ORAL HISTORY OF MORTON HOLLANDER

Third Interview
September 4, 2007

This is the third interview of Morton Hollander as part of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Judith S. Feigin. The interview took place at Mr. Hollander's home in Northwest Washington on September 4, 2007.

Ms. Feigin: Mr. Hollander, I know you wanted today, rather than continuing chronologically, which we will get back to in the next interview, to discuss some of the cases that you thought were significant and mattered a lot to you. So let's just reserve today for that and I think you would like to begin with *U.S. v. Western Pacific*, if I am correct.

Mr. Hollander: Yes, even though we ultimately lost after the Supreme Court directed that the basic issue in that case, namely the appropriate freight rate for transportation by a freight company of napalm gel which was used literally in thousands of napalm bombs during World War II be determined by the ICC. It seemed to me that after we lost the case in the Court of Claims – and the reason that I had handled the case in the Court of Claims was because there was so much reluctance on the part of the Court of Claims section to undertake that fight, which they were certain would result in a loss of the case.

Ms. Feigin: You were still in Mr. Sweeney's section at that point?

Mr. Hollander: Yes, but nobody in the Court of Claims section wanted to handle the case. They were sure it was a 100 percent loser and they turned out to be right. But I figured that I could somehow inject into the case, knowing that I was

going to lose the case too, some issue which might possibly have interested the Supreme Court in taking on for decision a railroad freight rate case. That doesn't sound very appealing even though it involved a lot of money because there were so many hundreds of thousands of pounds of gelatinized gasoline. That's what napalm really is. They liquify the gasoline, put them in fifty-gallon tanks, and then transport them in their semi-frozen form.

After losing the case in the Court of Claims, I prepared a petition for *cert*. The railroads were charging the government freight rate based on the freight rate that applied to shipments of liquid gasoline, and liquid gasoline is very volatile. The liquid very frequently breaks down. Its volatility causes it to break down so that if someone snaps a match within fifty or sixty feet of a tank that carries liquid volatile gasoline, you would have an immediate explosion.

The government used the semi-frozen and gelatinized gasoline in the napalm bombs itself. When they released them through the bomb hatch, the bomb was accompanied by a charge of white phosphorous, which is a chemical that on exposure to the air will immediately explode itself. Since the white phosphorous charge was carried along with the gelatinized gasoline, it would set the bomb on fire.

The railroad said that the only appropriate rate is the rate we charge for liquid gasoline, which was considerably higher than the rate they charged for an item that's far safer than liquid gasoline because the material

being transported had no volatility. In fact, that was the purpose for their being gelatinized. And everybody knew that the only way the napalm or the gelatinized gasoline could do its work was to have it accompanied by a small charge of white phosphorous, which ignites spontaneously on exposure to the air. And the white phosphorous would accompany the napalm bomb when it is released through the hatch in the airplane. The railroads had persisted in their insistence that the higher rate, the rate applicable to liquid gasoline, was the appropriate rate.

As it turned out, before the Court of Claims got the *Western Pacific* case, they had decided another case involving the identical question. It was called the *Union Pacific* case. The Court of Claims had held in that case that the higher rate applied, the rate that's prescribed by the freight rules for highly volatile liquid gasoline. That was the reason that the Court of Claims people felt that they'd be spinning their wheels if they tried to raise the identical issue.

No *certiorari* had been sought from the *Union Pacific* adverse decision. After I lost the same issue in the *Western Pacific* case, we did get authorization from the solicitor general to file a petition for *cert*. and then to brief the cases for petitioner after *cert.* had been granted.

The argument I made included the notion that if the Supreme Court agrees with the railroads, then the necessary alternative is that they send the case under the primary jurisdiction rule to the ICC for decision. The ICC,

ever since 1887, had been handling cases involving disputes between rail carriers and the people who use the rail lines for transportation of goods and commodities. The ICC had always retained jurisdiction to make those decisions themselves. And that was the part of the case that the *Western Pacific* decision agreed with the United States. So the case was remanded by the Supreme Court without decision, other than to direct that the ICC be given a crack at determining what the appropriate rate is, or was, for gelatinized napalm gel. I was very happy with that result.

Ms. Feigin: Was this the argument where one of the justices was haranguing your opponent?

Mr. Hollander: Yes, it was. I think it was actually Stanley Reed who was upset by the rail counsel's statement at the very beginning of his argument. He tried to, I think, drum up the Court's interest in what otherwise would have been a very dry case by telling the Court that you know, Your Honor, there are many cases involving the government, but in this case you've got to know that we're here before this bench only because the government has reneged on a stipulation it solemnly entered into in the court below. And he was really pummeled with questions, so that he had to devote twenty minutes to trying to explain his charge of the government reneging on a stipulation.

After the case got back to the ICC under the primary jurisdiction rule because the ICC was the expert, I felt very good that we had salvaged at least part of the case (laughs). So I told the people in the Court of

Claims section that if they wanted me to, I would be happy to handle the case before the ICC (laughs). Which was a big mistake on my part because I lost before the ICC and the ICC directed that the higher rate for volatile liquid gasoline be applied.

But the primary jurisdiction rule was intact before *Western Pacific*, as it is today. If there's a case which actually calls for the administrative expertise of a government agency, and that's the focal point of the litigation, you've got to give the administrative agency a chance to pass on it. Well we did, but we lost.

Ms. Feigin: It sounds as if the argument, unlike most, was a very personal one, since there was an attack on you, basically.

Mr. Hollander: He must have been attacking me, including everybody else who had anything to do with the case in the Court of Claims. I was working with other people who were regular Court of Claims staff at the time.

Ms. Feigin: So it's nice to have a justice come to your rescue.

Mr. Hollander: Oh, there's no question about that! And my opponent, Colonel Wiener, was really getting hot under the collar, because they would not let him proceed with his defense of the decision he had won in the Court of Claims.

Ms. Feigin: Did you know Justice Reed from his days in the Solicitor General's Office?

Mr. Hollander: I never had any personal contact with him. He actually, I think, was solicitor general before I entered the department. Obviously, I knew of him. I knew he was a staunch defender of the government because of his

prior exposure as solicitor general. But I did have occasion to meet with several of his successors.

Ms. Feigin: You served under a lot of solicitors general.

Mr. Hollander: Oh yes. I think I served under fifteen attorneys general, and all of the attorneys general had their own solicitor general.

Ms. Feigin: Which solicitor general stands out most in your mind?

Mr. Hollander: Sobeloff was the best. He had a lot of appellate experience before he came to the department. He had been chief judge of the Court of Appeals of Maryland, which is the highest appellate court in Maryland. In fact, he called me once to suggest that I should look at the qualifications of someone who had served as his law clerk while Sobeloff was chief judge of the Court of Appeals of the State of Maryland, with a view to determining whether or not he would be useful on the appellate staff. Apparently this lawyer, his name is Jack Eldridge, he was really a hotshot. He was very good. I used to assign to him really the most difficult cases that we had and he always did a beautiful job.

Ms. Feigin: When you say that Sobeloff stands out as premier in your mind, what is it in your experience working with them, that makes for a great solicitor general?

Mr. Hollander: So far as most legal issues were concerned, he was able to cut through really to the basics. I remember one of the first discussions I had with him, while he was already on the bench of the Fourth Circuit Court of Appeals.

They were hoping that they might be able to get him a seat on the Supreme Court but it never worked out that way. So he did settle for a seat on the Court of Appeals for the Fourth Circuit. I remember after an argument, he had opened up a discussion on another case earlier decided by the Court of Appeals for the Fourth Circuit that I had argued. It involved the absolute liability theory issue as to whether or not that liability theory is available to claimants under the Federal Tort Claims Act, the same issue that later surfaced in the *Dalehite* litigation. And I told him that Judge Parker, who I think in the '20s ran for either president or vice-president of the United States, had written the opinion for the court in this prelude case, in which they threw out a claim by the parents of a child who had been killed when an Air Force plane hit the play area of the school. I do remember very distinctly that when I told him that Judge Parker had written the opinion holding that there was no liability on the part of the United States government under the Tort Claims Act because of the nonapplicability of the absolute liability theory as a basis for recovery of damages, Sobeloff's remark was that no judge worth his salt would have reached that conclusion (both laugh). He was very, very blunt in his appraisal of some of his colleagues.

Ms. Feigin: Where were you having this discussion with him?

Mr. Hollander: At the court. He had asked me to stop by his office. You know in the Fourth Circuit they have that custom where the judges come down from the

bench at the end of the argument. In that connection, on another occasion when I was arguing before the Fourth Circuit, Haynsworth was on the bench. Haynsworth was one of the nominees who had been rejected by the Senate for a Supreme Court position. Haynsworth came down from the bench. He started to talk to me about the beer parties we went to (both laugh). And he was talking about the wrong Hollander (Feigin laughs).

Ms. Feigin: Did you tell him that?

Mr. Hollander: No, I certainly did not; the case had not yet been decided! I knew that I was not the Hollander that he was involved with because the beer parties had taken place up in Boston. And there happens to be another guy whose name is Morton Hollander who's been a long-time – I don't know if he is still living – lawyer in Baltimore. He has the same name. Unlike myself, he does have a middle initial, because I was eager to trace it down (laughs). Like myself, he also had applied, at the same time that I did, for a Justice Department job. So many of the papers that are his were in my file. And also many of my papers were in his file.

Anyway, I felt that it would be a better idea for me not to straighten Haynsworth out (Feigin laughs). But I enjoyed those meetings with the judges. Sometimes they would last five minutes, but sometimes they would last half an hour. They would invite the attorney to discuss some of the cases.

Ms. Feigin: You mean to come back to chambers after the argument?

Mr. Hollander: Yes. Haynsworth later was nominated by Nixon and Carswell was nominated at the same time. Carswell I think was a district judge in the Carolinas, I forget which one. Haynsworth was a long-time Court of Appeals for the Fourth Circuit judge. What his opponents were stressing was the fact that he sat on a case involving Brunswick-Balke-Collender, C-o-l-l-e-n-d-e-r. They're the largest billiards pool table manufacturing company. His wife had a substantial share of stock in that company and he did not recuse himself.

As for Carswell, does the name Norman Knopf, K-n-o-p-f, strike any familiar chord? He was in the office for about six years. When Norman heard that the name of Carswell had been sent to the Senate Judiciary Committee, to decide whether he should get the Supreme Court nomination, Norman was very, very upset. He had been a student at Columbia Law during the big splurge in Voting Rights legislation. Norman came in with the story that papers had been prepared by Columbia law students who had tried to handle the litigation in Carswell's court. They stuck by the rules of the district court. But when they came down to South Carolina to file the papers, they were told by the clerk that the rules had changed so that the clerk would not accept any of the briefs or other memos that Knopf and his associates, the other students, wanted to file in court. And they were getting a rough time, the law students at Columbia, including Norman. So he wanted to testify against Carswell's nomination.

It turned out though that Joe Tydings, a former United States Attorney from Baltimore, pretty much felt the same way about Carswell and Carswell's court and Carswell changing his own court's rules so as to try to justify not accepting government briefs and memos of law on the ground that the rules had changed by the time they got down to Carolina. I don't know if Tydings was head of the Judiciary Committee, but he must have been on it. He issued a subpoena when he found out what Norman's story was. He issued a subpoena to Norman to come and testify.

An attorney in the Justice Department needs the permission of either the attorney general or an associate attorney general to testify in Congress, particularly when they're testifying against a nomination that the president has sent forth to the Congress. I do remember of course that his name was never referred out of Committee.

Ms. Feigin: So there was no need to testify?

Mr. Hollander: Norman did testify.

Ms. Feigin: He got approval to testify?

Mr. Hollander: No. This was where Rehnquist entered into the situation. Rehnquist was actually the hatchet man for the administration on nominations to the United States Supreme Court. Indeed, on nominations to all federal appellate courts. Rehnquist was a stickler on that. Actually Rehnquist was the guy in the Department of Justice who did all of the legwork to make sure that the president's nominees would not have any problems.

When Rehnquist found out that Norman had testified against Carswell, he called me up to his office and said, "Weren't you aware that you're not allowed to testify against a presidential nomination to the Supreme Court?" I said, "I was aware of it, Mr. Rehnquist, but I did not think that really applied where he's testifying under the compulsion of a subpoena." So it worked out okay although I was, as was Norman, nervous about the episode.

Ms. Feigin: Was there any repercussion for you?

Mr. Hollander: No, none at all. I really never had any direct contact with Rehnquist after that because Rehnquist's official position in the department had always been assistant attorney general in charge of the Office of Legal Counsel. Actually what the Office of Legal Counsel did, their principal responsibility, was to resolve conflicts between, let's say the Interior Department and the Environmental Protection Administration, where two cabinet departments were at odds with each other and they wanted to get the attorney general's blessing for their respective view. That was his official position, but actually Rehnquist spent most of his time in analyzing the backgrounds of prospective judicial nominees so that he would be in a position to advise the president whether or not this is the sort of guy we want to put on the Supreme Court.

Ms. Feigin: I know this is not the only time you've been called to come to bat for one of your charges who allegedly ran afoul of the rules. I know there was one

time with Michael Stein, if you could tell me that story.

Mr. Hollander: As I remember it, it was probably in connection with some Vietnam protest. There were thousands of protestors that the police had rounded up and penned into one of the large fields. I forget whether it was a football stadium or what. The police realized that in order for any of the arrests that they were making for these protestors, they had to have the name of the police officer who arrested the particular protestor. That was of the essence so far as the charges were concerned.

Ms. Feigin: I believe this was May Day in 1971.

Mr. Hollander: Seventy-one, of course, we were still in Vietnam and there was also a lot of effort on the part of the more liberal groups to bring the boys back. As I remember it, and it's pretty vague, the assistant attorney general of the Criminal Division sent out calls to the other divisions and said that we need your help. You have to supply us with ten names of lawyers in your respective division who can help us out in associating a particular arrest with identifying the particular police officer who made the arrest. Of course nobody could do that because there had been no attempt at the time of arrest to try to link a particular arrest with a particular policeman.

I think the Civil Division had to supply either five or ten lawyers to that project that was being run by the assistant attorney general for the Criminal Division. Mike was in that group of five or ten who had been designated to help out the Criminal Division and to link names. But there

was no basis at all; they had no way of knowing which police officer arrested which of the protestors. So if my memory serves me correctly, Mike was the only one of the five or ten Civil Division attorneys who said he can't put up with that. He just did not want to be part of what was going to be a fictitious link with an until-that-time unknown police officer. It was such a massive operation that they had no way of knowing. He begged off and said that he couldn't cooperate with them. I really don't remember the names of any of the others, but I think there was maybe one, maybe two other people on the appellate staff who had been summoned to help the assistant attorney general in charge of the Criminal Division.

I did have occasion to speak with Harold Greene, the district judge before whom the people who had been arrested appeared. He was going to try their cases. He told me point-blank – because I had known him very well – I had known him since his days in the late '40s as an assistant U.S. Attorney in the District of Columbia. He acknowledged that the government's case was really too thin.

Ms. Feigin: Were you called on the carpet for Mike's not cooperating further?

Mr. Hollander: No. I never had any repercussions so far as Mike was concerned. I was called into Assistant Attorney General L. Patrick Gray's office once, in connection with an entirely different matter that had nothing to do with the roundup of protestors. It had to do more with one of our attorneys having earlier been charged with marijuana or some other kind of dope possession.

Gray told me that he had to go. I mean the guy was too valuable to go.

Ms. Feigin: So they hadn't known it when he was hired and they discovered it later?

Mr. Hollander: Yes. Gray was reluctant. He later went on to become F.B.I. director. I told him that if he insists on this guy being fired, that I would go along with him. I don't know if that really made any difference to Gray. Probably could get rid of two bums at the same time (both laugh).

Ms. Feigin: But he didn't! (Feigin laughs)

Mr. Hollander: No. There were no repercussions against us. He was really a very valuable assistant, and I worked with him actually on some other cases after I got out of the department myself.

Ms. Feigin: Does he know you saved him?

Mr. Hollander: I really don't know. He knows he did not have to leave the department at that time. I think he left the department years after I did. I left the department in '79 because that's when Civiletti asked me to go over to London and Paris on the claims of the Iranian government to the effect that it was unconstitutional for Carter to extend his freeze order against Iranian government-owned assets, to those assets owned by the Iranian government but on deposit in banks in France and in England. Indeed, those banks were branches of United States-owned banks.

That was interesting. I certainly enjoyed my stay in London and Paris but we never had a chance. I hired, while I was there, one of the leading barristers in London. A guy who actually headed up one of the

schools at Oxford, who worked with me on the cases in the British courts. But I could tell from the outset that we weren't going to get anywhere because the notion that the United States Government could reach out and try to meddle with issues involving – even if it was Iranian government money – to try to tell the courts in England and in France that the Iranians had no right to their own assets because of Carter's freeze order – The notion of French sovereignty and British sovereignty made it impossible to make that pitch. We never did get an opinion from any of the courts in which we made that argument.

Ms. Feigin: The case is still under submission?

Mr. Hollander: No. What happened was that during the period of time that we were arguing, the Ayatollah Khomeini replaced the deposed Shah. The hostages who had been seized by the Iranian government were all staff members of the American Embassy in Teheran at the time of the revolution and at the time of the imposition of the Carter freeze. When they were seized, a number of them were really roughed up so there were literally hundreds of lawsuits that were filed in United States courts after they were released. And the reason they were released was because Reagan had been elected in '80; he took office in January of 1981. The Iranians had no desire to have any discussion about any of the issues raised by the extension of the Carter freeze order to American-owned banks in London and Paris while Carter was in office. So right after the election, they were able to enter into a

hostage-release agreement which was part of the overall settlement. I don't remember the figures, but I did notice that one of the briefs that Appellate sent to me a couple of weeks ago is still talking about some of the issues that were involved.

Ms. Feigin: You still get all the briefs that Civil Appeals files?

Mr. Hollander: Yes. Some of them I pay very close attention to, as I did that one, particularly because I was familiar with the background of the arrangements leading to the release of the hostages.

Ms. Feigin: Let's go back a little to some of the cases that you wanted to discuss. I know you wanted to talk about the *New Haven and Hartford* case. And I also want to talk about *Feres*. So let's see if we can discuss those two cases. Which would you rather do first?

Mr. Hollander: Let's take care of *Feres* first because the implications of *Feres,* insofar as potential claimants against the United States Treasury, is far more significant than the ten or twelve million dollars that was involved in the *New Haven* case.

Ms. Feigin: *Feres* is untold billions probably at this point.

Mr. Hollander: Yes. Actually, I checked the *Oxford Companion* to Supreme Court decisions, and they make no bones about saying that the case was wrongly decided. There have been at least ten or twelve attempts in the United States Supreme Court for the Court to reconsider the decision in *Feres* and they are uniformly turned down.

Ms. Feigin: Let's go back to your role, because you were there in the court of appeals.

Mr. Hollander: I had *Feres* in the court of appeals. It was a run-of-the-mill case. Soldiers were stationed at some training camp up in New York state. The heater in the barracks malfunctioned so a couple of the soldiers suffered serious injuries as a result.

Sweeney, who was my boss at that time, asked me if I would be willing to handle the case. On the surface it seemed to me there was no reason to exclude a military serviceman from the jurisdiction of the provisions of the Federal Tort Claims Act. First of all, the Federal Tort Claims Act applies only in situations where you can establish that a negligent tortfeasor was acting within the scope of his employment for the United States. And I think Congress did have a *bona fide* reason in making sure that that language did not exclude military servicemen as tortfeasors acting within the scope of their employment.

The concept that a soldier is acting within the scope of his employment is somewhat strange because first of all, a serviceman, from the day he enters the service, is considered to be in line of duty unless he's guilty of some reprehensible misconduct. That's the only time that his action is not considered to be action by him on behalf of the United States. So they added in the definitional section a statement that so far as military servicemen are concerned, they are to be considered as acting within the scope of their employment. That language really doesn't fit a serviceman's

situation. They're on duty twenty-four hours a day. And they're in line of duty at all times except when they're doing really vile or bad things.

This definitional section says that so far as military servicemen are concerned, they are considered to be acting within the scope of their employment whenever they are acting in the line of duty. That really covers practically everything. Of course that's what the other side's been arguing for decades now. For that reason, it would seem that there really would be no problem.

If you're going to equate line of duty with acting within the scope of employment, there's no problem in covering a military serviceman's negligence as a tortfeasor as something triggering liability on the part of the United States if the essentials of the negligence action are there. But there had been a couple of cases, and there had been a guy in the office named Leavenworth Colby, who actually had had a similar problem under the Public Vessels Act and the Suits in Admiralty Act. Both of those involved naval servicemen who had been injured in the course of carrying out their responsibilities onboard ship. I spoke to Colby when Sweeney asked me to handle the case. And Colby did not play his cards close to the chest. He said that's always been the law so far as naval personnel are concerned, that is the fact that they were servicemen does not exclude them from the coverage of the Suits in Admiralty Act or the Public Vessels Act.

In fact as I remember the two cases that he relied on – and this goes

back probably thirty or forty years – were *Dobson v. United States* and *Bradey v. United States*, in which, I think it was the Court of Appeals for the Second Circuit, had held that the fact that the plaintiffs were naval servicemen does not deny them the coverage provisions of the Suits in Admiralty Act or the Public Vessels Act. So it seemed to me that we could fashion some argument and point to the longstanding decisions under those two Admiralty statutes. That's what we did and the Second Circuit was very receptive to our argument that Congress could not possibly contemplate giving servicemen the right to sue for combat injuries because they claim that their sergeant was exposing them to a risk greater than actually necessary to achieve their combat goals. There was a lot of support for the view that a serviceman's injuries incident to his military service should not furnish him with the opportunity of hauling his sergeant into court to testify as to specific measures that the plaintiff serviceman thinks would have avoided the damage or the injuries suffered by the serviceman who was suing. The Second Circuit was wide open to receive arguments of that sort and they decided in the government's favor.

Ms. Feigin: Were you involved in the case at the Supreme Court level?

Mr. Hollander: I wrote the brief for Newell Clapp who argued the case in the Supreme Court. At the time that I was handling this case in the Second Circuit, there was another case, I think the name of that case was *Griggs*. I think that was a malpractice case. I think in that case a soldier had an infected kidney and

he also had tuberculosis. He was in the service so they decided to remove the damaged kidney because apparently it is not uncommon for people to get along on one operational kidney. That case I had assigned to the United States Attorney's Office, I think it was in Colorado. I was keeping close tabs on it because the *Griggs* case before the Tenth Circuit and mine on the East Coast were both moving along at the same pace.

On the day of the operation in this *Griggs* case, the operating surgeon said to one of his assistants he wanted to find out which kidney had to be removed. He said to the assistant surgeon we've got to remove the left kidney, looking at the charts. His assistant said, "Right," meaning yes, the left kidney. But the operating surgeon thought that he was being corrected so he took out the wrong kidney and the soldier died.

Now the U.S. Attorney actually lost that case, the court finding that the negligence – They said that they at least should have had some markings on his body indicating which kidney was to go to; there should have been some backup.

Ms. Feigin: That's what they do now.

Mr. Hollander: They do now, I am sure. But the U.S. Attorney lost the case, so I knew immediately that the Supreme Court is going to get interested in the case, which they did. Newell Clapp was not an assistant attorney general, but he was the number two man. They used to call them deputy assistant attorneys general. He felt it would be a good case for him to argue in the Supreme

Court. And he did and he got a sweeping affirmance by the Supreme Court of the decision I had gotten from the Second Circuit in *Feres*.

Ms. Feigin: And your feeling about the *Feres* case now?

Mr. Hollander: Well, we were biting off more than we should have been allowed to chew. Some of the tort claims awards have really been outrageously high. In fact, many of the briefs I get from the office deal with the excessiveness of the award. These are not military cases, but it is not unusual for an award to be four million, ten million, twelve million. That's very frequent. I just see briefs in those cases in which the government is protesting the excessiveness of the judgment. There is no jury in a Tort Claims Act case; it's just between the judge and the parties. Many of the judges have taken advantage of it.

But on balance, I don't think anyone has ever made any study of how much money the federal treasury has saved because of *Feres*. But regardless of how high that figure is, it still is a very small percentage of the overall total liability of the United States under the Federal Tort Claims Act. What I'm trying to say is that if the Supreme Court had reversed *Feres*, and allowed suits to be maintained by soldiers even though the injuries occurred incident to military service, I don't know how many billions of dollars that would have entailed or added to the federal treasury's obligation. But it would be, I think, and this is really a guess on my part, a small part of the overall liability that the government has

suffered because of the Tort Claims Act. So in retrospect, I feel that the servicemen are getting a raw deal.

The compensating factor for servicemen is that they do have a catalogue of benefits available through the Veterans Administration if they have suffered injury as a result of service-connected incidents. And some of the VA compensation schemes are very, very substantial. I have noticed a tendency on the part of some courts who are willing to make an award in a service-connected military case, notwithstanding *Feres*, if the case is really such an atrocious one, to deduct the net value of any benefits available to the veteran under the VA compensation system from the total award, which may make sense. But *Feres* really should say we never had any intention of excluding servicemen from benefits of the Tort Claims Act. That's our position and they should in effect wipe out *Feres*.

Ms. Feigin: That leads to the question that government attorneys, and all attorneys, have sometimes, which is what do you do when you are on a case where the position you are asked to take is not the position that you think should be pursued. This must have happened to you.

Mr. Hollander: Yes.

Ms. Feigin: *Feres* may be one example. But how do you handle that question?

Mr. Hollander: I'm a good soldier. I get the orders to defend the case, I'm going to do the best to come up with a reasonable basis for the defense. I think in all my years with the Justice Department, there was one case where I felt that as a

matter of conscience that I could not work on the case. It must have been the late ‘60s or mid-‘70s.

Up until about fifteen years ago, Annapolis had no synagogue or any other place of worship for Jewish midshipmen. They were required by law to attend services on Sunday, whether they were Jewish or whether they were nonbelievers. The military felt that there is no telling when a naval officer might be called on to be of some help to either a serviceman who was dying or who had just suffered some terrible loss.

The ACLU filed suit pointing out that it was unconstitutional to force agnostics or Jewish kids to go to services on Sunday. Instead they sought to leave the non-believers alone, not force them to attend any services. And they were putting pressure on Congress to build a chapel for the Jewish kids. In fact, that chapel was finally dedicated five years ago.

I became involved in that litigation when the ACLU had prevailed in the District of Columbia Court of Appeals, saying you have to leave the non-believers alone Sundays and don’t force everybody else to attend services in the Christian chapel on Sundays. The military was very agitated about the decision by the Court of Appeals for the District of Columbia Circuit and insisted that we file a petition for *certiorari* to the Supreme Court from the decision, which in effect embraced and authorized that a Jewish chapel be built, and also that agnostics should be left alone and not force them to attend. That is the one case where I went in and spoke to my

assistant attorney general who at that time was Bill Ruckelshaus, who later became the first administrator of EPA. He had no trouble going along with me and we wound up with our telling the solicitor general that we don't want to go for *cert*.

Ms. Feigin: Did the solicitor general agree with you?

Mr. Hollander: Yes.

Ms. Feigin: Had the office defended it in the court of appeals?

Mr. Hollander: I don't know the answer to that question. I got involved in the case when the Navy wrote this screaming letter saying that they cannot conduct wars with that decision outstanding.

That one wound up okay. There may have been another case, but talking about thousands of cases that I had some connection with. Most of them, nearly all of them, I generally had no problem advancing a position that I did not agree with.

Ms. Feigin: This is another Ruckelshaus story, but I would like you to tell the story of when you went into Bill Ruckelshaus on the issue of part-time work for women. That is something that resonates today.

Mr. Hollander: It was Greer Goldman in connection with whom we had that problem. It seemed silly for the department to deny her work privileges at the Justice Department, where no matter how short the day, because she had to take care of the baby, she still was producing as much as the average attorney in the office. So that wasn't a difficult bill to sell.

Ms. Feigin: How did you pitch it to Mr. Ruckelshaus?

Mr. Hollander: His wife Jill had been very, very active in the women's movement and her name would appear very frequently in the newspaper. I don't remember what the time frame was; it must have been in the '70s.

Ms. Feigin: I think Greer's first child was born in about 1974.

Mr. Hollander: Is she in practice now?

Ms. Feigin: She is but not with the government.

Mr. Hollander: I know she left. She was with Wald Harkrader.

Ms. Feigin: She was, and then she came back to Justice in the Environmental Division. She is now with the Audubon Society.

What in essence did you say to Mr. Ruckelshuas?

Mr. Hollander: I told him that I don't think it would sit well with Jill (Feigin laughs). Ruckelshaus was a good guy.

Ms. Feigin: And so that argument carried the day?

Mr. Hollander: Yes. I knew I wouldn't have any real problem with it.

Ms. Feigin: So until then they did not allow part-time?

Mr. Hollander: No. This comes back to Sal Andretta who was the assistant attorney general in charge of administration. It was something on the books and he felt he had to enforce it even though I explained to him that it makes no sense.

Ms. Feigin: So was this the first time that an attorney had been allowed to work part-time at Justice?

Mr. Hollander: Yes.

Ms. Feigin: That's wonderful. Absolutely wonderful!

I know that there's one last case; you wanted to talk about the *New Haven and Hartford case.*

Mr. Hollander: The reason I wanted to talk about that was to focus on, and to emphasize, the need for attorneys on both sides to make sure that when they're invoking the jurisdiction of any court, at the trial level or the appellate level, make absolutely certain they're in the right court. That case wound up okay because a companion class-action suit had been filed by the derivative claim stockholders and they did okay in that case.

Ms. Feigin: I guess the essence of it was that it turned out late in the day that it was in the wrong court?

Mr. Hollander: It didn't take Frankfurter long to change his mind about the jurisdiction. Friendly, I don't know if he's still alive – I think he's still with Cleary Gottlieb. If he is alive, he's one of the best judges we have.

Ms. Feigin: I would like in another session to discuss the judges you think were best, because you appeared before so many. That would be a wonderful thing to discuss.

Mr. Hollander: Okay.

Ms. Feigin: Thank you very much.