ICJ.

Q: Do you think this interaction affected the Gulf of Maine decision?

FELDMAN: As you no doubt remember, the Nicaragua proceedings were bitter and controversial; the Reagan administration did some things that did not look good. Not only did the U.S. argue against the jurisdiction of the court, it sought to amend our 1946 declaration accepting the general jurisdiction of the court retroactively. The U.S. filed an amendment to the declaration on April 4, 1984—two days after we arrived in The Hague. We were still in The Hague on May 10, when the court issued its first order in favor of Nicaragua. As I listened to Judge Elias address the United States with the full bench besides him, I couldn't help worrying about the impact on our case.

Q: Okay. We have three more boundaries to discuss. Why don't we move on to Mexico?

Maritime Boundaries: Mexico

FELDMAN: Let's do. A good source for this subject is the Senate Foreign Relations Committee Report on Maritime Boundary Treaties with Mexico, Venezuela, and Cuba, Ex. Rep. 96-49, 96th Cong., 2nd sess. August 5, 1980; this includes my prepared testimony and dialogue with senators at the hearing on June 12, 1980; see also 1980 *Digest U.S. Practice Int. Law* 587-599, 412-415; Feldman, Letter to New York Times, A Treaty With Mexico That Is Good for the U.S., September 16, 1980.

Q: Let's start with the basics. How was the new maritime boundary line worked out?

FELDMAN: The U.S. and Mexico signed a treaty on May 4, 1978 establishing boundary lines in the Pacific Ocean and Gulf of Mexico based on points equidistant from the coasts of the Parties *giving effect to certain islands*, but the treaty was not ratified until November 13, 1997, 214 UNTS 405. Mexico first proposed giving effect to these islands for delimitation of twelve mile contiguous zones in Article V of the 1970 U.S.-Mexico Treaty regarding the land boundary, Treaty to Resolve Pending Boundary Problems and Maintain the Rio Grande and Colorado River as the International Boundary, 23 UST 373,

TIAS 7313. At that time, T.R. Martin, the Mexican desk officer, suggested to me that Mexico was probably looking down the road to the future extension of two-hundred-mile maritime zones. Applying the 1970 model in that context would push the Pacific boundary south to U.S. advantage while benefiting Mexico in the oil-rich Gulf of Mexico. Two hundred mile zones were not discussed by the two governments in 1970, but we assumed that Mexico knew exactly what it was doing and had decided that its long-term interest was best served by maximizing future oil revenue.

The Legal Adviser's Office concurred in the 1970 treaty text on the assumption that Mexico would take the same position on extended maritime boundaries down-the-road and that the United States would be prepared to agree. We anticipated that the U.S. would accept a line in the Gulf more advantageous to Mexico because early agreement on the boundary would avoid a boundary dispute with Mexico and permit drilling to proceed promptly to the benefit of both parties. Most likely, Mexican oil would flow to American refineries anyway. At the same time, the advantageous line in the Pacific would benefit U.S. fishing interests and better protect U.S. law enforcement and national security interests. We were also mindful that the United States had significant island interests potentially relevant to other maritime boundary delimitations, including the Florida Keys.

Fast-forward to 1976. When the U.S. and Mexico adopted two-hundred mile zones in 1976–77, I proceeded on this basis, and the interagency committee agreed. The Interior Department, the U.S. agency responsible for off-shore drilling, was eager to have early agreement on the boundary so that exploration and production could get started. There was no need to discuss islands with Mexico; we just followed the 1970 pattern. The U.S. and Mexico concluded a provisional boundary agreement by exchange of notes on November 24, 1976, 29 UST 196, TIAS 8805, and a treaty using the same boundary lines was signed on May 4, 1978. All parties recognized that the Gulf was prospective for hydrocarbon development, but we assumed that deep water drilling was decades off. As it turned out, deep water drilling progressed faster than expected, and U.S. ratification was delayed due to criticism [much exaggerated] that equidistance gave the Mexicans too large a share of hydrocarbon resources in the Gulf. The 1978 Treaty was finally ratified by both parties in 1997, See U.S.-Mexico Treaty On Maritime Boundaries, S. Ex. Rep. 105-4, 105 Cong. 1st Sess., October 22, 1997.

Q: Did that mean there were twenty years without a boundary?

FELDMAN: No. We had an agreed provisional boundary. Ironically, while it took twenty years to ratify the 1978 Treaty, drilling by both countries proceeded as planned and without controversy pursuant to the provisional boundary established by sole executive agreement in 1976. Fortunately, the 1976 exchange of notes provided that the lines established therein were to be applied provisionally “pending final determination by treaty.” I included this language to protect U.S. interests in an uncertain world resting executive authority on past practice regarding provisional boundary agreements and *modi vivendi*. Our approach is elaborated in Feldman and Colson, *The Maritime Boundaries of the United States*, 75 AJIL 729, 740 [1981].

Q: What were the precedents for provisional boundaries by executive agreement?

FELDMAN: In the nineteenth century, when U.S. land boundaries were a major focus of our foreign relations, the executive frequently framed U.S. territorial claims and negotiated a number of provisional boundaries to stabilize relations before formal treaties were concluded. Perhaps, the most powerful modern precedent was President Truman's unilateral proclamation of U.S. sovereign rights in the continental shelf in 1945. When queried about congressional authority, Legal Adviser Hackworth noted that legislation would be required to regulate activity in the area. President Reagan followed Truman's precedent when he extended the U.S. territorial sea to twelve miles on December 29, 1988.

Q: Did the Senate accept this?

FELDMAN: Questions were raised and answered, but the discussion was largely theoretical. Drilling in the Gulf went forward, and petroleum flowed to the refineries. A similar arrangement is in place with Cuba. Here are extracts from the 1997 Senate Report:

“Senators Zorinsky and Javits both also raised concerns with the State Department concerning the legality of the provisional application of maritime boundaries pursuant to executive agreement rather than treaty. The administration asserted that precedent existed for the establishment of provisional maritime boundaries by executive agreement, that authority to establish boundaries for fisheries purposes was provided by the Fishery Conservation and Management Act of 1976, and that the president had the responsibility under the Constitution for the conduct of foreign affairs. In reporting the treaties to the Senate, the Committee expressed its disagreement with these assertions: * * * [T]he Committee wishes to register its concern on the issue of provisional application of treaties. The administration has argued in its responses to Senator Javits that the president may apply a treaty provisionally in advance of Senate advice and consent so long as “the obligations undertaken” are “within the president’s competence under U.S. law.” This phrase simply begs the question of how broad such competence might be. While the Committee does not dispute the practical necessity of reaching limited practical accommodations between treaty signatories prior to Senate action, it does not accept the broad and vague assertions made by the administration in its response.” S. Ex. Rep. 105-4, 105 Cong. 1st Sess., at p. 4.

“RESPONSES OF MARY BETH WEST [State Department] TO QUESTIONS ASKED BY SENATOR HELMS

Question 1. The exchange of notes accompanying the treaty stated that the two parties would recognize the provisional boundaries set forth in the notes “pending final determination by treaty of the Maritime Boundaries between the two countries off both coasts.” The Committee opposed the “provisional” boundary in 1980. What is the legal basis for determining maritime boundaries by executive agreement? Doesn't the fact that the administration, in its testimony before the Committee last week, cited the need for

“legal certainty” as to the border between the U.S. and Mexico indicate that the “provisional” boundary is not an appropriate legal instrument for settling boundaries?

Answer. The administration fully acknowledges and respects the role of the Senate in the treaty making process. The exchange of notes associated with this treaty, which stated that the two parties would recognize the provisional boundaries set forth in the notes pending final determination by treaty, was within executive power vested in the president, and did not prejudice the prerogatives of the Senate regarding the provision of advice and consent. As a practical matter, the administration has viewed the provisional boundary reflected in the exchange of notes as a transitional tool which, pending entry into force of the treaty, has facilitated the exercise of jurisdiction by each side in its respective 200-mile zone. It should be remembered that, at the time of the exchange of notes, the United States and Mexico had recently established their respective 200-mile zones. The provisional boundary dividing these zones has greatly reduced the likelihood of disputes concerning, inter alia, where fishing vessels of each country could operate.”

Annex at p.7.

Q: How did the Mexicans react to the boundary line?

FELDMAN: Understandably, Mexican fisherman reacted badly to the Pacific boundary line, and I inadvertently complicated matters for the Mexican negotiators by testifying to the Senate Foreign Relations Committee in June 1980 that the boundary line was a negotiated agreement involving trade-offs. To my mind, this was obvious. All agreements made are negotiated unless imposed, and the trade-offs were apparent to both parties. Nevertheless, I was accused of misrepresenting the facts as there had been no specific discussion of islands or trade-offs in the treaty talks. “Mexico [it was said] would have absolutely opposed such a trade-off,” Szelkey, 22 Nat. Resources J. 155, 158 [1982]. One might ask: didn’t Mexico agree to these lines?

Q: Who were the Mexican negotiators?

FELDMAN: I negotiated the 1978 Treaty with Jorge Castañeda, then deputy secretary of foreign affairs, and his step-son, Andres Rosenthal. Andres called me one day soon after I testified in June 1980. He was taking a lot of heat from Mexican fishermen and was angry with me for telling the Senate the boundary line was negotiated. In fact, he told me, with apparent conviction, that, “The equidistance line was not negotiated. I was there, and we did not discuss it.” I was flabbergasted. The line was established by agreement; it did not come out of nowhere. I understood he had a political problem at home, but that was the price for getting a good deal in the Gulf. I moved on to other things and forgot about this concern. It was only a couple of years ago that I learned that the backlash was so uncomfortable for Mexico that one of their team published an article attacking my testimony back in 1982.

Q: Was Jorge Castañeda the father of Jorge Castañeda Gutman who also became secretary of foreign affairs?

FELDMAN: Yes. Jorge Castañeda y Álvarez de la Rosa was foreign minister 1979–82. His son, Jorge Castaneda Gutman, served as Foreign Minister 2000–2003. Andres Rosenthal became deputy secretary and served as Mexico’s ambassador to Washington.

Q: A prominent family.

FELDMAN: Yes and very talented. Thanks to Steve Schwebel, I had a long dinner with the senior Castañeda in Geneva in the ’70s. In those days, the whole family were pro-Castro, part of an influential cohort in senior Mexican circles. I enjoyed their company and was happy to hear Andres Rosenthal speak at CFR [Council on Foreign Relations] shortly before the pandemic. I hadn’t seen him in nearly forty years. He is now president of the Mexican Chamber of Foreign Commerce. Times do change.

Q: What were you doing in Geneva?

FELDMAN: Steve represented the U.S. in UN negotiations of the Charter of Economic Rights and Duties of States proposed by Mexican President Echevarria. He asked me to stand in for him in one session when he had marital obligations at home.

Q: A good cause. Shall we move on to Cuba?

Maritime Boundary: Cuba

FELDMAN: The maritime boundary with Cuba was both indispensable and exceptionally sensitive. Castro’s island lies only ninety miles off the coast of Florida, a state host to large numbers of Cuban refugees, including fishermen. A confrontation between competing fishermen could easily escalate into something nasty. In any event, the Carter administration was eager to communicate with the Cubans and hoped technical talks on boundaries and fisheries might lead to bigger things. Secret, direct talks began in New York City on March 24, 1977 and continued for a few days. I remember participating in one or two of those meetings dealing with the boundary. We moved around to different hotels to avoid the press and for security reasons. At that time, there was active anti-Castro terrorist activity in the United States.

Q: Did you get to visit Havana?

FELDMAN: There was a negotiating session in Havana, but I didn’t attend. I was in California when that meeting was being scheduled, and another lawyer got the trip. I got a bigger prize, however. When we finalized the text, a signing ceremony was scheduled in Washington for December 16, 1977. Herb Hansell was legal adviser then. He was generally eager for the spotlight, but he did not want the honor of signing a treaty with the Castro regime. So, I signed the boundary agreement for the United States. A woman named Olga Miranda, legal adviser of the Cuban Foreign Ministry, signed for Cuba. The signing ceremony was very low key—at the State Department but in a back room with no fancy furniture.

Q: Did the Cubans feel slighted?

FELDMAN: I don't think so. I expect they had mixed feelings about the whole process.

Q: How did the negotiations go? Were there any hard issues?

FELDMAN: Not really. There was an issue about straight baselines, but it was easily resolved. The problem we expected was with the Senate, not Cuba.

Q: So, this was a treaty?

FELDMAN: Technically, the Maritime Boundary Agreement Between the United States of America and the Republic of Cuba contains both a treaty and an executive agreement. We did not expect the Senate to approve the treaty, so I adapted the approach we took with Mexico. This time, I included a two-year provisional agreement in the text we sent to the Senate. Article V provides: *“This Agreement is subject to ratification in accordance with the respective constitutional procedure of the two States. The Parties agree to apply the terms of this Agreement provisionally from January 1, 1978, for a period of two years, and it will enter into force permanently on the date of exchange of instruments of ratification.”*

Q: How did that work out?

FELDMAN: As expected, the Senate has not acted on the agreement. We do not have a boundary treaty with Cuba. But, the provisional agreement has been renewed every two years by exchange of notes.

Q: Interesting.

FELDMAN: We have another situation with Russia today.

Maritime Boundary: Russia

Q: Okay. Let's talk about Russia.

FELDMAN: Prior to 1976, the State Department considered the equidistance principle an adequate basis for future maritime delimitation off the Alaska coast and hesitated to accept the [perceived] Soviet preference for the 1867 Alaska Convention line due to concerns about excessive Soviet polar claims tracking that line to the far North. As we prepared to publish coordinates for the new U.S. Fishery Conservation Zone, I became aware of strong American resource interest in the area. In addition to substantial fisheries, some American oil companies thought the Navarin Basin was prospective. [I understand that those expectations did not pan out.] After consulting with the most interested U.S. agencies, Bernie Oxman and I concluded that the 1867 Convention line would better protect U.S. resource and security interests and had the advantage of facilitating agreement with the USSR.

Q: How did the Russians react?

FELDMAN: To the best of my memory, we notified the USSR before publication of the new U.S. coordinates and followed up with an invitation to discuss boundary negotiations. The first Russian reactions seemed to be positive, but there was no follow up. When the Russians did respond, they expressed concern about the mapping methodology and suggested a preference for Rhomb lines. [I later learned this preference may have dated back to 1867.] The bottom line was that the Russians didn't agree to formal boundary negotiations on my watch and for many years thereafter. Eventually, a boundary treaty based on the 1867 Convention line was concluded with the U.S.S.R. in 1990, late in the Soviet era. The U.S. Senate gave advice and consent, but the дума of the new Russian Federation has never acted.

Q: So, the treaty is not in force.

FELDMAN: Correct, but despite some Russian complaints, both countries have followed the treaty line.

Foreign Bribery 1975–1977

Q: I understand that you worked on the foreign bribery issues that led to the enactment of the Foreign Corrupt Practices Act of 1977, 15USC 78ddd-1 [FCPA]. How did that extremely important piece of legislation develop?

FELDMAN: In 1975 and 1976, American public life was shaken by dozens of scandals involving bribery of foreign officials by prominent American companies. These disclosures, driven by SEC [Securities and Exchange Commission] enforcement actions and high-profile public hearings by the Church Subcommittee on Multinational Corporations, made headlines for months causing serious problems for foreign leaders important to the United States. Some of the most sensational disclosures involved corrupt payments by Northrop, Lockheed, United Brands, Gulf Oil, and Mobile in Saudi Arabia, Japan, Honduras, Korea, Italy, and the Netherlands. The headlines were punctuated by suicides of corporate executives and foreign officials. One CEO [chief executive officer] jumped out a window. A European dignitary stepped in front of a streetcar. As you can imagine, this commotion caused serious political problems for the Ford administration and bitter complaints to the State Department from injured allies.

Q: I particularly remember the Lockheed case. How did the U.S. government respond?

FELDMAN: SEC enforcement, led by Stanley Sporkin, doubled down working hand-in-hand with congressional staff. DOJ began prosecuting foreign bribery under mail fraud and wire fraud statutes. The State Department did damage control hurrying to

negotiate mutual cooperation agreements with trading partners eager to reassure domestic audiences.

After a few weeks of this, pressures for new legislation mounted in Congress and within the administration. President Ford tasked Elliot Richardson, then secretary of commerce, with developing the administration's position, and his team, led by Dick Darman and J.T. Smith, developed a bill requiring disclosure of illicit payments to foreign officials. Senator Proxmire led a movement to impose criminal penalties on American companies making illicit payments to foreign officials.

Q: What was the State Department's position in the interagency process?

FELDMAN: The Richardson team said we were waging guerrilla war against new legislation. The department was deeply concerned about foreign corrupt payments because this practice undermined governance and the rule of law, particularly in resource rich developing countries, and distorted international trade to the advantage of our competitors in the industrial world. At the same time, the department was worried about the foreign relations impact of legislation that would engage U.S. law enforcement in continuing investigation of the conduct of foreign officials in their own countries.

There was also concern about the competitive burden on American companies trading or investing abroad. Frankly, corruption in government procurement was extremely wide-spread at the time. In fact, allies like the United Kingdom and France financed foreign bribery in their export promotion programs.

Q: What was your role in all this?

FELDMAN: Deep and extended. In the Ford years, I was the point man for State on country problems, coordinating with U.S. law enforcement and congressional staff. Also, I represented State in the Richardson task force, testified to Congress, and represented the United States in UN discussion of bribery by multinational companies. In the Carter years, after the FCPA was enacted, I was tasked with negotiating an international convention that would commit other nations to the same measures we had imposed on our companies. That was a heavy lift that did not succeed in my time. After leaving government service in 1981, I continued to follow these issues and testified to Congress twice on amendments to the FCPA. See Testimony on Illicit Payments, Activities of American Multinational Corporations Abroad, Subcomm. Int. Economic Policy, House Int. Relations Comm., 94 Cong., 1st Sess., June 5, 1975, DOS Bulletin July 7, 1975 at 39; Testimony on Illicit Payments, Subcomm. Consumer Protection and Finance, House Interstate and Foreign Commerce Committee, 94 Cong., 2d Sess., September 21, 1976; Testimony on FCPA amendments [S. 708], Joint Hearing, Senate Banking, Housing and Urban Affairs Comm., 97 Cong., 1st Sess., May 21, 1981; Testimony on FCPA amendments, Subcomm. Int. Economic Policy and Trade [Bonkers presiding], House Foreign Affairs Comm., 98 Cong., 1st Sess., April 18 [etc], 1983.

This story is well documented in a law review article by Michael Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 *Ohio State L. J.* 929 [2012].

“The following exchange between Representative Solarz and Deputy Legal Advisor [sic] Feldman during the hearing best captures the State Department’s views.

“MR. SOLARZ. . . . Do I understand your position to be that you would be opposed to any prohibition against the bribery of foreign officials by American corporations on the grounds, first, that that would be resented by the governments of other countries as an unwarranted intrusion in their affairs and, second, you would be opposed to it on the grounds that it is, by definition, unenforceable since we would be unable, in cases where such allegations had been made, to obtain the testimony of foreign officials for the judicial proceedings that would have to ensue? Would that be a fair statement of your position?

“MR. FELDMAN. It is a generally correct statement of our position, and I would like to give our reasons with more precision. I think that we would be opposed to any legislation that would be directed to the conduct of U.S. citizens abroad in their relations with foreign officials which is based on a general proposition that U.S. citizens should behave well abroad. . . . That kind of legislation we would oppose, not because we differ with the moral imperatives involved but we feel that the enforcement of such legislation would involve us in the surveillance of activities taking place in foreign countries, including the behavior of foreign officials, and would fundamentally intrude our moral views into foreign societies which may have different conditions.

“Deputy Legal Advisor Feldman likewise stated as follows during a House hearing: We believe that the main responsibility for enacting and enforcing criminal laws rests with the State whose officials are involved, and we believe that there is an important role for cooperation in law enforcement on the part of the home countries of companies, or of exporting countries such as the United States.” *Id.* at 966-67.

Q: How did the American business community react to the draft legislation and the whole issue?

FELDMAN: With great alarm. Apart from the bad publicity and losses in foreign markets, companies faced the risk of federal investigation. Moreover, individual executives and board members risked personal liability to shareholders. There was a rush to open internal investigations, and a number of firms appointed prominent attorneys for independent, outside reports. It was a field day for the bar. This generated considerable demand for government advice on the lecture circuit. I participated on a number of panels with colleagues from the Justice Department. There was also anger at the SEC and pressure on the commission to rein in Stan Sporkin, chief of SEC enforcement.

Q: How did that play out?

FELDMAN: This is a sensitive subject. I'll be speaking from memory as I made no notes at the time. I have no direct, personal knowledge of pressures put on Stanley, but I'm certain he heard from the commission early on and in the Carter years as well. At one point in the Ford years, Stan visited me at State for a private conversation. Each of us had someone with us, but I no longer remember the names. Basically, Stan proposed that the State Department issue a public statement that bribery of foreign officials was contrary to United States policy. If we would do that, he would ease up on the investigation of foreign payments by American companies.

Q: What was your response?

FELDMAN: I said we would consider his proposal and get back to him. The offer was tempting, but I had two concerns. First, there was no question that foreign bribery was inconsistent with U.S. policy, but I worried that a statement to that effect would feed the narrative that American companies caused this problem. The main cause was the greed, corruption, and pressure of foreign officials who insisted on bribes and the willingness of our competitors to pay them. Second, more importantly, I was concerned that the State Department would be accused of improper intervention with law enforcement to cover up the evil deeds of American business. By now, Congress and the Justice Department were engaged, and a change at the SEC would not go unnoticed. My associate agreed with me, but this was not my decision to make. So, I took the issue to William D. Rogers, at that time a senior official at State who had a close relationship with Secretary Kissinger. I knew Rogers well and had great confidence in his judgment. Bill concurred that we should not take up Sporkin's idea. So, I reported back to Sporkin. He seemed disappointed and told me that he would continue with his program.

Q: Were there any repercussions?

FELDMAN: The rest is history. I always wondered whether I made the right decision; whether Sporkin's idea would have cooled the situation and averted the FCPA; and whether, in the long run, the FCPA was beneficial. Despite the pressure, Stan Sporkin remained at the SEC until Ronald Reagan appointed him general counsel at the agency and, later, as a federal judge.

Q: Well, as a career economic officer who worked mostly in Latin America in the decades after, I can tell you that most of my peers and I believe the FCPA was extremely beneficial. It gave the U.S. companies working overseas an easy out when confronted with requests for bribes and it increased the stature of the U.S. business community overseas.

What was the international reaction? In the UN?

FELDMAN: Prompt and opportunistic. These scandals erupted at a time when developing countries were pursuing measures in the United Nations to control multinational enterprises and to force better terms of trade. They were quick to seize on the bribery issue to advance their goals. The United Nations General Assembly adopted

Resolution 3514 in December 1975 condemning foreign bribery and soon established a Center for Transnational Corporations in New York and an Intergovernmental Working Group on Corrupt Practices [of the Economic and Social Council] to develop an international treaty to “to prevent and eliminate” illicit payments in international commerce. I represented the United States in those discussions. See Statements of Mark B. Feldman, November 15, 1976 and March 29, 1977, State Department Bulletin December 6, 1976 and April , 1977.

Q: It may have taken time but we have UN and OECD anti-bribery treaties now.

FELDMAN: Correct. It took another generation or two. The OECD Anti-Bribery Convention entered into force in 1999; the UN Convention followed in 2005. However, the U.S. did make a major effort on my watch. There was serious pushback from business when the Carter administration began implementing the FCPA in 1978. They complained that the new rules relating to agent fees put U.S. companies at a competitive disadvantage. It was hoped that a multilateral treaty could help level the playing field.

Q: The FCPA is a criminal statute, right?

FELDMAN: Yes. Senator Proxmire supported criminalization, and Jimmy Carter endorsed the idea in his presidential campaign against President Gerald Ford. Unlike many other candidates, President Carter meant to keep his campaign promises, and Stu Eizenstat put together a little book, “Promises, Promises,” to remind everyone.

Anyway, Carter sought to deflect the criticism by seeking to spread the burden of compliance around the world. Deputy Secretary Warren Christopher called me in one day and told me to make this project a priority in the OECD and the UN. He must have known it wouldn’t work out. The world was not ready, but I drove our embassies nuts making diplomatic demarches. And we came closer than people expected.

Q: What was your strategy?

FELDMAN: We concentrated on the UN which had established a forum for that purpose hoping to exploit two facts: one, most governments prefer not to be seen as indifferent to bribery; two, industrial countries would bear the burden of enforcement against their own nationals. In the end, the group of developing countries found a clever way to deflect the pressure by linking their support of our agreement to their proposed Code of Conduct for Transnational Corporations. The latter included provisions unacceptable to any free market country; we could not agree.

Q: How did the OECD countries react?

FELDMAN: They were mostly amused. We did manage to arrange an OECD consultation in Paris, but there was no interest in an OECD Convention at that time. Ironically, the only clear statement of support I received was from De Lacharriere, the

French legal adviser, and he was appointed to the International Court of Justice not long after. The Europeans did not oppose our effort in the UN, but they didn't help either.

Q: Very important work.

Jonestown Massacre—November 17, 1978

FELDMAN: Why don't we move on to the Jonestown massacre?

Q: That was terrible. Please set the scene.

FELDMAN: The People's Temple in Jonestown Guyana was the compound of an American cult community led by Reverend James Jones that had relocated from California to escape public scrutiny and controversy. When Congressman Leo Ryan led a delegation to Guyana to look into Jonestown on November 17, 1978, Jim Jones responded by having his lieutenants assassinate Congressman Ryan and four members of his delegation at the airport as they were getting ready to depart. He then proceeded to organize the mass murder-suicide of more than nine hundred of his loyal followers—men, women, and children who were induced or forced to drink poisoned Kool Aid. I listened to the screaming and moaning on tapes obtained by the embassy. Chilling.

I should mention that one of our attorneys in L/ARA, Terry Fortune, planned to travel with the congressional delegation to Guyana, but I refused to authorize the trip. I had no premonitions of disaster. Rather, I objected on separation of powers grounds to an official congressional investigation of private American citizens on foreign territory. I saw it as congressional infringement on the president's Article II diplomatic relations powers and worried that the presence of a State Department attorney might validate the practice. Naturally, Terry was grateful for my decision. He might have been killed if he had made the trip.

People's Republic of China and Taiwan

Q: Continuing with the Carter years, let's talk about China and the Blumenthal Mission to Beijing in March 1979.

FELDMAN: Well, I've had a long interest in the China question. Back in 1955, when I was on the intercollegiate debate team for Wesleyan University in Middletown, Connecticut, the national debate topic was whether the United States should recognize Red China. We had to argue both sides of the question.

Q: Mark, let's just step back a second to talk about what the policy issue is. Prior to the Carter administration, we didn't have formal diplomatic relations with Beijing, right?

FELDMAN: Correct. We had a liaison office in Beijing, but no formal diplomatic relations until 1979.

Q: And Beijing has always insisted that Taiwan is part of China and that the U.S. could not maintain diplomatic relations with Taiwan, if it entered diplomatic relations with the PRC [People's Republic of China]. Is that correct?

FELDMAN: Correct. Beijing insisted that the United States transfer recognition from the Republic of China [ROC] on Taiwan to the Peoples' Republic of China and terminate the Mutual Defense Treaty with the ROC. By the way, when I came to State in 1965, Secretary Rusk and others still spoke of "Peiping." I'm not sure when "Beijing" entered State's vocabulary.

Q: Peking, right? That's what we called it when I was growing up.

FELDMAN: For Dean Rusk, it was Peiping.

I think we should remind people that the original opening to China was made in the Nixon administration beginning with ping-pong diplomacy, followed by Henry Kissinger's secret meeting with Zhou Enlai and President Nixon's visit to China in 1972. In the Shanghai Communique, "the U.S. acknowledged the PRC position that all Chinese on both sides of the Taiwan Strait maintain that there is only one China and that Taiwan is part of China." To this day, our position remains that sovereignty over Taiwan remains to be determined.

Q: So, the Carter administration completed the process by recognizing the PRC as the sole government of China and established formal diplomatic relations. What was your involvement?

FELDMAN: This was a complex process, controversial with the Republican right and complicated by a turf fight with Treasury. My role was limited but challenging and exciting. I worked on one, the settlement of U.S. property claims against China which was an essential U.S. requirement for normalizing relations with China, and two, a suit brought by Senator Barry Goldwater challenging the president's constitutional authority to terminate the U.S. Defense Treaty with the ROC without Senate consent.

Q: Let's start with the turf fight with Treasury.

FELDMAN: Okay. Normally, the secretary of state has the lead on questions of recognition and diplomacy. Presumably, Secretary Cyrus Vance was fully involved and supportive of Carter's policy decisions, but Michael Blumenthal, secretary of the treasury, was tapped to head the U.S. mission to Beijing that would negotiate the terms of normalization because of his personal interest in China. As a child, Blumenthal lived in Shanghai under Japanese occupation during World War II. A good number of German-Jewish families found refuge from the Nazis in Shanghai. So far, so good, but somehow Treasury managed to take control of issues that were traditional responsibilities of State, including claims negotiations which had always been done by the Office of the Legal Adviser.

Q: That reminds me of the turf fight over expropriation policy in the Nixon administration.

FELDMAN: Right, but here there were no policy differences. A pure power grab. Herb Hansell, the legal adviser, was unhappy, and I was furious. That was my portfolio as deputy legal adviser.

The large delegation that traveled to Beijing in March 1979 was top-heavy with Treasury officials. Only two or three State Department officers were included, although the U.S. Liaison Office was well represented by Stapleton Roy. I was thrilled to be along on this historic mission and to see something of China before any modernization had taken place, but I was not thrilled to be second chair to Treasury on claims.

Q: Were you satisfied with the claims agreement?

FELDMAN: Yes. The negotiations were very difficult, but the deal was done, Agreement Concerning the Settlements of Claims, May 11, 1979, United States—People's Republic of China, 30 U.S.T. 1957, T.I.A.S. No. 9306, reprinted in 18 I. L. M. 337 [1979]. We had eighty million dollars of frozen Chinese assets in the U.S. that were ceded to the U.S. for payment to U.S. citizens whose property had been seized without compensation when the Communists came to power. The Chinese resented the U.S. demands, but finally gave in. The claims settlement was a sore point for years to come with both China and the claimants who only got about thirty cents on the dollar.

This trip was one of the most fascinating travel experiences of my life. It would be hard for anyone who has only known modern China to imagine the primitive China just emerging from the Mao era that I saw in Beijing and Shanghai in March 1979. Sadly, I don't have the language skills to recreate it, just as I struggle to relate my experience as a student visiting Franco's Spain in 1955. Those worlds are long gone.

To set the stage: At this particular moment, March 1979, Deng Xiaoping dominated the Chinese government. The memory of Mao Tse Tung was not in favor; his tomb was closed to the public. Openness and change were in the air. People were listening to western music and learning English. There was a "Democracy Wall" where people freely posted a variety of political messages. Ironically, a small border war was going on between China and North Vietnam. The street scene was colorful and unfamiliar—huge crowds on the streets and sidewalks, little traffic. Every morning large numbers of people, many older, exercised on the lawns. Tai Chi, I suppose. One day, walking in a crowd, I spied down the street, above the crowd, an image of a traditional Jewish challah [braided bread]. When I managed to shoulder my way through, I saw the word, "Harbin," the Manchurian city once home to thousands of White Russian refugees. I saw no remnant of the bakery that must have been there and have always wondered what the Chinese made of the challah.

Q: Where did you stay?

FELDMAN: In Beijing, the delegation was housed in the official guest quarters—simple but very comfortable. The food and service was superb. I discovered that if I let a sock lie on the floor, it would be laundered and pressed for me. I also discovered that no one on staff would help me stamp or mail a letter. I should have known better.

Q: Did you eat well and see the sights?

FELDMAN: Oh yes. The Chinese were marvelous hosts. We attended a number of elaborate dinners in The Great Hall of the People where each guest was assigned a personal host who served us dinner. I remember delicious, sculpted duck dishes and mouth-watering sweet chestnuts. They took us to palaces and to a fabulous performance by Chinese acrobats—the highlight for me. Our hosts also organized group photographs of our delegation with their Chinese counterparts and senior leaders, including Deng Xiaoping. I love showing that photo to Chinese students at Georgetown.

Q: Did you travel outside of Beijing?

FELDMAN: We also spent three days in Shanghai housed in a hotel. The food was not as good. The highlight of that visit was a walking tour led by Michael Blumenthal. I remember visiting a bicycle factory where there was talk that China might be able to export bikes to the U.S. No one imagined that much of American industry would later relocate to China. But some prescient Treasury folks remembered that John Foster Dulles told the Japanese after World War II not to try exporting autos to America; they would not be able to compete with Detroit.

Q: Was the Treasury team advising the Chinese on economic matters?

FELDMAN: One of the main goals of the Treasury delegation was to teach the Chinese how to frame tax codes so that American oil companies and others would be able to invest in China with a minimum tax burden at home. Amazing, when you think about it.

Q: Okay, back to substance. What was the issue surrounding the termination of the Defense Treaty with Taiwan?

FELDMAN: As mentioned before, the PRC understandably insisted, as a condition of normalization, that the United States terminate our Defense Treaty with the ROC. The treaty provided for termination by either party on one year's notice, and President Carter gave that notice on January 1, 1979, effective one year later on January 1, 1980. A group of individual senators and congressmen opposed to the new China policy sued the administration challenging the executive's authority to terminate the treaty without the Senate's consent. Imagine the shock in Washington when Judge Oliver Gasch issued an order on October 17, 1979 enjoining the State Department "from taking any action to implement the president's notice of termination unless and until" the Senate approves the notice. *Goldwater v. Carter*, 481 F. Supp. 949 [D. DC. 1979]. The Justice Department

represents the government in court, and I was the senior State Department lawyer on the case at that stage.

Apart from the legal merits, this was an unprecedented and extraordinary judicial intrusion into a major foreign policy issue of enormous consequence for world affairs. President Carter was deeply perturbed and he passed that emotion to Secretary of State Vance and down-the-line to Deputy Secretary Warren Christopher, who could be critical, and to my boss, Legal Adviser Herbert Hansell, who did not do well under pressure. I will never forget the day Herb and I met with David Andersen, the Justice attorney in charge. It was tense. Voices were raised, and David caught the mood, saying, “There’s the smell of panic in the air here.”

Q: What happened on appeal?

FELDMAN: The Court of Appeals reversed Judge Gasch on November 30, 1979 on grounds that the treaty approved by the Senate authorized termination by the executive, *Goldwater v. Carter*, 617 F.2d 697 [DC Cir. 1979]. But the issue had to be settled by the Supreme Court, and the clock was ticking. The court expedited argument and issued a decision on December 13, 1979, dismissing the action primarily on grounds that the dispute was a political question not suitable for adjudication by the judiciary.

Q: What was your view of the law?

FELDMAN: I had argued all along that we should emphasize the president’s Article II responsibility for recognition of foreign states and governments. Justice Brennan agreed with me and dissented from the Supreme Court decision dismissing the case. He would have allowed the Court of Appeals mandate to stand, albeit for different reasons than the DC Circuit.

Iran Hostage Crisis: November 4, 1979–January 20, 1981

Q: Mark, were you still working at the State Department on November 4, 1979?

FELDMAN: Yes, I was. I’ll never forget that date. A group of Iranian students overran the American embassy in Tehran and took fifty-two U.S. diplomats hostage. This action precipitated a drama that captivated the nation for 444 days and made Jimmy Carter a one-term president. There is a straight line between the hostage crisis in 1979–80 and the hostility between Iran and America today.

It is hard to recreate the atmosphere of those 444 days. There were yellow ribbons everywhere, and the whole nation was riveted to newscaster Ted Koppel’s daily, late night TV show dedicated to the hostage crisis.

When the embassy was first taken, the administration expected the leader of Iran, Ayatollah Khomeini, to restore order. After all, the seizure of an embassy was an extraordinary violation of international law. But Khomeini did the opposite. The regime embraced the student action and rejected all efforts to open negotiations for almost a year.

Anti-American passions were so high in Iran that the most radical mullahs were able to exploit the crisis to purge all the moderates in the Khomeini coalition.

Q: Why were anti-American passions so high?

FELDMAN: That is a long story dating back to 1953 when the U.S. and the UK toppled the Mossadegh regime and installed Reza Pahlavi as Shah. The immediate catalyst was Carter's decision to allow the ailing Shah to come to the United States for medical attention when he was forced from the Peacock Throne by the Khomeini revolution. A great deal has been written about the Carter administration's handling of Khomeini's return from exile to Iran and of the hostage crisis itself. We can't cover all that ground here, but I'll make a few personal observations on the question of whether Jimmy Carter lost Iran.

I agree with the critics on two points: one, the emergence of Islamic Iran has been a disaster for America and the world; two, the administration was not paying enough attention as the Shah's regime collapsed in 1978 and Khomeini returned home to screaming thousands. President Carter and his top aides were preoccupied with an extraordinary agenda including the Panama Canal, China, and the Mid-East, and it didn't help that Ambassador William Sullivan and Carter's National Security Adviser Zbigniew Brzezinski were at cross-purposes. However, America does not control history. In this case, as in China in the 1940s, internal forces controlled events. I am particularly troubled by the charge that Carter lost Iran by failing to urge the Shah to suppress the demonstrations by military force. Experts say that neither the Shah nor the army were up to that task. I ask who could think Carter should have recommended slaughtering the population. The Shah was through; thousands were in the street. A blood bath would have left an indelible stain on our country, and there is no reason to believe it would have led to a good result.

Q: Why don't you begin by describing your role in the hostage crisis and, perhaps, give us an outline of the topics you want to cover.

FELDMAN: To begin, I have to say that my work on the Iran hostage crisis for the Carter administration, although a small part of the larger effort, was the most absorbing and satisfying work of my career. I don't think historians appreciate what a success it was for the administration to bring the hostages home safely without paying ransom and, in the process, to obtain billions in compensation for American investors, contractors and banks. The most detailed account of the hostage crisis and the Algiers Accords is found in *American Hostages In Iran: The Conduct of a Crisis* [Yale 1985] put together by the Council on Foreign Relations. I get a footnote at p. 312.

It was thrilling for me to stand among the crowd at the White House to welcome the diplomats home on January 28, 1981. As reported on the *Times* front page:

“In an emotion-charged ceremony on the South Lawn of the White House, President Reagan today welcomed home the 52 Americans formerly held hostage in Iran and

promised 'swift and effective retribution' for attacks on American Government employees in foreign lands. Earlier, thousands of citizens waving yellow ribbons and balloons cheered the former hostages through the streets of Washington as a motorcade led by Vice President Bush bore the freed Americans to a private reception by President and Mrs. Reagan in the Blue Room of the White House. Mr. and Mrs. Reagan watched from an upstairs window with tears in their eyes as the motorcade rolled slowly up a drive lined by a Marine honor guard. Moments later, as the couple shook hands with the former hostages in the Blue Room, Mrs. Reagan suddenly exclaimed 'Oh, I can't stand this!'" and began hugging and kissing the freed Americans." Howell Raines, Special To the New York Times, Jan. 28, 1981.

Standing against the White House wall near the line of marine guards, I couldn't help noticing when a cigarette pack fell out of a marine's cap. His commander, not amused, speared the pack with his sword; the marine broke into sweat.

Q: Can you explain the role you had in helping to resolve the hostage crisis?

FELDMAN: To put my work in context, hundreds of lawyers in various government agencies and the private sector played a role in this drama. From day one, the policy of the Carter administration was to obtain the safe return of the hostages without paying ransom to terrorists or otherwise embarrassing the United States. On November 14, 1979, President Carter issued an Executive Order [EO] freezing Iranian assets in the United States and in U.S. banks abroad and imposing a sweeping embargo on U.S. trade with Iran. It took a long time, but this economic pressure eventually bore fruit in forcing Iran to negotiate. As time passed, it became clear that a hostage agreement would have to deal with the financial issues as well.

As a deputy to Legal Adviser Roberts Owen, I worked with Treasury on the regulations implementing the sanctions [trade embargo and asset freeze], helped manage the government's response to the numerous lawsuits brought by private parties in the United States, and consulted with dozens of lawyers in the private sector representing banks, investors and contractors with claims against Iran. Looking back, my principal contributions were one, drafting the Iran-U.S. Claims Agreement incorporated in the Algiers Accords and two, implementing the accords as acting legal adviser in the first months of the Reagan administration. That involved presenting the accords to Congress and the incoming administration, helping to draft regulations implementing the accords, and establishing the Iran Claims Tribunal at The Hague. See Testimony on Algiers Accords [Iran Claims Tribunal], Hearing, Senate Foreign Relations Comm., 97 Cong., 1s Sess., February 17, 1981 pp. 185-191.

Q: Were you involved in the decision to freeze Iranian assets?

FELDMAN: No, and I was shocked that the announcement by the secretary of the treasury pretended that Iranian assets were frozen because of financial issues with Iran, not because Iran occupied our embassy and held American diplomats hostage. Apparently, Secretary William Miller was concerned that freezing foreign bank deposits in the United States for political reasons would spook foreign depositors, particularly Saudi Arabia, and damage our banks. In my view, the pretext lacked all credibility and

undercut our strong legal rationale for vigorous counter-measures. Happily, that theory soon disappeared from our pronouncements.

Q: When did you first become involved?

FELDMAN: In December 1979, when Iran's central bank, Bank Markazi, sued the United States in London and Paris to block President Carter's order freezing Iranian deposits in U.S. banks in England and France. The suit was a serious challenge to the extra-territorial application of U.S. sanctions which was often a sensitive issue with close U.S. trading partners. An interagency team led by Assistant Attorney General Alice Daniels was sent to London to seek assistance from HMG with the courts. For me, the highlight of the trip was a conference with Sir Patrick Neill, Warden of All Souls at Oxford. Daniels was hoping to persuade the UK government to ask the High Court [then the trial court] to apply the act of state doctrine to bar judicial review of the Carter freeze order. She asked Neill to prepare a legal opinion for the British authorities. We sat around a large, wooden, round table in the All Souls conference room while Sir Patrick wrote out his opinion in long hand on a yellow pad—a charming scene, out of Dickens.

I should add that I very much enjoyed being hosted by Kingman Brewster, a professor of mine at Harvard Law, who was Carter's ambassador to the Court of St. James.

Q: Did the mission succeed?

FELDMAN: Not in the way we asked for. The Brits took the position that there was no act of state doctrine in English law and that it would be inappropriate for the government to intervene with the judiciary. [Whatever the case in 1979, I understand that English law now recognizes the act of state doctrine in some form.] However, the suit never troubled us. The deposits frozen by President Carter in London remained frozen for the duration of the crisis. As far as I know, there were no proceedings in the case. HMG has its own way of dealing with problems like this.

In France, likewise. I went to Paris from London on a solo mission to meet with U.S. Ambassador Arthur Hartman to see what could be done with the French government. I knew Hartman well from the Vietnam days when he was a senior assistant to Under Secretary Nicolas Katzenbach, and I enjoyed seeing him in Paris. So, I stood by while he visited the Foreign Ministry—the Quai D'Orsay. When Arthur came back, he said, "Okay," and I said, "Thank you." The deposits frozen in France remained frozen for the duration. By the way, Hartman went on to be U.S. ambassador to Moscow, and we became neighbors in DC when I moved in with Mimi Feinsilver in 2011. Washington can be a small town.

Q: What happened next?

FELDMAN: Around this time I had a tense conversation with my boss, Bob Owen. The White House was frustrated that Khomeini refused to talk with us or to any intermediary and was becoming nervous as the crisis dominated the news. I casually mentioned that

this could go on for a long time. I told him that I had been through a similar situation in the Johnson administration when North Korea captured a U.S. intelligence ship, the *Pueblo*, and held on to the crew for almost a year. Bob was a calm person, but this upset him. We did not know it, but the worst was yet to come.

Q: The disaster in the desert?

FELDMAN: Exactly, but I'm getting ahead of my story. The next date on my legal calendar is December 19, 1979.

Q: What happened then?

Assets and Claims

FELDMAN: On that day, Treasury authorized private litigants to file suits against Iranian entities, including prejudgment attachments of Iranian assets frozen in the United States. This order unleashed a flood of litigation that became a big part of my Iran workload. The original Iran Asset regulations issued by the Treasury Office of Foreign Assets Control [OFAC] prohibited all transactions involving interests in Iranian property including attachments by claimants. When the administration's hopes for the prompt release of the hostages faded, the decision was made to turn up economic pressure by unleashing private claims in U.S. courts. Hundreds of suits were filed by parties hoping to establish priority in case the government authorized execution down-the-road.

Q: Why did these suits increase your workload?

FELDMAN: Good question. Every action brought in the United States against a foreign government or government agency falls under the Foreign Sovereign Immunities Act of 1976 [FSIA]. [Remember, I helped draft that statute.] The FSIA is a complex measure that leaves many questions open for judicial decision. Every action brought against Iran raised difficult questions of interpretation important to the U.S. government and to all of our trading partners. And judges confronted with difficult questions in a sensitive diplomatic environment were quick to ask for the State Department's views.

The White House established an interagency committee chaired by Associate Attorney General John Shenefield to coordinate the government's response. I prepared the first draft of answers to judicial inquiries, but it quickly became apparent that many of these questions raised serious conflicts of interest between the government and the claimants. For diplomatic and political reasons, it was untenable for the administration to side with Iran on these issues.

Q: How did the administration deal with that?

FELDMAN: The minute White House Counsel Lloyd Cutler saw the problem, he decided we could not answer these questions. We had to ask the courts to suspend proceedings in these cases for some period of time. The Justice Department duly asked

the courts for suspension, but some judges refused. To the best of my recollection, we did not address those questions while the hostages were held in Tehran.

Q: Did the attachments complicate the negotiations as well?

FELDMAN: They did. Attachments were a two-edged sword. They helped pressure Iran to release the hostages and complicated achieving that goal by bringing the claims of American citizens secured by attachments to the fore. We knew Iran would insist on the return of its assets and termination of litigation as a condition of returning the hostages. From the outset, the administration had linked the asset freeze not only to release of the hostages but to protection of the interests of American nationals with claims against Iran. There were two basic options for a claims settlement: either a lump sum payment or a complex procedure for binding third-party arbitration. International claims was an important part of my portfolio in the Office of the Legal Adviser, so I began looking at past precedents going back to the Mexican petroleum expropriations in the early 1900s. My workload also included numerous consultations with claimants, particularly when negotiations finally began in November 1980.

Q: What numbers are we talking about here? How big was the pool of Iranian assets as compared to the amount of the claims?

FELDMAN: Everyone kept asking those questions. The numbers were huge, but it was extremely difficult to obtain firm figures. Estimates of frozen assets ranged up to twelve billion dollars. Ultimately, the figure was around nine billion. U.S. bank claims for outstanding loans were four billion, and there were potentially billions more for expropriated investments, including petroleum interests, and the claims of American contractors who had had a major stake in the Iranian economy under the Shah. The Khomeini regime targeted American interests early on and many of these claims arose before the hostage-taking. Whatever American business activity remained was seized or shuttered after the Carter freeze order on November 14, 1979.

Q: What's the next date on your calendar?

FELDMAN: April 7, 1980. Before then, the administration was busy with numerous initiatives, diplomatic and otherwise, to open negotiations with Khomeini. All failed, including a personal mission by UN Secretary General Kurt Waldheim in January and a UN Commission in March. On April 7, Khomeini slammed the door, ruling that the hostages would remain in the hands of the students and their fate would be determined by the Majlis [parliament] to be convened in May. The next day President Carter broke relations with the Islamic Republic, expelled Iranian diplomats and, I presume, turned to the military option.

Q: That did not go well.

Desperate Measures: Rescue Attempt Fails

FELDMAN: Many people believe that Jimmy Carter lost his presidency on April 24, 1980 when a secret mission by the Army's Delta Force to extract the hostages from Tehran crashed and burned in the Iranian desert with eight American fatalities. A 2020 film titled *Desert One* presents a detailed and vivid description of the military operation.

Q: Were you involved in planning the rescue mission?

FELDMAN: No. The first inkling I had came from the German Foreign Office a few days before the event. I happened to be in Bonn on other business with the head of the North American desk, a certain Herr von Richtofen, grandson of the famous World War I ace pilot, the Red Baron. He asked me whether the legal office had heard anything about military options to rescue the hostages. I said, "Not a word." He replied, "Just what I was afraid of."

Q: Where were you when the news broke?

FELDMAN: With my wife, Marcia, in Paris at the Hotel Crillon. She had been traveling in Portugal with Edward P. Morgan for the German Marshall Fund, and I scheduled my visit to Bonn so we could meet in Paris. We were stunned by the disaster. It was a national humiliation and we worried that the Iranians might retaliate against the hostages.

Q: Yes. That was a very dramatic failure and highly embarrassing for the United States. Didn't Secretary of State Cyrus Vance dissent and resign over it?

FELDMAN: Yes. But he told Carter privately before the operation saying he would resign whether the operation succeeded or failed.

<https://history.state.gov/historicaldocuments/frus1977-80v01/d144>

Senator Edward Muskie of Maine became secretary for the remainder of Carter's term. He was a delightful person. Personally, I thought the mission was extremely dangerous and could have turned out worse. If Delta Force had reached Tehran, the hostages might have been killed. And I worried that the White House might have been influenced by domestic political considerations.

Q: So, what happened next?

FELDMAN: One development was the beginning of informal talks between American banks and the Iranian Bank Markazi that contributed eventually to the financial piece of the Algiers Accords. From my perspective, a key development occurred in June when Treasury asked Roberts Owen to begin drafting an arbitration agreement to submit to Iran. The administration had concluded that it would be impossible to negotiate a comprehensive financial settlement before the election. Treasury hoped to negotiate payment of the bank loans and to establish a process to resolve the claims of American investors and contractors. Initially, Owen called on Gerry Rosberg, our counselor on international law, to draft the agreement. I pitched in and together we prepared a

twenty-five page document before negotiations began. We'll spend a lot of time on the claims agreement. First, though, let's get to the Iranian decision to negotiate.

Q: Meanwhile, the Shah died in July?

FELDMAN: Yes, but the first hints of a break in the stalemate didn't come until September—through a German channel.

On September 12, 1980, Khomeini announced four conditions for release of the hostages. Khomeini's four points were: one, return of the Shah's wealth to Iran; two, cancellation of U.S. claims against Iran; three, unfreezing Iran's assets in the United States; four, U.S. guarantees of non-interference in Iran's internal affairs. The Majlis approved these conditions on November 2, 1980—two days before the U.S. presidential election. On November 3, we received a diplomatic note from Algeria confirming that Iran was ready to negotiate on the basis of the four points through the good offices of the Algerian government. The hostage negotiations proceeded to conclusion via mediation by Algeria. There were no direct contacts between Washington and Tehran.

Q: So, Carter was running for reelection and on November 4, Ronald Reagan was elected president. Whether successful or not, the attempt to release the hostages was going to affect the elections somehow. How did that play out?

FELDMAN: The election and the inauguration set a deadline. President Carter told the Iranians that any agreement with his administration would have to bring the hostages home by January 20. Reagan let it be known that he was not necessarily committed to negotiations. He wanted Carter to resolve the issue.

The political question remains controversial. Some years' later, Gary Sick, who had the Iran portfolio on Carter's NSC staff, wrote a book about the October Surprise propounding the thesis that the Reagan campaign, particularly George H.W. Bush, had contacted Iran to dissuade them from resolving the hostage crisis before the U.S. election in the way that the Nixon campaign had encouraged South Vietnam's President Thieu not to negotiate peace with Hanoi before the 1968 election. This charge was rejected by a bipartisan study, but new information has raised serious questions.

Q: What do you think about that? Do you think that happened?

FELDMAN: The evidence is suggestive. I remember being astonished that the Republican National Committee put out a press release in September 1980 welcoming Khomeini's four points and urging President Carter to accept them. That was impossible. We could not waive all U.S. claims or return the Shah's wealth to Iran.

Q: How did we respond to the Iranians' four points?

FELDMAN: Deputy Secretary Warren Christopher carried the U.S. response to Algiers on November 10. That was the first step in a complex negotiation with many moving

parts and dramatic twists culminating with the release of the hostages on January 20, 1981, minutes after President Reagan's inauguration. We can't cover the whole scenario here. Let's turn to the claims negotiation which was my central focus.

The Iran-U.S. Claims Agreement

As I said before, Gerry Rosberg and I began work on a draft arbitration agreement in June and developed a twenty-five page draft that provided the following: Property and contract claims of U.S. nationals would be submitted for binding arbitration to an international tribunal composed of nine members: three appointed by Iran, three by the United States and three neutrals appointed by the six. The tribunal would sit in The Hague and would follow the arbitration rules adopted by the United Nations Commission on International Trade Law [the UNCITRAL Rules]. Awards would be paid from an escrow account funded by frozen Iranian assets. Claimants with large claims would present their claims directly to the Tribunal. The United States government would represent claims under 250,000 dollars. Among other details, the tribunal would generally function in chambers of three arbitrators.

The key concepts were one, the awards had to be final, binding, enforceable, and, hopefully, funded in advance; two, the process had to work even if the Iranians defaulted and never appeared in The Hague—the UNCITRAL Rules provided for majority awards; three, the Tribunal needed considerable authority, independent of the Parties, to manage its own affairs and procedures. To that end, the agreement specifies that the Tribunal can adapt the terms of the UNCITRAL rules if it chooses. I always hoped that the small claims could be settled by lump-sum agreement with Iran, and I was gratified when that was accomplished.

Q: I take it the twenty-five page draft was superseded.

FELDMAN: Right. We never tabled that document. I think the team was working off a one-page concept paper, but I don't have it. The Iranians finally agreed to claims arbitration and an escrow account on December 21, 1980, but coupled those concessions with an unexpected, unacceptable demand for a twenty-four billion dollar deposit [fourteen billion dollar frozen assets plus ten billion dollars for the Shah's wealth]. As part of President Carter's final effort to salvage the negotiations, an Algerian delegation came to Washington on Christmas day. For good reasons, Christopher decided that the Algerians could not handle a twenty-five page draft in this context and asked Bob Owen to boil it down. One day Bob called me into his office and handed me a hand-written, one-page draft. He said, Chris asked me to draft a short claims agreement and not to talk to anyone about it. I'm going to confide in you. Please make it better, but don't talk to anyone about this. I said I would try, but I didn't think we could do it with one page.

But, thanks to the in-depth work that Gerry Rosberg and I had done, I was able to come up with something that worked. As I recall, my first cut was about four pages and the draft Bob presented to the Algerians was about eight. This assignment also gave me the opportunity to make some changes in the text to address issues that had come up in the

negotiations, including some creative language on the law to be applied by the tribunal. If we have time, we can get into some of that later. I discussed drafting the claims agreement at an NYU [New York University] Conference, Revolutionary Days: The Iran Hostage Crisis and the Hague Claims Tribunal, A Look Back [Juris 1996] at pp. 91-111.

Q: Did you get to meet with the Algerians?

FELDMAN: Yes. I had a useful discussion with them over lunch, and I was invited to pop-in to the negotiations for a few minutes when the claims agreement came up. My main take-away there was to shorten the agreement again. The Algerians didn't think the Iranians could handle eight pages of legalese. The final text is only three and a half pages, but we preserved all the essentials.

Q: What were the substantive concerns of the Iranians to the draft, if any?

FELDMAN: As I recall, the Algerians raised two main Iranian concerns: the tribunal should not be open to U.S. companies controlled by third country nationals, or to claims under contracts providing for exclusive jurisdiction of Iranian courts. The first was easily fixed; the second bedeviled us to the end.

Q: Was the agreement reciprocal?

FELDMAN: Of course. It applied to claims of American nationals against Iran and to claims of Iranian nationals against the United States. Further, Iran insisted that the agreement include inter-governmental claims, e.g., for undelivered aircraft sold to the Shah. The tribunal is still working on the latter as we speak—forty years later.

Q: What about hostage claims? I guess they had to be waived?

FELDMAN: Yes. There was no choice. That was the price of freedom for the hostages. We understood that the families had been briefed and accepted the necessity. As you know, in recent years, hostage claims have become a political problem.

Q: Why was the tribunal located in The Hague?

FELDMAN: Gerry Rosberg and I picked The Hague and the UNCITRAL Rules, because we thought Iran would be more likely to accept them than any alternative. The Hague was, and is, the historic location of major international tribunals including the World Court and, today, the International Criminal Court [ICC]. Many American attorneys, including Lloyd Cutler, would have preferred London for the amenities and because their firms had offices there. Frankly, I never knew that Christopher suggested London to the Iranians. That was a non-starter. To my knowledge, every paper presented to Iran named The Hague.

Q: Let's go back to the Christmas surprise. How did the Carter team deal with that?

FELDMAN: Basically, by following the Kennedy-Khrushchev precedent for resolving the Cuban Missile Crisis. They ignored the hostile rhetoric and impossible demands. At President Carter's direction, Christopher, Owen and the team flew to Algiers on January 7, 1981 to confer directly with Algerian Foreign Minister Benyahya. They expected a short visit, but stayed in Algiers until January 21, 1981 after the Reagan inauguration.

Q: What were you doing during those fourteen days?

FELDMAN: Well, Bob Owen was with the first team in Algiers. Bill Lake, his principal deputy, was in London with the second team [mostly Treasury] negotiating financial issues with the U.S. banks, the Iranian central bank, and coordinating with the Bank of England. I was the State attorney on the home [third] team following the negotiations hour-by-hour, coordinating positions with the White House, Treasury, and Justice, and providing advice/instructions to the delegation. My main role in this phase was working on Iranian changes to the claims agreement with WH Counsel Lloyd Cutler and Rich Davis, assistant secretary of treasury.

Q: Were you satisfied with the agreement?

FELDMAN: It was a great success, particularly the escrow fund to pay awards, unprecedented in international claims practice, and amazing given the leverage Iran had with the hostages. Warren Christopher and co. did a phenomenal job. Unfortunately, though, the Iranians surprised us by unilaterally submitting the agreed text to the Majlis at the last moment. The Majlis insisted on excluding contracts with Iran court clauses from the jurisdiction of the tribunal. That was a major problem; we didn't know how many there were and what language was used.

Q: How did the U.S. respond?

FELDMAN: This was a bitter pill to swallow, but time had run out. The best we could do was to add a few words to help claimants argue that the radical courts of revolutionary Iran could not perform the function American contractors had bargained for. The tribunal did not buy my theory, but took care to minimize the damage. I discussed these issues, and my difference with my former boss, George Aldrich, in Ted L. Stein on the Iran-U.S. Claims Tribunal—Scholarship par Excellence, 61 *Washington Law Review* 997 [1986].

Q: Okay. The claims agreement was finalized in the last hours of the Carter administration. But that was only one piece of the settlement.

FELDMAN: Yes. The package included two declarations issued by the government of the Democratic and Popular Republic of Algeria to the government of the Islamic Republic of Iran and the government of the United States of America and three supporting technical arrangements. The Algiers Accords were initialed by Warren Christopher in Algiers, formally accepted by President Carter and entered into force as an international agreement between Iran and the United States all on the same day, January 19, 1981.

Q: There must have been a huge scramble to marshal the Iranian assets and to organize the safe return of the hostages.

FELDMAN: It was a madhouse. Dozens of people worked around the clock for two days while the Carter administration was packing up and the Reagan crowds began celebrating the inauguration.

Q: What were the major problems?

FELDMAN: The financial settlement was extremely complex. It covered billions of dollars of blocked Iranian assets of different kinds located in different countries to be distributed to different parties on a prescribed timetable. Dozens of private banks, the Federal Reserve Bank of New York, and the Bank of England were engaged. Distribution had to be organized on a schedule that would assure the United States that no assets would be released to Iran until the hostages departed Iranian airspace, and the Iranians needed assurance that they would receive the promised assets promptly on release of the hostages. The trigger finally agreed was certification by the Bank of England that it had in hand mixed assets aggregating to 7.955 billion dollars.

This was all too complicated for me to follow, but I remember one episode that demonstrates how fragile this whole structure was. The Iranian assets needed to trigger release of the hostages were being transferred to the Bank of England overnight, January 19-20, pursuant to bank instructions sent by telex [coded] telex. Unfortunately, some of the telex codes were not properly transmitted. Billions were involved and banks, including the NY Federal Reserve Bank, hesitated to proceed without proper documentation. Around two am the morning of January 20, I called into the Operation Center to see how things were progressing and happened to hear a fragment of conversation between President Carter and Ernie Patrikis, counsel for the NY Fed. Ernie was quite concerned. Carter told Ernie to lie down and take a nap; he, the president, would take care of the problem. Later, I read that Treasury Secretary William Miller made the necessary calls.

Q: So, it must have been a great relief when word finally came that the hostages had been released.

FELDMAN: Yes, and it was sad that the Iranians delayed their release until President Reagan had become president.

I would like to say a word about Inauguration Eve. A large group of us were gathered in the Cabinet Room near the Oval Office working on the executive orders and other documents that would be needed the next day—assuming always that Iran did not renege and the hostages came home. It was Jimmy Carter's last night in the White House, and he stopped by and looked in on us wondering, I imagine, who were these strangers in his home. I had never seen President Carter before, and he seemed forlorn. It was a sad moment. And it became weird as we worked into the evening. Inaugural crowds were gathering. Bands played outside the windows and there were fireworks. The next day I

came back to the White House for some reason and all the wall hangings had been changed. This was now Ronald Reagan's house.

Q: Come January 20, Ronald Reagan was president, and Mark Feldman was acting legal adviser of the State Department.

FELDMAN: True. I can't recall who informed me or whether there was a formal announcement. I served in that capacity until mid-May, 1981.

Q: What more needed to be done to implement the accords?

FELDMAN: A great deal. First, the accords had to be approved by the Reagan transition team—led for L by Paul Wolfowitz and Alan Keyes—and reviewed by Congress. We briefed the Senate on February 17, 1981, Hearing, Senate Foreign Relations Comm., 97 Cong., 1s Sess., February 17, 1981 pp. 185-191, and the Reagan administration approved the accords on February 19.

Q: Was there any doubt the Reagan administration would approve the accords?

FELDMAN: Not a great deal, but we were nervous. They did not like some of the text relating to the Shah and asked whether Reagan might legally reject the accords on grounds of duress. Arthur Rovine, assistant legal adviser for treaty affairs, recounts that he told the transition team that might be a possibility, but asked why President Reagan would want to reject the claims agreement that provided U.S. claimants a funded process for compensation.

Second, we had to draft implementing regulations to be issued by the Treasury Office of Foreign Assets Control [OFAC] that would protect the interests of U.S. nationals as best we could while complying with the Accords and maximizing prospects for approval by the Supreme Court in the challenge certain to come from some U.S. companies. I consulted with the stakeholders and worked with Treasury and Justice on the USG positions. See, e.g., Symposium on the Settlement with Iran, University Miami Law School, Lawyer of the Americas, *U Miami J. Int'l Law* [Special Issue, Spring 1981].

Third, we had to establish the Claims Tribunal at The Hague. That was a big project.

Q: What were some of the legal issues before the Supreme Court?

FELDMAN: The administration was confident that it had plenary authority to deal with the frozen assets under the International Economic Emergencies Act of 1977, 50 U.S.C. § 1701 et seq and constitutional authority to settle private American claims against Iran relying on Article II and State Department practice from the founding of the republic. But we understood that claimants could argue that the executive could not foreclose remedies provided by the Foreign Sovereign Immunities Act of 1976, if any, and were concerned that some claims might not meet the jurisdictional standards for the tribunal. Rejection by the Supreme Court would have been a disaster.

Q: So, how did you deal with that concern?

FELDMAN: At my suggestion, the Orders and Regulations were careful not to challenge the jurisdiction of the courts in these cases. Rather, we asserted the foreign affairs power to establish rules of decision for the courts. Also, instead of terminating access to the courts, we suspended access pending recourse to the tribunal. Both formulations helped persuade the Supreme Court to approve the Accords as a proper exercise of presidential power. See *Dames & Moore v. Regan*, 453 U.S. 654 [1981]. Iran later persuaded the Claims Tribunal that “suspension” did not satisfy our commitment to terminate all litigation against Iran in U.S. courts; the Tribunal assessed a small monetary penalty for the inconvenience to Iran.

Q: Okay. Let's talk about establishing the Claims Tribunal. What did that involve?

FELDMAN: To begin, I appointed Arthur Rovine to be the first U.S. agent at the tribunal and David Stewart to the new position of assistant legal adviser for international claims and investment disputes. L/CID became an important piece of the L infrastructure eventually taking on the NAFTA Chapter 11 workload for the U.S. government. The most difficult piece in the first weeks was the appointment of three Americans to sit on the tribunal. The lead candidate was Howard Holtzman, an experienced arbitrator who became a mainstay of the tribunal. I got into trouble with the DC Circuit and the Reagan team by nominating Judge Malcolm Wilkie, a respected moderate Republican who was sitting on cases in Senior status on the Court of Appeals. That provoked a call from Chief Judge McGowan to Deputy Secretary Judge Clark, a long-time Reagan crony, complaining that the court was short-handed. Eventually, we filled that slot by appointing George Aldrich, a long time deputy legal adviser. He wanted the job and the Reagan team was glad to see him leave his work on the Law of the Sea Convention. The White House nominated Richard Mosk, son of a prominent California jurist, to the third position.

Q: Did you go to The Hague before leaving the department?

FELDMAN: Oh, yes. There were a lot of organizational issues to be worked out with the Dutch government and the Iranians. I made a trip to The Hague with Arthur Rovine and Howard Holtzman to begin that process in April or May. Arthur had the lead on most of the issues including persuading the Netherlands Bank to manage the tribunal's escrow account, arranging quarters for the tribunal in the Peace Palace and office space for the U.S. agent and staff. At this point, I can't remember all the issues, but I recall spending a long night drafting with Arthur and Howard in Holtzman's hotel room. We should have booked a suite. Mrs. Holtzman ended up crashing in the bathtub.

Q: We've covered a number of country matters involving Vietnam, Japan, China, Singapore, Micronesia, Cuba, Mexico, Panama, Chile, Peru, Canada, the U.S.S.R., and

Iran and some global issues such as international investment, foreign bribery, terrorism and cultural patrimony. What else should we discuss?

FELDMAN: Well, the range of matters coming to the State Department and the legal adviser is as broad as America's interests in the world. I'd like to address a few matters that illustrate the diversity of that work, including some arising out of U.S. domestic law and litigation in U.S. courts.

Diverse Legal Matters and Cases:

State Secrets: Pre-Publication Book Review [1973]

Q: Is it true that you helped censor a book?

FELDMAN: I always tell people that my mother did not bring me up to be a censor, but I can't deny it. "The CIA and the Cult of Intelligence" by Victor Marchetti and John D. Marks, is said to be the first book published in the United States with blacked-out redactions. That is weird looking—chilling actually. Marchetti worked for the CIA; Marks was a State Department employee. CIA employment contracts required pre-publication review of post-employment writings. State employees did not have that kind of contractual commitment, and I declined to introduce them on my watch. In the spirit of the seventies, the authors wanted the public to know some things the government did not. The Justice Department obtained court orders requiring pre-publication review, *U.S. v. Marchetti*, 466 F.2d 1309 [4th Cir. 1972] and broadly upholding deletion of classified material, *Alfred Knopf v. Colby*, 509 F.2d 1362 [4 Cir. 1975]. The authors made their point by publishing the book showing the redactions.

Q: You know, I actually remember reading that book and drawing from it for a college paper. How did you get involved?

FELDMAN: We were brought into it by the Justice Department attorney, Irwin Goldbloom, when the CIA deletions were challenged in court. State had different interests than the agency—questioning some deletions and proposing a few new ones. We only wanted to protect classified information damaging to important American allies such as Willy Brandt and Eduardo Frei. Goldbloom had to mediate the differences. Ultimately, the number of proposed deletions was reduced. On balance, I would argue, my contribution was more transparency.

Discharge Grievances—LGBTQ [1974]

FELDMAN: Early in my tenure in the Front Office, I became aware that the department had discharged a number of diplomatic couriers for security reasons relating to their sexual preferences. These employees challenged the discharges under the State Department grievance procedure which, I believe, had recently been inaugurated by agreement with a union representing Foreign Service personnel.

Q: Yes, the union is called AFSA [American Foreign Service Association].

FELDMAN: Someone in Management asked me to look at the file. At that time, it was established policy across all agencies that homosexuals could not serve in positions requiring a security clearance because they were at risk for blackmail by foreign powers. I was also told that the State Department was under pressure from congressional appropriators, particularly Congressman Rooney, to clean-house; Rooney expected a good number of discharges. Hard to believe now, but that was a different era.

My impression was that the department managers were trying to do the right thing. They wanted to foster a fair process, but were uncertain how to go about it. I couldn't do anything about the established security assumption, but this was an opportunity to create a new administrative practice. In brief, I advised—and the clients readily agreed—that it was necessary one, to publish written employment standards that would provide notice to employees and a clear standard for decision by the grievance panels, two, to provide employees written notice of the reasons for discharge and an opportunity to respond, and three, to ensure a hearing affording the employee an opportunity to confront the charge and to introduce evidence in defense. This was Administrative Law 101, but I felt good about it.

Q: I certainly understand that. I am sure that was helpful to many, particularly as the years went on and the world changed.

Executive Privilege [1974]

Q: Speaking of Congress, there is a history of executive branch resistance to congressional requests for internal administration documents. What is your view of the doctrine of executive privilege? Were you involved in a case where the president formally invoked executive privilege?

FELDMAN: You're right. The conflict between Congress and the executive goes back to George Washington. Claims of executive privilege are based on separation of powers theory; the U.S. constitution establishes three separate and equal branches. The Jay Treaty with Great Britain [1794] was extremely controversial leading congressional opponents to demand access to the secret minutes of the negotiations. Washington's refusal is cited as the first exercise of executive privilege.

I did work on a case when President Nixon formally exercised executive privilege to support rejection of a Congressional demand for the personnel file of Helmut Sonnenfeldt, one of Henry Kissinger's close aides. This may have been one of Nixon's last official acts before resigning the presidency in August 1974. I remember working with Fred Fielding, deputy White House counsel on the matter. Sonnenfeldt was a brilliant, intense, and colorful guy who had worked closely with Dr. Kissinger for years. I don't know all the background, but he was controversial in conservative quarters and had been the subject of FBI investigation.

Q: I'd also like to ask about the Freedom of Information Act. Am I right that the FOIA system has changed a lot over the years?

Freedom of Information Act [1974–77]

FELDMAN: The Freedom of Information Act, 5 USC 552 [FOIA], is a big deal for open government and a serious burden for the agencies. The statutory requirements were substantially expanded in 1974 over President Ford's veto and again in 1976. In response, the department centralized management and revamped its procedures. It was a substantial undertaking. The department's principal concern, and my main focus, was the protection of classified information, particularly communications with and information received from foreign governments. I testified to Congress on Security Classification Reform in 1974, See Hearings on H.R. 12004, Comm. Gov. Ops. July 1, 1974 [et seq.] at 325-26, 330, 337, 347-49.]

As punishment for my sins, I became FOIA counsel for the managers and spent a good deal of time drafting and explaining the new procedures, and dealing with sensitive cases, including the Kissinger press briefing litigation we discussed earlier. The Carter administration was more enthusiastic about transparency and moved the interagency process into the White House Roosevelt Room. That was an august setting for the subject. In retrospect, I spent more time in the Roosevelt Room than in the West Wing.

War Powers Resolution: Mayaguez [1975]

Q: We haven't mentioned the West Wing before. Did you spend much time there?

FELDMAN: Not really. I remember being in the Situation Room once or twice, but I don't recall what the agenda was.

I was called to the White House to discuss the War Powers Resolution, 50 USC 1541 et seq: [WPR] with President Ford's Counsel, Phil Buchen, when a U.S. flag vessel, the Mayaguez, was seized by Khmer Rouge off the coast of Cambodia on May 12, 1975. To release the vessel, U.S. forces attacked the Khmer Rouge in the last battle of the Vietnam War. This was the first action implicating the WPR since it was enacted over President Nixon's veto in 1973. Like Nixon and most subsequent presidents, President Ford held that the WPR was an unconstitutional limitation of the president's Article II war powers as commander-in-chief. The administration was prepared to send a report to Congress as called for by the WPR, but was looking for language consistent with its legal position. I suggested that the report cite Article II as authority for the deployment and "note" the WPR in the preamble. Buchen agreed. However, beginning with President Carter, who took a more favorable view of the WPR, the executive has submitted WPR reports to Congress—"consistent with" the WPR.

International Traffic in Arms Regulations [ITAR]—Foreign Payments [1976]

Q: The State Department [PM] licenses exports of weapons and defense technology. Did the foreign bribery scandals we discussed earlier affect that program?

FELDMAN: Of course. U.S. agencies, including DOS, were required to adopt measures to prevent their international programs from accommodating bribery of foreign officials. The U.S. defense industry is a major factor in international arms sales, and a number of defense companies were caught up in the scandals of the mid-1970s. I had that beat in the Office of the Legal Adviser and drafted new ITAR provisions requiring applicants for export licenses to report political contributions, fees or commissions in respect of any sale for which a license or approval is requested. See 22 CFR 130.9.

National Environmental Protection Act: E.O. 12114, January 4, 1979

Q: Changing gears a little, do you want to talk a little bit about the National Environmental Protection Act [NEPA]?

FELDMAN: Thank you. Application of the National Environmental Protection Act, 42 U.S.C. 4321 et. seq. to the foreign affairs function was a bitterly divisive issue in government from its inception. The domestic agencies with environmental responsibilities [Environmental Protection Agency, EPA; Council on Environmental Quality, CEQ; and DOJ] argued that an Environmental Impact Statement [EIS] was required for export approvals including, particularly, export of nuclear power plants. The foreign affairs agencies, e.g., State, DOD, and the Export-Import Bank, resisted extraterritorial application of NEPA as an intrusion into the sovereign decision-making of our allies and trading partners. Foreign leaders understandably resented having U.S. officials evaluate the environmental risks they were taking to develop their economies.

This issue was contested for years in the courts, Congress and within the Executive Branch. For some reason, Herb Hansell, legal adviser in the Carter administration, undertook to mediate interagency resolution of this issue and asked me to assist. This was a difficult undertaking, but Herb managed to work out a solution which I framed in EO 121444, signed by President Carter on July 4, 1979.

The EO created a matrix of environmental review documents matching the level of review required with the sensitivity of the environmental effects. A full EIS was required for major federal actions significantly affecting the global commons, such as Antarctica, but less detailed reviews were required for other categories, including nuclear exports. This satisfied the White House and the foreign affairs agencies, but not strong environmentalist advocates. The EO put interagency strife on hold, but did not put all litigation to rest. See *Environmental Defense Fund v. Massey*, 986 F.2d 528 [DC Cir. 1993] [EIS re Antarctica reviewable under NEPA].

State Department Litigation

Q: This seems a good time to address the department's role in litigation in U.S. courts?

FELDMAN: Right. This is a major area. In addition to the State Department's traditional role representing the United States before the International Court of Justice and other international tribunals, the department may become involved in litigation in U.S. courts in two categories of cases: one, when the United States is a party to the litigation or two, when litigation between other parties raises issues affecting U.S. foreign relations. The Justice Department has a statutory right to file a statement of interest in any action in federal or state court, 28 USC 517, and courts frequently invite the executive to submit views on issues touching governmental interests. For some years now, L has had an office dedicated to diplomatic law and litigation.

Q: That's helpful. Why don't you address some of the cases you were involved in personally?

FELDMAN: Let me begin with a few cases where the United States was a party.

Q: Fine. Didn't you work on an immigration case in L/ARA?

Mexico: Green Card Commuters: *Gooch v. Clark*, 433 F.2d 74 [9th Circ. 1969]

FELDMAN: Yes. One of my first assignments in L/ARA involved the southern border. American farm workers represented by Cesar Chavez challenged the INS [Immigration and Naturalization Service] practice allowing Mexican green card holders to commute into the United States for seasonal farm work and to return to Mexico during the off-season. The Union had reason for concern because Mexican labor competition made it more difficult to organize American farm workers, but the Mexicans also had equities. These folks had earned permanent resident status and enjoyed the same rights to work and to travel as citizens. The case also interested me, because Chavez was represented by my former law school roommate, Gary Bellow. Gary later became a Harvard Law professor and leader in clinical legal education. He also represented Black Panthers and a fugitive Weatherman. I was very close to Gary in those days and visited him in the vineyards of California where he was having a legal war with Governor Ronald Reagan.

Q: You had some interesting friends at Harvard.

FELDMAN: Right. I was asked to draft an affidavit for Secretary William P. Rogers supporting the DOJ defense of INS practice. The affidavit emphasized the U.S. foreign policy interest with Mexico, but I also made the point that these Mexican green-card holders had shaped the pattern of their lives on the established U.S. practice. We won the case, and Gary told me he knew they had lost as soon as he read the Rogers affidavit. See *Gooch v. Clark*, 433 F.2d 74 [9th Circ. 1969]. This was not a major matter in our office, but I mention it for what it says about the early history of immigration issues on the southern border. Those were the days of the bracero program, and the beginnings of substantial illegal immigration. Around that time, a senior Mexican official told me that Mexico was going to take back the territory lost in 1848 by immigration.

Q: I imagine there were judicial challenges to the Vietnam War?

FELDMAN: There were, but none succeeded. The first case I remember where a court interfered with a foreign policy action by the executive involved bowhead whales.

International Whaling Commission: *Adams v. Vance*, 570 F.2d 950 [DC Cir. 1977]

Q: Save the whales?

FELDMAN: Right. The movement to protect endangered marine mammals was heating up and bowhead whales were on the agenda of the International Whaling Commission. A judge directed the secretary of state to have the U.S. representative to the commission file an objection to a proposed rule that would interfere with whaling by indigenous populations in Alaska. Inupiat had hunted bowhead whales for subsistence for generations and enjoyed an exemption from restrictions imposed by the international community. That exemption was about to expire absent an objection by the United States.

Q: There was no prior notice to the department?

FELDMAN: No. The injunction came as a complete surprise. At that time, no one dreamed a court would order the secretary of state how to vote in an international organization. The Justice Department scrambled; the Court of Appeals scheduled argument on Veterans Day—a federal holiday, and summarily vacated the order publishing an opinion weeks later.

Congressional Suits to Enjoin Executive Foreign Policy Actions

Q: You were involved in some important cases involving congressional challenges to the president's foreign policy?

FELDMAN: Oh, yes, particularly in the Carter years. I don't think there were many suits by congressmen challenging foreign policy actions by the executive before the Vietnam War. We've already talked about congressional suits concerning the Panama Canal, *Edwards v. Carter*, 580 F.2d 1055 [DC Cir. 1978] and termination of the China defense treaty, *Goldwater v. Carter*, 444 U.S. 996 [1980]. There were others.

Crown of St. Stephen Returned to Hungary [1977]: *Dole v. Carter*, 444 F. Supp. 1065 [D. Kan. 1977] aff'd other grounds 569 F. 2d 1109 [10 Cir. 1977]

FELDMAN: In 1977, two senators sued President Carter to block the return of the Hungarian royal regalia to the communist government in Budapest.

Q: How did the U.S. come to have the Crown of Saint Stephen and why did Washington decide to return them in the 1970s long before liberation?

FELDMAN: Good questions. The Crown of Saint Stephen and related items are the emblems of Hungarian sovereignty dating back to the first Christian dynasty. As I

understood the facts, when the Soviet Army overran Hungary in the closing days of World War II, the custodians deposited those items with U.S. forces for safekeeping during the long night of Russian domination. In 1956, the Hungarian people revolted against Soviet occupation, and thousands of Hungarians immigrated to the United States after the rebellion was violently repressed by Soviet tanks. As the years passed, however, Hungary was the first Warsaw Pact country to show an interest in moving closer to free Europe. At some point, the Ford administration decided that it would serve U.S. interests to return the Regalia to Hungary, but there was a big political problem. The Hungarian prime minister was Janos Kadar; the man who had been prime minister when the Russian tanks rolled over the demonstrators in 1956. Many Hungarian refugees were not ready to trust that regime. The issue was still pending when Jimmy Carter took office.

Q: What was the legal issue?

FELDMAN: The main issue was whether the executive could return the crown on its own authority without congressional approval. One sub-question was whether the regalia was property of the United States. Fortunately, my predecessors had studied these issues thoroughly, and the answers were clear. The regalia was not war booty; they were Hungarian property. The U.S. was simply custodian for the Hungarian state. Further, the U.S. had taken responsibility for these items by executive action for reasons of foreign policy. The president had authority to return the material to Hungary by executive agreement in exercise of his Article II foreign affairs powers. No treaty or statute was required. All I had to do was sign-off on the legal opinion. Secretary Vance personally returned the Crown of Saint Stephen to Budapest on January 6, 1978 where he was received with acclaim.

Q: But the president's decision was challenged in court?

FELDMAN: Twice, by Senator Curtiss [Republican, Nebraska] in DC and Senator Robert Dole [Republican, Kansas] in Kansas. Frankly, I don't remember much about the DC litigation, which established that this was not U.S. property. But I was asked to present an affidavit in the Dole action rebutting the argument that the Constitution required a treaty for this purpose. I traveled out to Kansas City, Kansas for the trial. Of course, the Justice Department argued that the case presented a political question not within the jurisdiction of the courts. However, the Judge was fascinated by the material and could not resist writing a long opinion on the legal difference between a treaty and an executive agreement. Happily, we won—on the merits of presidential power. *Dole v. Carter*, 444 F. Supp. 1065 [D. Kan. 1977]. In the end, though, the Court of Appeals dismissed the case on political question grounds, *Dole v. Carter*, 569 F. 2d 1109 [10 Cir. 1977]. This has become the pattern. If the president has authority to deal with a matter by executive agreement, he can choose to go that route or the treaty route.

Hijacking to Berlin: *U.S. v. Tiede* [1978–79]

Q: What was your most difficult case?

FELDMAN: On August 30, 1978, two East German nationals seeking refuge in the West hijacked a Polish aircraft and flew it to Tempelhof, a military airport in the U.S. sector of Berlin, triggering one of the most awkward episodes in my State Department career. In normal course, U.S. forces in Berlin would have transferred the hijackers to German authorities for prosecution. The United States had no civil judicial apparatus in occupied Berlin, and both governments were pledged to prosecute aircraft hijacking. Unfortunately, that presented a political problem for Chancellor Schmidt, and he persuaded President Carter to take on that responsibility. When Army JAG refused the assignment, Carter tasked the State Department to create a tribunal in Berlin after the fact, and that responsibility was passed down to me.

That was an enormous undertaking requiring us to draft new laws for Berlin and to appoint a judge, prosecutors, and defense counsel all while the accused were confined by the army in Berlin. The work was done by John Crook, assistant legal adviser for European Affairs and Andre Surena, a State Department attorney at the U.S. mission in Berlin.

Q: You said that didn't go well.

FELDMAN: That is an understatement. To make a very long story extremely short, the judge we appointed to preside over the trial, Herbert Stern of New Jersey, went rogue and had to be fired to get him out of Berlin when the trial was done. First, he rejected the established Four Power and German doctrine that U.S. government operations in Berlin were governed, not by U.S. law, but by the international law of military occupation, and empaneled a jury of Berliners to decide whether the hijackers were guilty. Then, after the case was finished, he did not come home. Instead, he opened his court to Berliners who complained about U.S. military housing in Berlin. That was contrary to the whole concept of occupation; the department had to remove him and close the court.

Q: How did you get that judge?

FELDMAN: He was not our first choice. Originally, we appointed Judge Bonsal of New York, but he reneged for personal reasons after visiting Berlin. What really hurt was that Judge Stern was recommended by Bruno Ristau, a sophisticated Justice Department attorney responsible for litigation against the United States in foreign courts. Then, without asking us, Ristau got himself appointed as Judge Stern's clerk and told the judge that the U.S. government's position on the law applicable in occupied Berlin was wrong. I did not understand how a serving Justice Department officer could put himself in that position.

Q: What happened to the hijackers? Were they convicted?

FELDMAN: They were convicted; the jury did a good job even though Germans had no experience with trial by jury. But Judge Stern sentenced the two defendants to time served. I understood that; they were detained for months before we got the Berlin court up and running. But his opinion was a tirade against our people in Berlin that astonished me.

He accused one of the army officers of sexual interest towards his female prisoner. We had no inkling of that in Washington, and I never heard anything to substantiate Stern's impression.

Q: Wow. What a story.

FELDMAN: That was only the tip of the iceberg. Judge Stern wrote a book about the case, titled *Judgment in Berlin*, and organized a Hollywood movie that bombed despite the strong cast.

Q: Did you go to Berlin for the trial?

FELDMAN: Not for the trial. I visited Berlin with Judge Bonsal and was shown something of Berlin by the mission. We drove into East Berlin through Checkpoint Charlie. I had never been to Berlin before, and that was pretty exciting. Later, when things became difficult with Judge Stern, Herb Hansell wouldn't let me go to Berlin. He was afraid that Judge Stern would throw me in jail. I think he was right.

Q: Interesting. Did you have some important cases where the United States was not a party?

Extraterritorial Application of U.S. Law: Uranium Antitrust Litigation [1980]

FELDMAN: Many. The department is constantly coordinating with Justice on statements of interest in private litigation relating to legal issues affecting U.S. foreign relations, e.g., foreign state immunity, the federal act of state doctrine, customary international law, and the Iranian claims cases we discussed earlier.

Let's focus today on one case of particular consequence in my professional life—the Uranium Antitrust Litigation, 617 F.2d 1248 [7 Cir. 1980]. This proceeding raised important questions concerning the extraterritorial application of U.S. law—a topic of major concern in U.S. foreign relations then and now—and led to my leaving the department for private practice.

Westinghouse, a major U.S. exporter of nuclear power plants, defaulted on long-term contracts to supply uranium at low prices [six dollars to ten dollars per pound] when market prices rose to forty-two dollars per pound in 1975. As the contract disputes went to trial, Australian activists published allegations charging a worldwide conspiracy to raise prices by uranium producers based in Australia, Canada, England, France, and South Africa. Westinghouse cited the cartel in defending actions for breach of contract and initiated an antitrust action against twenty-nine defendants in the Northern District of Illinois. Some of these entities were owned by foreign governments.

Q: How did you become involved?

FELDMAN: State was following the case because many of our closest trading partners strongly objected both to the extraterritorial application of U.S. antitrust laws and to orders issued by U.S. courts for the production of foreign documents. This led to retaliatory legislation in Canada, England, and elsewhere. But the issue that precipitated my engagement was a judicial comment that compounded injury with insult. Nine of the foreign defendants refused to appear in court, but a number of their governments filed briefs *amicus curiae* challenging the jurisdiction of U.S. courts. In approving entry of default judgments against the parties not appearing, the federal Court of Appeals in Chicago expressed shock that “the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction.”

This comment was particularly unfortunate, because the State Department had encouraged these governments to brief their issues directly to the courts. Traditionally, a foreign government would submit its concerns by diplomatic note to the State Department for transmission to the court. In 1978, however, the clerk of the Supreme Court notified the solicitor general that the Federal Judiciary preferred an *amicus* filing in such cases, and the department issued a circular to the embassies in Washington encouraging governments to submit their views directly to the courts by counsel.

Q: I bet the embassies were not happy with that.

FELDMAN: No one likes to pay legal fees.

Q: How did the U.S. government respond to the Court of Appeals comments?

FELDMAN: We took the unusual action of writing a letter to the Justice Department, signed by Legal Adviser Roberts Owen, for transmittal to the Court of Appeals explaining why “this language has caused serious embarrassment to the United States in its relations with some of our closest allies.” Justice sent its own letter to the Court of Appeals endorsing State’s position. On remand to the trial court, Associate Attorney General John Shenefield followed up with a formal statement of interest by the United States reiterating that “The case implicates foreign policy concerns of both the United States and foreign governments— The views and representations advanced by these foreign governments are entitled to appropriate weight in resolving legal questions that turn, at least in part, on considerations of international comity.” This episode is documented in 1980 *State Department Digest of U.S. Practice in International Law*, pp. 299-302.

Q: How did the court react?

FELDMAN: We must have done something right. The offending language was excised from the court’s opinion; a Canadian official wrote me a personal thank you note; the parties settled the litigation, and the law firm representing Westinghouse offered me a job.

Q: Did you take the job?

FELDMAN: Yes. A year later, I joined the Washington office of Donovan, Leisure, Newton & Irvine. I had been thinking of private practice for some time. Government salaries could not keep up with inflation in the Carter years, and I was not going to receive a presidential appointment from President Reagan. Sadly, the Donovan firm no longer exists, but it had a distinguished history. The founder, “Wild Bill Donovan,” earned the Congressional Medal of Honor in World War I, was FDR’s [Franklin Delano Roosevelt] personal emissary to Winston Churchill in the days before World War II [“Mr. Intrepid”] and ran the OSS during that war. FDR’s famous Lend-Lease bill supporting the British war effort was drafted in the firm’s offices at 30 Rockefeller Center, and a number of CIA leaders, e.g., William Casey and Bill Colby, worked there at different times. Wild Bill died in 1959, but he was still revered in my time and there were still a few OSS veterans on-hand.

Q: What did they want you to do for them?

FELDMAN: In those days, Donovan Leisure was the most prominent “big case” antitrust litigation firm specializing in cases like the Uranium Cartel case. But they knew the antitrust business was drying up and were looking to diversify. The firm was shrinking when I moved on in 1988, but it was fun while it lasted.

Exit Interview: Secretary of State Alexander Haig

Q: In May 1981, you were still acting legal adviser, but you had accepted a position with Donovan Leisure Newton & Irvine and were preparing to leave government service. Did that go smoothly?

FELDMAN: It did. The Reagan administration had not yet chosen a new Legal Adviser. Suddenly, I’m told to come up to Secretary Haig’s office to be interviewed for that job. I had met the Secretary in staff meetings a few times, and knew this interview was pro forma. To defuse the tension, I quickly thanked Haig for the interview and told him I was leaving. As soon as he heard that, the Secretary relaxed, sat me down and chatted with me for almost an hour. We talked about a lot of things, including the importance of government service, the work of the legal office and leadership.

One point sticks in my mind: He said private practice would be a piece of cake; there was nothing in private life as demanding as government service. I was surprised, because I knew from experience [1960–65] how demanding law practice could be. But I understood where Al Haig was coming from. This man had been Commander of NATO forces, Kissinger’s deputy at the NSC, WH Chief of Staff and Secretary of State. He was not touched by the Watergate scandal and played a major role in keeping the White House functional during that crisis. Unfortunately, his standing was badly hurt by his

response to the Reagan shooting on March 30, 1981. [Haig's statement that he was in charge of the government as Reagan lay wounded was not well received.]

I left the meeting feeling that I had made a new friend, and he signed a glowing departure tribute to me that still hangs in my home office.

Q: That's very nice. I expect your staff also gave you a nice goodbye.

FELDMAN: Yes. Liz Verveille organized the reception and presented me with a lovely, embossed folder with copies of a number of agreements, statutes and materials documenting my work. Under Secretary Walter Stoessel, who lent me his office in Moscow, made the remarks.

Q: Before we move on to your life outside of the Department, I wanted to ask for your thoughts on what the most important qualities are for a successful State Department Legal Adviser?

FELDMAN: The best candidate would be an experienced attorney with excellent character and good judgment who is trusted by the Secretary and can be influential. Experience in government and international matters would be plus. It would also be good to have someone who can work under pressure and set an example for the staff.

Roberts Owen, for example, was an excellent Legal Adviser trusted by the Seventh Floor and popular with the staff. He succeeded Herbert Hansell who was a good lawyer but could not deal with the pressures of the job. I had high regard for John Stevenson, the Legal Adviser in Nixon's first term. I remember him as a thoughtful, high-minded gentleman who protected the Office from the Nixon political machine that distrusted civil servants and planted political operatives in every bureau. Monroe Leigh was an outstanding attorney and a successful Legal Adviser. I admired him, but Monroe was very much the Virginia gentleman. Our relations were not always easy.

The Kalamazoo Spice Expropriation Case

Q: I understand that an interesting expropriation case came in the door on your very last day in the State Department. What happened?

FELDMAN: Thank you. As I was packing up my things, ready to leave, I received a visit from two lawyers from Kalamazoo, Michigan that would, a couple of years later, bring me a great international case. These attorneys represented a Kalamazoo company whose business in Ethiopia had been confiscated by the Mengistu regime that overthrew the government of Hailee Selassie. They were looking for help from the State Department and someone had directed them to me. I was totally sympathetic and highly interested, but I was on my way out the door. All I could do was refer them to others in the Department who might be able to help.

In the back of my mind, of course, was the thought: “Don’t do anything stupid that would create a conflict of interest that would preclude your working on the case in private practice.”

Q: Did that prospect interest them?

FELDMAN: Not at all. They wanted me to sit down with them then and there and were slow to let me go. I don’t know what they expected me to do for them under those circumstances, but they were not happy.

Lo and behold, sometime later, when I was still new at Donovan Leisure, Jim Withrow, a senior New York partner, called me to his office and handed me this case. [Withrow had served in Donovan’s OSS during World War II and parachuted into Vietnam to be with Ho Chi Minh.] Apparently, he had a close personal connection with one of the Kalamazoo lawyers. My guess is that they went to Withrow looking for me, because they were afraid of losing the case for an important client.

Q: What was the case about?

FELDMAN: Briefly, Kalamazoo Spice [Kal-Spice] produced red food coloring from paprika. When paprika became scarce, it developed a secret process for removing the heat from red peppers and built a plant in Ethiopia to process peppers from local farmers. The product would be sent back to Kalamazoo where the heat would be removed. When Mengistu confiscated the Kal-Spice investment in Ethiopia, the new managers continued to ship product to Kalamazoo. Not having been compensated by Ethiopia for the expropriation, Kal-Spice withheld payment. The Ethiopians then sued Kal-Spice in Michigan and lucked out when the district court ruled that Kal-Spice’s counterclaim for expropriation was barred by the federal act of state doctrine. When the case came to me, Ethiopia had confiscated the factory and was winning a two million dollars damage claim against Kal-Spice.

Q: Wow. They certainly found the right attorney for that case. Mark Feldman to the rescue?

FELDMAN: Thank you. My State Department work on foreign expropriation and the federal act of state doctrine gave me an edge. With the department’s support, we persuaded the Court of Appeals that the U.S. Friendship, Commerce, and Navigation Treaty with Ethiopia set the standard for compensation, the federal act of state doctrine did not apply, and Kal-Spice could counter-claim for compensation. *Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Ethiopia*, 729 F. 2d 422 [6 Cir. 1984]. The department was able to use this leverage to settle all property claims of U.S. nationals then pending against Ethiopia. TIAS No. 11, 193 [Dec. 19, 1985].

Two Wars with Iraq

Q: I understand that you became involved both with the Gulf War [1990] and the Iraq War [2003] later in your law practice.

FELDMAN: Yes, but my first involvement with Iraq came earlier at Donovan Leisure. Saddam had used chemical weapons in the war with Iran, and one of our clients became concerned that some of its products might be used for that purpose. After contacting State, I was able to comfort the client. The department was working on multinational rules to prohibit shipments of chemical precursors to Iraq and welcomed our input.

Q: So, early on you had concerns about Iraqi weapons of mass destruction.

FELDMAN: Yes, and those concerns grew after I moved to Feith & Zell, P.C. in 1988. In 1990, there was a fierce interagency dispute over a sensitive export to Iraq that DOD feared would be used for nuclear weapons. Commerce said it lacked authority to refuse a license, and we were asked by friends at DOD if we could come up with a solution. We did. New regulations were issued. The license was denied, and President Bush was spared the embarrassment of supporting Saddam's nuclear program on the eve of Iraq's invasion of Kuwait.

Q: Okay. Now, you're working with Douglas Feith. What was that firm like?

FELDMAN: Feith & Zell was a small Washington firm with a companion practice in Jerusalem and a number of interesting clients, including American and Israeli defense contractors and the government of Turkey. We did sensitive export control work for Loral in the satellite area and represented Lockheed in a high profile case involving foreign investment in the U.S. defense sector. Thanks to Doug, I sat on the Proxy Board of a Fujitsu subsidiary with Admiral Zumwalt and Fred Ikle. And thanks to Richard Perle, we represented Turkey on the Hill for several years. Doug Feith and I worked for the Turkish embassy along with Terry McAuliffe, the future governor of Virginia.

Q: Let's talk about the two wars with Iraq.

FELDMAN: When Saddam invaded Kuwait on August 2, 1990, Feith & Zell worked with Congressman Steve Solarz [Democrat, NY] and former Assistant Secretary of Defense Richard Perle to help organize a coalition of prominent Democrats and Republicans supporting U.S. action to liberate Kuwait. And after 9/11, I became a part-time DOD consultant as the U.S. moved towards the Iraq war. By that time, Doug Feith was under secretary of defense for policy, and I had joined another law firm—Garvey Schubert Barer.

Q: That will be interesting. First, would you like to say something about your relationship with Douglas J. Feith?

FELDMAN: Fair enough. We were strange bedfellows politically. Doug served in the Reagan administration as Richard Perle's deputy at DOD; I am a liberal Democrat. We disagreed then and now about many issues, especially arms control, Israeli politics, and

the State Department, but we found common ground building an exciting law practice from scratch and in conversation over lunch. Doug has broad intellectual interests and is schooled in Shakespeare and English history. He is also an extraordinary family man with four talented children devoted to their father. Like most of my Republican friends, Doug never liked Trump. Nevertheless, his three sons served in the Trump administration—one at State—out of a desire to serve their country.

I do not agree with many of Doug's views, but I applaud him for teaching his children that winning is not everything in politics.

The Gulf War: 1991

Q: How did you get involved in the Gulf War?

FELDMAN: At a breakfast with the Saudi ambassador, Prince Bandar bin Sultan Al Saud. Iraq's invasion of Kuwait on August 2, 1990 surprised the administration of George H.W. Bush, and the Saudis thought they were next on the list. By late October, the Bush team had organized a strong international coalition to defend the Gulf and was resolved to attack Iraqi forces in Kuwait from the air. But the administration was still debating whether to commit ground forces to Operation Desert Storm. That led Prince Bandar to invite a number of Democratic congressmen to breakfast at his palatial McClean residence the morning of October 26, 1990. Attendees included Stephen Solarz [NY], Tom Lantos [California], Robert Torricelli [New Jersey] and Robert Strauss [former Democratic National Convention chairman]. Richard Perle was also invited and he asked me to accompany him in case legal issues arose. That was pretty exciting for me.

Q: What was the outcome of this meeting?

FELDMAN: A consensus emerged that President Bush needed more public support to deploy troops and to win congressional approval to liberate Kuwait. It was decided to organize a bipartisan group to marshal public support for a congressional resolution authorizing the use of force. Feith & Zell agreed to provide legal and administrative support and became the de facto office for this coalition that I named "The Committee for Peace and Security in the Gulf." Unfortunately, that name was also applied to a 1998 letter to President Clinton by some former members urging regime change in Iraq.

Q: Did the committee persuade President Bush to commit ground troops?

FELDMAN: No. That concern prompted the Bandar meeting, but President Bush announced his decision before we got organized. The meeting did cause a stir, however. Robert Strauss said he was uncomfortable being there and may have leaked the story. On November 7, Rowland Evans and Robert Novak—never friendly to Israel—published a column in the *Washington Post* titled, "Drumming for War," calling attention to the unusual Saudi cooperation with pro-Israel Democrats.

Q: What did the committee actually do?

FELDMAN: It was active. Members gave talks and wrote pieces explaining the importance of countering Saddam's aggression, but the committee's main product was a full page statement with fifty signatories published in the *New York Times* on January 11, 1991 [p. A15]—three days before Congress adopted the joint resolution authorizing use of the armed forces by a close vote: 250-183 in the House; 52-47 in the Senate. Representative Solarz rallied 86 Democratic votes in the House, but only ten Democratic senators voted Yea. Those negative votes haunted Democrats for years leading many to vote for the Iraq War resolution in 2003—another vote they came to regret.

Q: Who signed the statement?

FELDMAN: Prominent signatories included several U.S. ambassadors, numerous congressmen, Senators Richard Lugar and Howard Baker, Stuart Eizenstat, Frank Carlucci, and Professor Graham Allison. I helped draft the statement and signed it along with Douglas Feith and Richard Perle.

Q: What was the thrust of it?

FELDMAN: Reading the statement in light of today's passions, it was remarkably measured:

“If Iraqi aggression cannot be reversed through other means, the coalition—assembled in the Gulf will have no alternative but to use force.”

“A decision to use force must be made only after consultation with Congress and in the knowledge that the international community has consistently—supported the coalition opposing aggression.”

For a time, the administration had been reluctant to seek congressional approval. The consensus, including the State Department [Richard Haas and Legal Adviser William Howard Taft IV], was that the president had constitutional authority to act alone, but that congressional approval would be politically valuable. In my view, that legal conclusion was wrong. The president has considerable authority to engage the military under Article II, but every major commitment to sustained ground combat abroad except Korea was authorized by Congress in advance, and the Korean War was ratified by Congress: conscription and appropriations.

Q: Did the statement mention weapons of mass destruction?

FELDMAN: Yes. I made sure of that. Some questions were raised about that emphasis, but we soon learned that the U.S. had underestimated the extent of Saddam's nuclear program. That had an effect in the years to come.

Q: What did President Bush think of the committee?

FELDMAN: He expressed his appreciation by inviting the signatories to a thank you reception in the family quarters at the White House soon before Operation Desert Storm began. Several top officials spoke to us, and the president mingled with the crowd. That was an experience. When Barbara Bush brought the dogs upstairs, we knew it was time to leave.

Q: Saddam fought back with scud missiles, directed at U.S. military, Saudi Arabia, and especially Israel. I understand you had family in Israel when the scud missiles started to fall.

FELDMAN: Yes. My daughter, Rachel, was on gap year in Israel with her future husband, Bernie Birnbaum. Early in the semester all the kids phoned home to tell the parents they were staying put. So, my wife Marcia and I joined the parent parade for a wintry Christmas at the King David Hotel in Jerusalem. That was fun, but it was scary when the scuds began dropping in January. The kids put on gas masks and huddled behind plastic sheets and duct-tape. Fortunately, they were not hit.

Q: The Gulf War ended, but after the 9/11 attack, with George W. Bush now in the White House, we began to consider war with Iraq again. I am interested in what you saw as a consultant at the Pentagon in 2002 and what you think about it all, looking back. First, could you tell us how you got to the Pentagon and what your role was?

The Iraq War: 2003

FELDMAN: As you know, the 2000 presidential election was decided by the Supreme Court on December 12, 2000, *Bush v. Gore*, 531 U.S. 98. The new Bush administration recruited Douglas Feith as under secretary for policy at the Department of Defense—the third highest position in the largest agency of government. Feith went to the Pentagon in July 2001 leaving me to wind up our firm. I remember vividly watching the Twin Towers go down on September 11 while lunching with the real estate guy taking care of our lease. It still turns my stomach. By December, I was affiliated with another DC firm, Garvey Schubert Barer, but I was restless for public service after 9/11. I tested a couple of other agencies without success and had a meeting with Jim Haynes, the DOD general counsel that did not go well. I didn't understand his thinking about presidential power at the time. Eventually, Doug asked me to consult with his office part-time on Iraq policy, and my new firm generously agreed. I became a special government employee—allowed 130 days of service per year, with or without pay. I worked two-three days a week, without pay, for a few months.

Q: What dates were you at the Pentagon and in which office?

FELDMAN: Roughly, May 2002–May 2003. They gave me a desk near Mike Mobbs, a former colleague at Feith & Zell. Mike headed the Policy [P] office working on post-invasion Iraq issues. To maintain the conceit that the president had not made the decision to go in at that point, the office was not called the Iraq desk, but the “Office for

Special Plans.” That led to accusations by Seymour Hersh and others not in the know that the office was some kind of intelligence shop competing with the CIA. Whatever DOD might have been doing on those lines, Mike Mobbs & Co. had nothing to do with it.

Q: What were they doing?

FELDMAN: The policy staff [two men] were mainly writing briefing papers for non-stop NSC meetings, often at the deputy secretary level, that seemed to be dealing mainly with bureaucratic battles over post-invasion governance. Being a part-timer, I had less than a full view of the policy process.

Halliburton

Mobbs and his cohort were doing what war planners often do—preparing for the last war, in this case Operation Desert Storm. Since Saddam had blown up Kuwaiti oil fields in 1991, Mobbs was tasked to recruit a contractor to extinguish fires in the Iraqi oil fields. To expedite that process—and to avoid the legal morass of competitive DOD procurement—he invited Brown & Root to add that assignment to an existing contract the firm had with the Pentagon. That happened to come up when I was in the office. The minute I heard that Brown & Root was a Halliburton subsidiary, I knew this would be a political issue. Vice President Richard Cheney had been a senior executive at Halliburton, and he was a *bête noir* to Democrats. So, I recommended that the team clear the conflict of interest issue with the White House, and they seemed to agree. To my surprise, they decided to consult Vice President Cheney’s office instead of White House staff, and they said okay. As expected, congressional Democrats held contentious hearings on the perceived conflict of interest.

Q: Did you think there was a conflict?

FELDMAN: I never got into the facts, but I knew that Brown & Root was an experienced government contractor and that Mike Mobbs had good reason to use their existing contract.

Q: Okay. What did you do in the Pentagon?

FELDMAN: Not what I had hoped. DOD’s General Counsel Jim Haynes greeted my arrival with a stern memo to Doug telling him that I was not to provide legal advice to Pentagon officials and should not meet with my former colleagues in the State Department. I tried to work around this constraint by offering myself as a liaison between the Mobbs’ office and the general counsel, but couldn’t carry that off. So, my usefulness was undercut. In the end, I wrote a few memos for Doug and his people on the rights of an occupying power under international law that may have been useful at the time but were quickly overtaken by events.

Q: What issues were you asked to address?

FELDMAN: The first issue was whether, consistent with international law, an occupying power could use proceeds from the sale of Iraqi oil to defer costs of administration. As I recall, the answer was: with some limitations, we probably could. But that discussion was entirely theoretical. To my knowledge, there was no planning along those lines.

Q: Was Iraqi oil a war aim as some critics suggested?

FELDMAN: Never. That makes no sense. There was some chatter, from an outside advisor, that a free Iraq would produce more oil and put price pressure on the Saudis.

Q: What other issues did you work on?

FELDMAN: I wrote a few papers considering whether U.S. authority in post-war Iraq could be based on the consent of a new Iraqi civilian authority— reflecting a “liberation” theory of governance instead of the international law of military occupation. That idea was consistent with the Pentagon preference for an early transfer of authority to the Iraqis. That approach did not take because State and CIA resisted an early transfer. They worried about internal opposition to an authority controlled by exiles. They were deeply suspicious of Ahmad Chalabi and his National Liberation Council. My friends at DOD were sympathetic to Ahmad Chalabi but disclaimed any intention to anoint him with power. See Douglas J. Feith, *War and Decision* [Harper 2008] at p. 255. Feith’s book is an invaluable resource on the Iraq War policy process.

Inside-the-Room

Q: Okay. You had an inside view of policy deliberation when critical decisions were being made. Tell us what struck you as important.

FELDMAN: The first thing was the debilitating antagonism between the Pentagon and the State Department. The second was how much debate there was over post-war planning and how little was accomplished, considering that Central Command [General Tommy Franks] had hundreds of people planning a short war.

In October 2002, DOD officials working on Iraq returned from a key NSC meeting elated: “We won.” DOD, not State, would be in charge of post-war reconstruction and stabilization in Iraq. “We’re late on this; there’s a lot of work to do.” Eventually, DOD worked up a conceptual framework including an Interim Iraqi Authority that would share responsibilities with U.S. authorities, but the bigger issue of how and when to stand up an Iraqi government was never resolved.

Q: Did Central Command have responsibility for post-war security and interim civil government?

FELDMAN: Yes. But judging by what happened after the fall of Baghdad, no one in the Bush administration foresaw the security threat that would follow the destruction of the Iraqi Army and the removal of Saddam Hussein. Apparently, Secretary Donald Rumsfeld

had promised General Franks that he could retire as soon as Saddam was removed. I saw no indication that Franks took any interest in post-war planning. He didn't submit a report on that subject until a few days before the U.S. attack on March 20, 2003. See Feith, *supra*, at 293. Moreover, DOD was very slow to think about organizing a civil government to support Central Command in Iraq.

On January 20, 2003, President Bush approved an Office of Reconstruction and Humanitarian Assistance [ORHA] to provide civil authority in Iraq pending installation of a new Iraqi government. "It was a small office, created in late January 2003 for a war that was to begin in mid-March." Feith, *supra*, at 349. Secretary Donald Rumsfeld tagged a retired general, Jay Garner, to head ORHA in December, but it took a while to get him on board. To bridge the gap, Feith sent Mike Mobbs to Kuwait in March to head OHRA. That surprised me. Mike was a very good lawyer and a friend, but I don't think he saw himself as directing the government of occupied Iraq. Garner arrived in Baghdad in mid-April and was replaced by Paul "Jerry" Bremer by May. From what I have read, there was little continuity between Bremer's Coalition Provisional Authority [CPA] and what went before.

Q: Mark, what were your views about the Iraq War and did they change over time?

FELDMAN: I supported the war before the invasion. I regretted it as soon as I saw what happened on the ground. We were totally unprepared for the resistance and incompetent to manage the challenge of occupying a Muslim country.

Q: Why do you think the United States went to war in Iraq?

FELDMAN: Books have been written about that. My short answer is 9/11. One could elaborate: President H.W. Bush's decision not to take the Gulf War to Baghdad was controversial. Saddam was causing problems and the UN embargo was breaking down. Most important, after the collapse of the Soviet Union and the devastating terror attack on our homeland, many policymakers came to believe that the United States did not have to tolerate dangerous regimes. Regime change was the logic of the Reagan revolution. For others, like me, weapons of mass destruction were the main concern. Still, I don't think President George W. Bush or the country would have gone to war in Iraq but for 9/11. The administration reacted like a wounded bull and took the country with it.

Q: What did you see as the reasons for the failures?

FELDMAN: As I see it, there were a number of policy mistakes and administrative failures, and there are some structural limitations in our government and in our society that limit U.S. competence to manage a situation like Iraq.

In my view, the first mistake was to define the mission as removing Saddam Hussein. We should not have gone into Iraq without a concept as to what would replace him. The Pentagon was opposed to nation building, but it insisted on retaining responsibility for

post-war reconstruction and stabilization. It won that bureaucratic battle late in the day but was not up to the job.

The second, related mistake was to set force requirements on the assumption that the U.S. Army would defeat the Iraqis, remove Saddam, and leave the country. General Shinseki was close when he told Congress, on February 28, 2003, that several hundred thousand troops would be required to occupy Iraq. Deputy Secretary Wolfowitz was wrong to say that Shinseki was “wildly off the mark.” He didn’t understand how it could take more troops to occupy Iraq than to defeat it.

Q: What about weapons of mass destruction? Weren’t we wrong about that?

FELDMAN: Yes. The U.S. intelligence community and allied services believed that Saddam had chemical weapons—he had already used them against Iraqi Kurds and Iran, and an active nuclear program. We were wrong on both counts, but it must be said that Saddam’s evasive responses to the UN investigation did not help.

Q: From your vantage point, did the Bush administration lie about these weapons?

FELDMAN: I agree that the “evidence” given to Secretary of State Colin Powell for his defense of the invasion was deeply flawed. But I don’t believe that top policymakers relied on that evidence for their conclusions on this issue or on reported disinformation provided by Ahmad Chalabi. As I see it, they had honest and reasoned convictions. With hindsight, it is fair to say that they were guilty of insider group think. I plead guilty to that—and agree that the Iraq War was a costly mistake—but my fear of Iraqi weapons of mass destruction was based on personal experience dating back to the 1980s.

Q: You suggested that structural limitations in American government and society compromised the war effort in Iraq. What were you referring to?

FELDMAN: There are several recurring problems: one, in both Afghanistan and Iraq, the U.S. poured billions of dollars into undeveloped economies leading to waste and pervasive corruption that compromised our work; two, the United States does not have colonial ambitions or a colonial service to conduct nation-building operations. The military did a good job winning hearts and minds in some areas, but relations with local communities cannot be sustained in a system requiring rotation of personnel on short-term deployments; three, few Americans have an understanding of, or respect for, foreign cultures, including some professionals. A lot of folks in Washington underestimated the Iranian influence in Iraq, and the agency made some terrible mistakes. I was appalled when some of our guys brought a Shiite religious leader from outside the country to a Baghdad mosque controlled by forces loyal to Muqtada al-Sadr. The visitor was executed on the spot, and we did not dare retaliate.

The torture and humiliation of Iraqi prisoners at Abu Ghraib, which tarnished America’s reputation in the world and undermined our war aims, stands in a separate category,

reflecting both the Bush administration's misguided torture policy following 9/11 and the character and training of the Maryland state prison guards on duty there.

Q: Many believe that the big mistake was to remove Baath party members from the government, the military, and the police. The result was that the trained people who had run these institutions—and knew how to use guns—were now unemployed and angry.

FELDMAN: I agree that mistakes were made. That decision recalls the NSC debate over what was called “catastrophic success”—the replacement of Saddam by another, less dangerous, Baathist dictator. That was a big issue between State, which was open to that prospect, and DOD, which was determined to eliminate the Baath party. DOD won the day.

Q: Mark that concludes our interview. Thank you so much.

FELDMAN: Thank you, Robin, for your support, and for your thoughtful questions.

End of interview

ANNEX A

MARK B. FELDMAN, CV

Personal

Born: Rochester NY October 3, 1935

Parents: Edward Paul Feldman, Grace [Relin] Feldman: Brother: Lawrence C. Feldman
b October 6, 1941, d June 15, 2004

Married: Marcia Smith, November 23, 1963, b December 1, 1940, d August 24, 1996

Children: Ilana K. Feldman PhD b October 6, 1969; Rachel L. Feldman MD b May 3,
1972

Loving friend: Miriam H. Feinsilver b January 8, 1939

Education

Brighton High School, NY Regents diploma 1953

Wesleyan University, AB 1957, High Honors, Phi Beta Kappa; French major with
Distinction in Government [Vichy: The War Within a War]

Harvard Law School, LLB 1960 *magna cum laude*, Law Review

Ecole Supérieure Pour la Préparation et Perfectionnement des Professeurs de Français à l'Étranger, Diplôme 1956 [Sweet Briar Junior Year Abroad; French government scholar; auditor L'École Supérieure de Science Politique]

Bar Admissions New York 1961, District of Columbia, 1974

Academic

Adjunct Professor, Georgetown University Law Center

- Foreign Relations Law [2007–2021]
- International Conflicts of National Jurisdiction [2009–2010]
- International Commercial Arbitration [1982–1987]

Professorial Lecturer, Johns Hopkins School of Advanced International Studies, Foreign Relations Law [2006–2010]

U.S. Department of State

- Office of the Legal Adviser [1965–1981]
- Attorney-Adviser, L/Far East Affairs [1965–1967]
- Assistant Legal Adviser Security and Consular Affairs [1967–1968]
- Assistant Legal Adviser Inter-American Affairs [1968–1974]
- Deputy Legal Adviser and Acting Legal Adviser [1974–May 1981]

Highlights: Coordinated drafting Foreign Sovereign Immunities Act of 1976; principal drafter Iran-U.S. Claims Agreement in Algiers Accords resolving Iran Hostage Crisis; established Iran Claims Tribunal in The Hague [1980–81]; managed international investment and claims questions, including expropriation and illicit payments issues [1968–1980]; OECD Declaration on International Investment [1976]. Chaired inter-agency committee that established limits of U.S. jurisdiction over 200 mile maritime zones in 1977, negotiated U.S. maritime boundary agreements, with Mexico, Canada, and Cuba, proposed 1867 Alaska Treaty line for maritime boundary with USSR/Russia; established U.S. policy to combat international trade in looted antiquities and negotiated UNESCO Convention On Cultural Property [1970]; worked on anti-terrorism issues in OAS and UN and drafted U.S.-Cuba Hijacking Agreement [1969]; worked with Averell Harriman on POW issues in Vietnam War requiring detained VC be treated as if POWs under Geneva Conventions [1965–67]; worked with Ambassador Graham Martin on U.S. ratification UN Refugee Protocol [1967].

U.S. Department of Defense [Spring 2002–Spring 2003]—consultant [SGE] to Under Secretary for Policy Douglas J. Feith

Committee for Peace and Security in the Gulf [1991] at Feith & Zell, P.C.

Private Practice

- Associate, Kaye Scholer Fierman Hays and Handler, NYC [1960–1965] [labor law, arbitration and collective bargaining]
- Counsel and Partner, Donovan Leisure Newton & Irvine, Washington, DC [1981–1988]
- Member, Feith & Zell, P.C., Washington DC [1988–2001]
- Counsel, Garvey Schubert Barer, Washington DC [2001–2019]

Highlights: Argued for the United States in the Gulf Of Maine Case [U.S. v. Canada] at the International Court of Justice; represented Kalamazoo Spice Extraction Co. against Ethiopia in Sixth Circuit case confirming treaty exception to the federal act of state doctrine; represented American investor in expropriation claim brought against Mexico under NAFTA, Chapter 11 [Feldman v. Mexico]; represented Turkey in DC during Ozal/Ciller administrations; represented Space Systems Loral in China launch failure investigation and other international matters; assisted Walt Disney Company in its negotiations with France establishing international arbitration procedures for its Euro Park investment near Paris; helped client recover paintings taken by Nazis from Dutch museum during World War II; represented Sigrid Biow, daughter of German photographer August Sander in international estate litigation.

Memberships

Council on Foreign Relations, American Society of International Law, American Law Institute [RS Third Foreign Relations Law], American Bar Association, International Law Section: Council [1983–1988], Chair Committee on Foreign Sovereign Immunity [1983–1988], Co-Chair Committee on Art and Cultural Heritage Law [2010–11]; Board, Washington Foreign Law Society [2020–21]; Board, Institute for Science and Judaism.

Selected Publications and Presentations

The Maritime Boundaries of the United States, 74 American Journal of International Law 729 [October 1981] with David Colson.

The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise? 77 American Journal of International Law 219 [April 1983].

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Drafting the Claims Settlement Agreement, Revolutionary Days: The Iran Hostage Crisis and the Hague Claims Tribunal [Juris 1996] at p. 91.

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Agreement Between the United States of America and the United Mexican States on Boundary Waters, Tlatelolco and Mexico City, Nov. 24, 1976, 29 U.S.T. 196, T.I.A.S. No. 8805. (“[A] treaty using the same boundary lines was signed on May 4, 1978.” (p. 92)).

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