

ORAL HISTORY OF MORTON HOLLANDER

Fourth Interview

October 9, 2007

This is the fourth 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 October 9, 2007.

Ms. Feigin: Mr. Hollander. Great to see you again. When we left off you were still one of six line attorneys in Mr. Sweeney's office. That morphed into a big appellate section with you at the head. I'd like to get a little understanding of how that came about and when that came about.

Mr. Hollander: I joined the staff in '48 and there were, as you say, six attorneys in the office. Oscar Davis was the lead attorney. He was getting most of the worthwhile Supreme Court cases to argue even before he went upstairs to the SG's office. And a guy by the name of Morton Liftin, he was another very, very good attorney. But nobody could run a close second to Davis and everybody conceded that. When the SG's office needed someone in a rush, they would get Oscar on the phone immediately. And that's where he wound up of course. He preceded Dan Friedman as deputy solicitor general in the Solicitor General's Office.

There was Mel Richter. He was pushing for me to join Sweeney. He was very much upset when I told him that Sweeney said there was no chance for me to move over for a year from where I then was, at the Interior Department, after I had been at the Office of Price Administration at the

beginning of the war. I remember the names I think of some of the others but they never made any real impression on me.

Ms. Feigin: How did the office come to grow and when did you come to lead it?

Mr. Hollander: The big spurt came in 1953 when Eisenhower appointed Warren Burger as the head of the Claims Division. I think I probably said this before, maybe a couple of times. Burger was very frustrated by the fact that the division he had just been named to head was the Claims Division. So he righted that immediately, re-characterizing it as the Civil Division.

Ms. Feigin: Mr. Sweeney was still the head at that point?

Mr. Hollander: Oh yes, Sweeney was there so far as I know for years. Not only was it not known as the Civil Division appellate staff, it was known as the Supreme Court section of the Claims Division. That was the official name when Sweeney headed it up, and also when it was headed by his predecessor Lloyd Kreeger. Lloyd had worked very closely with Sweeney and Sweeney had learned a lot from Lloyd. But at that time I don't think there were more than four people, at the most five, in that Supreme Court section.

Sweeney at the beginning had the notion that the Supreme Court section of the Claims Division responsibilities should be limited to cases in the United States Supreme Court. He did not want us to waste our time on court of appeals cases.

Ms. Feigin: So who handled the court of appeals cases?

Mr. Hollander: They were shipped out to the field U.S. Attorneys' offices. Sometimes if

an especially interesting or difficult case came along Sweeney would assign one of the members of the Supreme Court staff of the Claims Division to work with the assistant U.S. Attorney who was on the case.

Ms. Feigin: Is that how you got *Feres*?

Mr. Hollander: No. I was a full-fledged member of the Supreme Court section. I was never assigned to handle any case that was actually authorized to be handled by the U.S. Attorney's Office. Sweeney did the authorization. Sweeney used to make the decision, but it was invariably in favor of the U.S. Attorney, for the U.S. Attorney's Office to handle the more important appellate cases. Most of the times he deferred to the U.S. Attorney's Office. He resolved all doubts in favor of letting the field attorneys handle the more important appellate cases and never let them participate at all in helping on the Supreme Court litigation.

That did change dramatically in '53 because Burger could not understand why, if we had the nucleus of an outfit that's ready to do initial brief writing for the Supreme Court – and by that time, because of the lack of an adequate number of attorneys in the Solicitor General's Office we were shipped many more Supreme Court briefing and oral argument assignments than the people on the appellate staff wanted to handle. The workload was too heavy.

I don't think that when Burger was in office that we had more than 26 or 27 attorneys doing both court of appeals work and Supreme Court

work, including the oral arguments. I think now they probably have about sixty attorneys. It was reaching the point, even before I left, which was in '78 or '79, I felt that the section just couldn't keep up with its work.

Ms. Feigin: When did you take over the section?

Mr. Hollander: In the beginning of 1960.

Ms. Feigin: Did Mr. Sweeney retire?

Mr. Hollander: Yes. Actually, he was appointed as a commissioner of the Federal Power Commission. That was one field where he had quite a few Supreme Court cases under his belt. He and Mel Richter actually – Mel Richter used to do the brief writing for him and he would argue the Supreme Court cases. In between Sweeney's heading up the outfit, and January of 1960, for about a six- or seven-month period, a guy by the name of Sam Slade, S-l-a-d-e, headed up the outfit. He was really a brilliant attorney. He quit the staff for Schnader Harrison Segal & Lewis, one of the biggest firms in Philadelphia.

Ms. Feigin: Had he been on the staff?

Mr. Hollander: Yes, he'd been on the staff for about two or three years. And there's one lawyer I remember in private practice in Philadelphia. His name is Bernie Segal. Slade hit it off well with this Bernie Segal, and from the very first time that Slade argued a case against Segal in the Supreme Court, Segal told Slade that he wanted him to join his staff. It took him about another year or year and a half to decide. It's a very well-known and very large

Philadelphia firm.

Ms. Feigin: So he left and they chose you?

Mr. Hollander: Yes, he left. George Cochran Doub was then assistant AG. There really wasn't much talk about it at the time. Doub called me and asked me if I'd like to take Sam's job. Obviously I jumped at it.

Ms. Feigin: How did you change the section? What did you do that might have been different from your predecessors?

Mr. Hollander: I went over far more carefully. Slade took over the head job in the middle of '59 so he didn't last long at it. I had the premonition that he was going to accept Segal's pleas and move over as soon as it was convenient for him. He actually married Sandra, an attorney in our office.

Ms. Feigin: So you lost two people?

Mr. Hollander: Yes, but it wasn't too difficult with Sandra's departure. A very nice girl. She did very, very good work, but her departure did not leave a dent in the personnel makeup.

Ms. Feigin: So when you took over, how did you change it?

Mr. Hollander: The first thing I did was to go over a lot more carefully those cases that we were still going to assign to the U.S. Attorney's Office on appeal. And also I did start to offer to make some of our attorneys available for big cases that had been assigned to the U.S. Attorneys offices to give them backup that they really needed. Those were the two principal areas.

Ms. Feigin: But it evolved, because ultimately it wasn't just backup your section was

doing. So how did that come about?

Mr. Hollander: There were some problems with that, too, because some of the U.S. Attorneys offices were highly independent (laughs). I don't know how many times I was reminded by the United States Attorney's Office in the Southern District of New York and in the Eastern District of New York in Brooklyn. They always would start parading the fact that one of their foremost assistants was named Felix Frankfurter and they thought that that was enough (Feigin laughs). But it worked out. There were some bitter conflicts as to some of the cases, like *Feres* for example.

I had lost a *Feres*-type case in the Tenth Circuit, the *Griggs* case. It would have been a natural for me to try to get the conflict with *Feres* which was still before the Second Circuit. The U.S. Attorney, Fiske I think his name was, F-i-s-k-e, and a delegation from the U.S. Attorney's Office, didn't even try to see me. They just marched right on up to Byron White and said that's a big mistake. They started with this Felix Frankfurter bit and this supposedly was the first time we had grabbed an important case bound for the Supreme Court.

Byron White was at that time deputy attorney general. He was really running the department while Bobby Kennedy was attorney general. Bobby Kennedy, the story is, would not have taken the job because of his lack of experience in litigation, unless his brother made him the number one man and Byron White the number two man in the AG's office.

Morgenthau, Jr., the former Secretary of Treasury's son, was U.S. Attorney at that time in the Southern District of New York. He then went on, and had a long career, as the New York State district attorney after he lost – .

Ms. Feigin: He may still be.

Mr. Hollander: It's possible.

Ms. Feigin: I think he is.

Mr. Hollander: He lost; he was running for governor on the Democratic ticket. Anyway, I forget what remarks were exchanged between Byron White and the U.S. Attorney from New York who were up there to make sure that they went back with a reassignment to them of the *Feres* case (laughs). In retrospect, I wish they had handled it and lost it (both laugh). Seriously. In fact, I was just looking yesterday at the *Oxford Companion* to the Supreme Court. They have some nasty things to say about the *Feres* opinion. Not only that, the fact that Congress never really got along, over the years. *Feres* came down in the late 40s. There were some feeble attempts to get a legislative reversal of the Supreme Court decision. But the Pentagon was happy with it and nobody else important enough seemed to care. But there were some nasty remarks exchanged between Byron White and Morgenthau, including an admonition to Morgenthau by Byron White. I forget how he put it. It wasn't very pleasant.

These two really were giants, Morgenthau and White. White was

powerful. White ran the Justice Department. It was not unusual for anybody who had a real problem to bypass Kennedy and run to White, as did the U.S. Attorney's Office at that time.

Ms. Feigin: As an aside about Kennedy, can you tell me the story about his paychecks?

Mr. Hollander: I was in a carpool with a guy named Jack Dabit(sp?), who used to live a couple of miles from here. I was fortunate enough to have a parking space in the basement right near the elevator bank near my office. That figures prominently in Justice Department jurisprudence (both laugh).

I remember there was a judge out in the Tenth Circuit, I forget his name, a real nut. He started a proceeding before the Judicial Council for the Circuit. The Judicial Council handles all administrative details and problems confronting the court of appeals for that Judicial Council or the district courts within that particular court of appeals area. This judge, this is while the Murrah building was being constructed, he had a parking space right next to the front entrance in the parking area at the new Murrah building. He actually filed a proceeding before the Judicial Council claiming that some new chief judge who had just come in had reassigned the parking spaces (both laugh). We got involved in it for some reason.

Ms. Feigin: Really? The appellate section had to handle it?

Mr. Hollander: Yes. I think this guy wanted a writ of mandamus to prevent this new chief judge from reassigned the parking spaces. Of course you know the terrible finish for the building and the area when they used all of those thousands of

pounds of what they called fertilizer, FGAN, fertilizer grade ammonium nitrate.

I came across fertilizer grade ammonium nitrate when I was working on *Texas City*, the *Dalehite* case. The *Grandcamp*, one of France's largest cargo ships, was loading up under the Marshall Plan with thousands of fifty-pound bags of this bagged fertilizer grade ammonium nitrate, the same kind you would use to fertilize flower beds. Used in the proper quantities, and stored properly, it is very beneficial. But they stored all this stuff destined to be used as fertilizer under the Marshall Plan in Europe, which had recently been devastated by World War II. When they started to use that stuff and stack them in the holds and hatches of the ship, they, according to the plaintiffs in the case, improperly stored them in the hatches of the ship without affording sufficient area for some space between the bags. As a result of which, the bags started to explode and leveled not only the ship and the docks, but they were about three blocks away from one of Dupont Chemical's huge factories. So they wiped out practically the whole city with that explosion. The estimated damages, not the value of the ship, but the estimated damages in the way of deaths and personal injuries, exceeded \$275 million.

Ms. Feigin: In those days!

Mr. Hollander: Yes. That was a terrible disaster.

Ms. Feigin: Did you work on that case?

Mr. Hollander: Yes. Everybody in the section at that time worked on the case. Everybody's name is in the Supreme Court Reporter. Covington & Burling handled the case for the plaintiffs. Sweeney also hired – the first time I had known of – an outside lawyer. He hired Eberhard Deutsch, who was a famous admiralty lawyer in New Orleans, to handle the case for the government before the Supreme Court.

Howard Westwood was at Covington & Burling. Eberhard Deutsch was a very good New Orleans lawyer. Both he and Westwood argued the case on behalf of the claimants before the United States Supreme Court. They lost the case in the Court of Appeals for the Fifth Circuit. But I think under Deutsch's prodding, and the help of this guy Morton Liftin, whom I referred to before, they were able to get a reversal. That case by far, it makes the *Feres* litigation look silly. It really does. They were very important principles.

What Sweeney had done, under Liftin's and Eberhard Deutsch's recommendations, was assign a different issue – there were about seven main issues in the case – I was assigned a relatively important, probably less controversial issue than the others on the staff were. The part of the case I dealt with was that under the terms of the Federal Tort Claims Act, no theory of absolute liability for engaging in businesses involving extra-hazardous instrumentality – that's what we labeled this particular disaster as resulting from – is available under the Tort Claims Act. I had had a couple

of victories on that issue in the federal appellate courts and the Supreme Court, really without analyzing it properly, went along with the government on that issue. And on a much more important issue, if the government – and this is crazy (laughs), how loosely Congress can fashion legislation that results in billions of dollars of government giveaways – the main issue, and the one that has really cost the government much more, is that if the government is engaged in the discharge of a discretionary function and that results in disaster or an accident, that the government cannot be held liable for negligence in the exercise of the discretionary function.

So we were arguing, successfully, that was not my part of the case, that Army personnel had the discretion to decide whether for 100 square feet of fertilizer grade ammonium nitrate that's being stored in the hatches of the vessel, I think it was called *Grandcamp*, you would have to show that it was negligent for them to assign such a large quota of cubic air space with each 50 or 100 bags of fertilizer grade ammonium. That too, of course, dates back over fifty years, and nothing has been done to even amend the Tort Claims Act.

Ms. Feigin: You disagree with that?

Mr. Hollander: Yes. They should change it. Not my part of the case (both laugh). I was convinced that we were absolutely right. I remember talking about the *Dalehite* decision with Simon Sobeloff who had initially been chief judge of the Court of Appeals of Maryland and later was finally nominated to the

Fourth Circuit Court of Appeals. He was really outraged. Judge Parker on the Fourth Circuit Court of Appeals had no problem at all with the government's position that I was advocating, that it's a theory of law based on strict liability for engaging in extra-hazardous activity. Parker could see no problem at all in excluding all of those torts from the coverage of the Tort Claims Act. I remember Sobeloff commenting to me once that Parker was just plain stupid in reaching that result.

Ms. Feigin: When you had those discussions with Sobeloff, those were after-argument discussions –

Mr. Hollander: Yes. Jack Eldridge was one of the best guys we ever had on the appellate staff. Before he joined the appellate staff, he had been Sobeloff's law clerk up in Annapolis. He also succeeded Sobeloff as not chief judge, but as one of the associate judges on Sobeloff's bench after Sobeloff left Annapolis. I had been over there a few times, not as a guest of Sobeloff's but as a guest of Eldridge's, and Sobeloff was there..

Ms. Feigin: To go back for a minute to the RFK story and the carpool and the paychecks.

Mr. Hollander: This guy Jack Dabit (sp?), who lives probably less than half a mile from here, had been a member of our carpool – we had four of us in the carpool – for about six or seven years. That covered the time that Robert Kennedy was attorney general. For a couple of years, Dabit was actually sharing an office with Kennedy. This was in his first incarnation. Before Robert Kennedy became attorney general, he was a staff attorney in the Criminal Division, put

there primarily by Joseph McCarthy, because Robert Kennedy, in his non-attorney general incarnation, detested Jimmy Hoffa. Robert Kennedy had been working as a staff attorney at the Justice Department, trying to hunt down Jimmy Hoffa and his cohorts.

Dabit shared an office with Robert, and Robert Kennedy finally turned up becoming a father eleven times. Dabit had also by that time become a father ten times. It really sent Dabit crazy when, waiting for the minute that the secretary came around with the paychecks every second week, and Robert Kennedy would never even open up his desk for months after the checks came in (laughs).

Ms. Feigin: This was before direct deposit, obviously (both laugh).

Mr. Hollander: Yes, definitely. Dabit once asked him about it. Bobby Kennedy was very genteel in his response. I think I would have been inclined to say, well that's my business, not yours, but Kennedy explained to him that he is the beneficiary of two or three big trusts so that he doesn't have to deposit a check (Feigin laughs).

Ms. Feigin: Obviously you dealt with a lot of attorneys general and a lot of AAGs and SGs and I wonder if we can go through some of them, the ones who stand out in your mind. And you worked with a lot of incredible people in your section.

Mr. Hollander: That's true. People like Oscar Davis, Liftin, Dan Friedman, Mel Richter. They really furnished me with the kind of help that I really needed. I think

for the first six months at Justice, they were throwing so many things at me that I felt at sea. All of those people really were very, very helpful.

Ms. Feigin: You dealt so much with the solicitors general, certainly in the early years. You've talked a little bit about Sobeloff. But the others under whom you served –

Mr. Hollander: Erwin Griswold was tops.

Ms. Feigin: Tell me why.

Mr. Hollander: First of all, if he called you up to his office, if he had some questions to ask, the conversation would never last more than ten or fifteen minutes. He would tell you just exactly what he wanted to find out and zero you in on potential solutions to the questions that he himself had already formulated in his own mind. He obviously was not looking for help. He was looking for help in selecting what seemed to him to be the necessary option that whomever he had called up would choose.

I've told you about going over to England in '79 when there was the outbreak of the Khomeini revolution and his deposing the Shah. When I went there, I was surprised to find that the ambassador to St. James was Erwin Griswold. What also astounded me, I was wondering why he was so knowledgeable about funds frozen by the United States Treasury Department and all of the legal ramifications where the funds being frozen, as they were by President Carter in 1979, whether those frozen funds, even though in the possession of a branch bank of an American bank – Let me back up a little.

Of the eight billion dollars seized by Carter, sixty percent of it, more than half, were funds that Carter had seized while physically they were in Parisian and London branches of American-owned banks.

The revolutionary party which had taken over got a number of law firms, at least six of them, working on the case. Their theory was that whatever is resting in branch banks of American corporations in vaults or deposits in branch banks owned by the United States in Paris or London, their theory was that the presidential executive power of Jimmy Carter had absolutely nothing to do with the disposition of those assets. And actually the case went up to the highest court in London and the highest court in Paris and they never even resolved that question. Instead, what happened was that the new government of Iran was eager to find some justification for it to release the seventy-five hostages that they still had locked up. These hostages were former employees at the United States Embassy in Teheran. That question was never really resolved. Instead, what the Iranians offered, because they knew that public pressure throughout the world was mounting because here was three-and-a-half months after the revolution, after the Ayatollah took over power, that the hostages were still languishing –

They weren't in jail exactly; they were really living it up in the embassy. They were having a good time. Many of them thought that, in addition, they had solid lawsuits against the Iranian government.

Ms. Feigin:

Hadn't some of them been abused while they were in custody?

Mr. Hollander: That's exactly right. Some of them claimed that their conditions were horrible but from the reports we were getting through the American Embassy in London, it really wasn't a bad life for them. They weren't too eager to come home. There were obviously some cases of mistreatment.

Ms. Feigin: How was Griswold –

Mr. Hollander: Griswold, I was shocked. I thought I had been briefing myself on the question of extraterritorial seizure. A president of the United States seizing and confiscating funds located overseas on the theory that the branch bank in which they were located was a branch bank owned by the United States bank. That was the Carter theory. The other theory, espoused by the Iranian government – actually advocated by some Russian law firms on behalf of the Iranian government – was that every state has sovereign jurisdiction over all the materials and assets located physically in that jurisdiction. It went to the two highest courts in both England and France.

Toward the end of that negotiating period for the release of our hostages, Iran made steps to try to negotiate a break in the logjam, to work out some compromise arrangement so far as the return of the bank deposits owned by the American banks and the return of the hostages. What the Iranian government finally said, you return to us sixty cents on all the dollars you've frozen, and we in turn will guarantee that every single one of the hostages will be returned to the United States the day Reagan becomes president. That sort of broke that logjam.

To come to Griswold: Griswold in the interim, after he left the department and before he became ambassador, not only had been dean at Harvard Law School, but had specialized in courses involving the issue as to whether or not there can be extraterritorial vesting of other assets frozen by any country where the asset itself is physically located in another sovereign's jurisdiction. So it was a pleasure. I really had unnecessarily done work (Feigin laughs). This guy knew everything about it! It was amazing.

Ms. Feigin: And of course he knew you independently –

Mr. Hollander: He didn't really know me. I didn't have too many opportunities to be speaking with Griswold. I had been called up to his office about four or five times. In these conversations where he would outline the problem and the potentially optional solutions. Nice guy, very nice guy.

Ms. Feigin: Looking at the list of SGs you worked under, you've spoken about Sobeloff, and you worked under Rankin, Griswold, Marshall, Cox, Bork and McCree, is there anything you would want to remember about them?

Mr. Hollander: What I remember about Marshall – I was up in his office a couple of times when he made it clear to me that he does not like to hear anybody refer to blacks as other than Negroes. He just wants them known as Negroes. That's what they are; that's what they always have been. So far as he was concerned, it was inappropriate. That was the period of time when people were confused between browns and blacks. He said no need for any difficulty on that; they're *Negroes*! I don't know if he reiterated views like

that after he got on the bench but that's what I remember about him.

Cox took a very close (**indistinguishable**) at our office's work. In fact, at one point, he misled me because he had a student while he had been dean at Harvard. He called me up. He was the only one who ever personally referred a Harvard student for employment in my office. I don't think there was any exception to that. Court of appeals judges like Sobeloff had done that regularly. In fact, this guy John Eldridge, Sobeloff was apologizing that the SG's office had not latched onto Eldridge.

Cox called me with one recommendation. It was a ten-to-fifteen-minute recommendation. It proved to be a disaster.

Ms. Feigin: That's your major memory of Archibald Cox?

Mr. Hollander: Yes. That's how I think of him..

Ms. Feigin: What about Bork, did you have any contact with him?

Mr. Hollander: Yes, I had some contact with him. Not really any worthwhile contact. I thought some of his ideas were way out. I forget what the nature of the cases were, but he seemed to imply that we were reaching for too much. It had to do with grants-in-aid to the states from the federal Congress. I don't remember the specifics.

Ms. Feigin: And McCree, who was your last. Did you deal with him?

Mr. Hollander: Just superficially. I think he had been a former court of appeals judge.

Ms. Feigin: I think the Sixth Circuit.

Mr. Hollander: My contacts with the SG's office were not numerous.

Ms. Feigin: Next time maybe we can talk about some of the judges you did have contact with. And the AAGs, because that's where you did have significant contact. We should save that for another time because there's a lot of them.

Mr. Hollander: I did spend a lot of time. Douglas was our assistant AG I think in the 50s.

Ms. Feigin: I actually have a list. John Douglas, '63-'66.

Mr. Hollander: That would put him there with Kennedy and Johnson. George Cochran Doub is the guy who put me up for the appellate staff chief job. I never realized there were so many AAGs. There's a whole page full.

Ms. Feigin: There was a period when AAG was a real jumping-off point.

Mr. Hollander: Heading the list is Burger of course. He went on to become a judge on what I still call Sirica's court (Feigin laughs). William Orrick was a nice guy. He
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w Morton Hollander died on April 17, 2008 before his Oral History /ay. He always
was completed. cause his office
was on the same side of the building as mine was.

Ms. Feigin: Another thing we should discuss next time too is that you were there obviously during the time of Nixon and *Watergate* and there's a lot connected with that. That would probably be useful to discuss as well.

Mr. Hollander: I look forward to it.

Morton Hollander died on April 17, 2008 before he could complete his oral history.