File; Legal Adviser. Justice

Office of the Attorney General
Washington, D. C. 20530

December 9, 1979

Mr. Roberts Owen
Legal Adviser
Department of State
Washington, D. C.

Dear Mr. Owen:

This will serve to appoint you a Special Assistant to the Attorney General for the purpose of appearing in and arguing before the International Court of Justice in the matter of United States v. Islamic Republic of Iran. This will authorize you, under the provisions of 28 U.S.C. § 516, to serve as a counsel for the United States in this matter.

Sincerely,

Benjamin R. Civiletti
Attorney General

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THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

March 7, 1980

John M. Harmon, Esq.
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Dear John:

As you will see from later portions of this letter, it is arguable that I should now be writing directly to the Attorney General (to whom the matter should be referred if you consider it appropriate), but because it is my impression that the problem I am now addressing arises from a legal conclusion reached by your Office, I think it may be appropriate to address my comments in the first instance to you.

The immediate subject matter is the Tehran hostages case now pending before the International Court of Justice and the responsibilities of our two Departments with respect thereto. I recall that in late November or early December, some time before the oral argument of December 10, 1979, you indicated to me that there might be a view within the Department of Justice that the State Department could not represent the United States in the ICJ litigation without some sort of authorization from the Department of Justice. Your comment surprised me, because my understanding was that the State Department had traditionally represented the United States in all such international proceedings, but I thought no more about the matter until I received the Attorney General's letter dated December 9, 1979, which suggests that the litigation responsibilities of the Department of Justice under 28 U.S.C. § 516 extend to the adjudication of disputes between the United States and other countries before international tribunals.

In subsequent discussions of the matter we were told that the Justice Department might have documentation to show

that for some period of time it has interpreted 28 U.S.C. § 516 in the fashion indicated in the letter of December 9 (i.e.,.to show that in a number of prior international cases the Justice Department has exercised such statutory authority). I deferred any response to the December 9 letter pending a search for such documentation by your Office, but I have recently been informed that no such documentation exists. In short, as I understand it, the December 9 suggestion as to the applicability of 28 U.S.C. § 516 to international proceedings represents a new departure.

While your Office was searching its records, mine undertook a study of the statute and the history of U.S. participation in international proceedings, and the results are set forth in the enclosed memoranda. Our conclusion is that the statute is limited in its applicability to domestic courts and that participation by the United States in international adjudications falls within the Secretary of State's responsibility for the conduct of foreign affairs under the direction of the President.

With all due respect we think that it is clear, as a matter of both long-standing practice and common sense, that the question of whether the United States will participate in a proceeding before an international tribunal, as well as the question of the positions that will be asserted, are questions of foreign policy which are intimately linked with other aspects of our foreign relations. Recognizing its responsibilities in this area, this Department has quite consciously developed a unique expertise with respect to the issues which arise under customary international law and under the many treaties and international conventions to which the United States is party. To a very large extent, as you know, the particular legal interpretation to be espoused by the Government of the United States in a particular situation is necessarily a reflection of our current foreign policy at the time.

This is particularly true of the positions taken by the United States before the International Court of Justice, the "principal judicial organ of the United Nations" under Article 92 of the U.N. Charter. Foreign policy considerations govern the timing and nature of our participation in proceedings before the Court, just as they do with respect to our participation before other U.N. legal organs (e.g., the Sixth (Legal) Committee of the General Assembly, the International Law Commission, and plenipotentiary conferences

concerning multilateral treaties). The point is illustrated by the fact that in the Tehran hostages case itself the timing of the litigation and the content of the U.S. positions have been determined by the State Department in the light of its on-going negotiations with the Government of Iran.

Having summarized our position to the effect that 28 U.S.C. § 516 has no applicability to proceedings before international tribunals, I hasten to add that this Department and this Office will always be more than willing to cooperate fully with the Department of Justice in the conduct of both domestic and international litigation.

Sincerely yours,

Roberts B. Owen

Enclosures:
As stated.

Revised as of May 15, 1981

MEMORANDUM OF LAW

Subject: Applicability of 28 U.S.C. §§516 and 519 to Intergovernmental Litigation

Section 516 of Title 28 of the U.S. Code reads:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

A companion section 519 reads:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States Attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

The issue is whether these sections apply to proceedings in international tribunals which have traditionally been handled by the Department of State as part of the management of foreign affairs problems.

Appended to this memorandum is an historical survey of the international arbitrations and adjudications to which the United States has been a party over the last 200 years. The survey, which encompasses nearly 100 international cases, demonstrates that the Department of State has uniformly controlled the conduct of all such litigation from the decision to institute proceedings through the implementation of the award or judgment. Only in a handful of cases has there been any Department of Justice participation at all, and in these cases the Department of State retained the lead role while seeking and obtaining appropriate legal assistance from the Justice Department.

This practice has never been questioned. No record has been found of any instance in which the Department of Justice purported to authorize any State Department official to act on behalf of the United States. Rather, except in the cases where the President himself has designated the

United States Agent (i.e., the official in charge of the litigation), the Secretary of State or an officer acting under his authority has designated the Agent, and control over the conduct of the litigation has remained with the Department of State. Funding has come from Department of State appropriations.

The conclusion of the present memorandum is that 28 U.S.C. §§516 and 519 neither require nor justify a change in the traditional practice. On the contrary, the legislative history of these provisions demonstrates that they were not intended to apply to intergovernmental litigation.

Legislative History of 28 U.S.C. §516

The predecessor of §516 was contained in the act that created the Department of Justice (act of 22 June 1870, c. 150, s. 14 (16 Stat. 164)). The provision became §361 of the Revised Statutes, which read:

> The officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments, and the heads of Bureaus and other officers in the Departments, to discharge their respective duties; and shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any officer thereof, as such officer, is a party or may be interested; and no fees shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the Department of Justice, except in the cases provided by section three hundred and sixty-three [concerning employment of attorneys and counselors by the Attorney General]. (Emphasis added.)

This provision became §306 of Title 5 of the U.S. Code and was retained in substantially identical form until the 1966 revision of Title 5.

In 1966 several significant changes were made. The first clause relating to rendering of legal opinions and services was deleted as obsolete: the Revision Note indicates that other Federal departments and agencies had long been employing attorneys to advise them in the conduct of their official duties. The second clause was revised and became

28 U.S.C. §516; and the third clause was revised and became 5 U.S.C. §3106.*/

The revision of the second clause is of primary interest for the present issue. The Revision Note to §516 gives the following explanation for the changes:

> The section concentrates the authority for the conduct of litigation in the Department of Justice. The words "Except as otherwise authorized by law," are added to provide for existing and future exceptions (e.g., section 1037 of title 10). The words "an agency" are added for clarity and to align this section with section 519 which is of similar import. The words "as such officer" are omitted as unnecessary since it is implied that the officer is a party in his official capacity as an officer.

Interestingly, the Revision Note does not explain the change that is of most significance for present purposes. Section 516's predecessor clearly did not apply to foreign or international litigation, since it was limited to "suits and proceedings in the Supreme Court and in the Court of Claims" [emphasis added].**/ The question arises, therefore, whether the 1966 deletion of the italicized phrase was intended to expand the coverage of the section to encompass intergovernmental litigation.

The answer is no. The legislative history establishes beyond any doubt that Congress intended only to codify, and not to make substantive changes in, the preexisting statutory provisions:

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*/ 5 U.S.C. §3106 now reads: "Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice. This section does not apply to the employment and payment of counsel under section 1037 of title 10."

**/ Presumably the italicized phrase derived from the fact that for many years the United States could be sued only in the Supreme Court and the Court of Claims. Cf. United States v. Daniel, Urbahn, Seelye and Fuller, infra, 357 F. Supp. at 856, n.6. Subsequently additional domestic courts were given such jurisdiction (e.g., the Federal District Courts), thus making it appropriate in 1966 to expand the statute to encompass litigation in such courts.

> Like other recent codifications which have been previously enacted into law..., there are no substantive changes made by this bill... It is sometimes feared or assumed that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if there were the usual kind of amendatory legislation from which it can be inferred that a change of language is intended to change substance. The committee wishes to express that in a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantially unchanged. [citations omitted]

H.R. Rep. No. 901, 89th Cong., 1st Sess. 3 (1965); S. Rep. No. 1380, 89th Cong., 2d Sess. 20-21 (1966); 112 Cong. Rec. 17011 (1966). The Revision Note to §516 is quite explicit that no substantive changes were intended. It begins: "The section is revised to express the effect of the law."

The courts have construed §516 accordingly -- i.e., as not intended to expand the substantive responsibilities of the Department of Justice. See United States v. Daniel, Urbahn, Seelye and Fuller, 357 F. Supp. 853, 857-58 (N.D. Ill. 1973):

> "The change was to merely rearrange the then existing law, and the Senate Committee on the Judiciary rejected proposed amendments when they believed they 'constituted a substantive change in existing law which is not within the concept of a codification.' 112 Cong. Rec. 17010 (1966). In light of these intentions of Congress in passing this codification, §516 should be strictly construed."

Legislative History of 28 U.S.C. §519

A similar conclusion is justified with respect to what is now 28 U.S.C. §519. That provision, which also took its present form in the 1966 recodification, was derived from the former 28 U.S.C. §507(b), which in turn was derived from §317 of Title 5 of the 1940 code and §362 of the Revised Statutes. In relevant part the latter provision read:

> The Attorney-General shall exercise general superintendance and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties....

No intent appears from this provision to apply its principle to foreign or international litigation, and none can be inferred from either the 1948 or the 1966 codifications.*/

Conclusion

For two hundred years the Department of State has exclusively handled and funded intergovernmental proceedings before international tribunals. From its inception in 1870, the Department of Justice has had exclusive responsibility for U.S. litigation in the domestic courts. In 1966 the statutes governing the latter responsibility were codified but since it is clear that in 1966 Congress did not intend any substantive change in the Justice Department's responsibility, those of the Department of State remain as they have always been.

*/ "[A] well-established principle governing the interpretation of provisions altered in the 1948 revision is that 'no change is to be presumed unless clearly express.' Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228 (1957)." Tidewater Oil Co. v. United States, 408 U.S. 151, 162 (1972). See S. Rep. No. 1559, 80th Cong., 2d Sess. 1-2 (1948); H.R. Rep. No. 308, 80th Cong., 1st Sess. 1-8 (1947).

APPENDIX

HISTORICAL SURVEY OF INVOLVEMENT OF DEPARTMENTS OF STATE AND JUSTICE IN INTERNATIONAL ARBITRATIONS AND ADJUDICATIONS

I. INTERNATIONAL COMMISSIONS AND TRIBUNALS THROUGH 1900

From the founding of the Republic through 1900 the United States was a party to more than 40 proceedings before international arbitral tribunals, mixed claims commissions, and other adjudicatory bodies. The descriptions of these cases by Professor John Bassett Moore in his History and Digest of the International Arbitrations to Which the United States Has Been a Party (1898) include many details on the selection of the agents and counsel for the United States and the roles they played in the development of the U.S. case.

The pervasive control by the Secretary of State over all aspects of U.S. participation in international proceedings clearly appears from Moore's discussion. Not only was the Secretary responsible for negotiation of treaties of arbitration when other methods of dispute settlement had failed, but he also generally selected and instructed the agents and counsel, made decisions on the evidentiary facts and legal argument to be presented, corresponded with the tribunal, and ultimately decided whether and how to implement the tribunal's decision.

Sometimes the Secretary of State was himself the United States agent in the proceedings.1/ In cases in which the President did not designate the agent, the Secretary usually did so, and he frequently designated assistant agents or counsel to aid in the preparation of the case.2/ Sometimes the agent was a diplomat assisted by counsel from the federal or state service or the private bar; sometimes he was a distinguished private lawyer.3/ Moore documents many examples showing the Department of State instructing the agents and counsel on the conduct of the case.4/ The Department also arranged for the payment of expenses involved in the proceedings, including on occasion payment to U.S. district attorneys for their assistance in preparing the case.5/

The reasons for Department of State control over the management of international dispute settlement proceedings are clear. Frequently there were parallel negotiations going on in an effort to resolve or narrow the claims submitted to the tribunal.6/ Sometimes, as in the landmark Alabama case, questions arose during the course of the proceeding as to the correct interpretation of the treaty conferring jurisdiction on the arbitrators;7/ and the Department of State was the proper agency either to resolve the issue by further negotiations with the opposing government or to present the argumentation

and proofs to the tribunal on the negotiating history of the jurisdictional clause. In cases before claims commissions, the Department was the channel of communication between the claimant and the commission just as it would be the channel of communication with the foreign governments upon espousal of a claim.8/ Ultimately, the Secretary would decide whether to accept the arbitral award as a settlement of the dispute and would take the steps necessary to implement it.9/ As the umpire in the Panama Riot case put it, the Secretary of State is "the most natural and competent judge on international questions."10/

Only in a handful of cases has the Justice Department had any involvement at all, and the special circumstances of each deserve attention.

In one of the 43 cases discussed by Moore, Congress specifically provided in the act of June 30, 1797[11]/ that the agent or agents should be under the direction of the Attorney General. The issue concerned debts owing to British creditors that had been confiscated by State enactments during the Revolutionary War. However, the board ruling on the cases dissolved when its American commissioners withdrew after a breach with their British colleagues. The matter then reverted to the Secretary of State, who instructed the minister at London either to negotiate a new arbitral convention with the British foreign ministry or to agree with the British Government on the amount of a lump sum payment in satisfaction of the claims. Ultimately the British Government accepted £600,000 in settlement.

In another instance the Solicitor General was the U.S. agent in an arbitration with Haiti over the claims of two U.S. citizens against that government.12/ The arbitrator ruled in favor of both claimants, but Haiti asked the Department of State to reopen the award on the grounds, inter alia, of clear mistake and newly discovered evidence. This was done. The Secretary of State reported to the President, who in turn reported to the Congress, on the circumstances justifying the decision of the Executive Branch not to enforce against Haiti an award which the United States agreed was unconscionable.

Apart from these two instances of direct Justice Department participation in the conduct of the case, each of which actually supports the view that foreign relations considerations predominate in the handling of international proceedings, the

only involvement of the Attorney General in the cases discussed by Moore is in rendering opinions to the Secretary of State at his request on selected issues of law.13/ In the Halifax Commission case, an opinion of the Attorney General on the need for unanimity in the tribunal's decision was not accepted by the U.S. Government; the Secretary of State advised the U.S. commissioner on the tribunal of his decision after consultation with Secretaries of War and of the Treasury that a majority decision would be considered binding.14/

II. TWENTIETH CENTURY ARBITRATIONS

The twentieth century practice with regard to the management of international litigation is entirely consistent with the nineteenth century practice. A few illustrative examples are the Shufeldt Claim (Guatemala v. United states), 2 R. Int'l Arb. Aw. 1079 (1932)1/ the Tripartite Claims Commission (United States, Austria and Hungary), 6 R. Int'l Arb. Aw. 1 (1929), 2/ and the U.S.-German Mixed Claims Commission, discussed in Z.&F. Assets Corp. v. Hull, 311 U.S. 470, 488 (1941). In these, as in all similar cases for which documentation is available, the agent was instructed by and reported to the Department of State.3/ Instances in which the Department of State's Solicitor or attorneys from the Office of the Legal Adviser served as agent are enumerated in the attached memorandum dated April 21, 1947, prepared by Marjorie Whiteman.4/

More recent examples include U.S. participation in three international aviation arbitrations, two with France and one with Italy.5/ In each of these the agent and deputy agents came from the State Department. They were assisted by attorneys from the Civil Aeronautics Board and Department of Transportation and the private bar as counsel and expert advisers. There was no Justice Department participation in any of these arbitrations. Funding was from Department of State appropriations.6/

III. CASES BEFORE THE INTERNATIONAL COURT OF JUSTICE

The United States has participated in 24 cases before the International Court of Justice: 8 contentious cases as applicant, 3 contentious cases as respondent, and 13 advisory cases.

In every one of the eleven contentious cases the Legal Adviser of the Department of State was Agent for the United States.1/ He had a Co-Agent in one case, Interhandel, the only one of the 24 cases apart from the Tehran case in which

any Department of Justice participation is recorded.2/ The Legal Adviser was assisted by counsel in 4 contentious cases: in Interhandel attorneys from the Departments of State and Justice and the Georgetown University Law School were counsel; in Rights of U.S. Nationals in Morocco a State Department attorney and mission personnel and a member of the private bar were counsel and expert advisers; in Aerial Incident of 27 July 1955 the Special Assistant to the Legal Adviser was counsel; and in the Tehran case the Attorney General and a Deputy Legal Adviser of the State Department were counsel.

In Interhandel, in which actions of the Justice Department's Alien Property Custodian were central issues, the Co-Agent delivered the portion of the oral argument at the interim measures phase concerning the U.S. local proceedings, but the Legal Adviser made the major presentation at this phase and the only presentation on behalf of the United States at the preliminary objections phase. In the Tehran case the argument on interim measures was divided between Mr. Owen and Mr. Civiletti. In every other contentious case in which there was an oral argument, the Legal Adviser made the presentation on behalf of the United States.

In the advisory cases, the general U.S. practice was to submit unsigned written statements,3/ though in the two earliest advisory cases letters to the registrar were signed by the Secretary of State.4/ Where the United States participated in the oral proceedings, the presentation was always made by the Legal Adviser,5/ with one exception.6/ Sometimes the attendance of other Department of State attorneys is also noted in the court records.7/

Thus in two of 24 cases the Justice Department has had some participation -- once where domestic U.S. legal proceedings were involved (Interhandel) and once where the Attorney General appeared at the President's direction (Tehran). In the other 22 cases the litigation was entirely directed (and funded) the Department of State.

Footnotes to Part I (all citations are to chapters and pages in J. B. Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, Vols. 1 and 2 (1898)

1/ In the Fur Seal arbitration, ch. XVII, John W. Foster was commissioned as agent June 6, 1892. On June 29, 1892 he became Secretary of State and held that office until February 23, 1893 (pp. 805-807).

The Secretary of State also acted as agent in the Whale Ship "Canada" case, ch. XLI, p. 1736.

2/ Claims of the Hudson's Bay and Puget's Sound Agricultural Companies, ch. VIII, pp. 240-41; Halifax Commission, ch. XVI, p. 727; Panama Riot, ch. XXVIII, p. 1381.

3/ For example, in a boundary case the agent was a native of the Maine district that gave rise to the boundary dispute, and at the time of his appointment as agent was Attorney General of Massachusetts. St. Croix River, ch. I, p. 8; see also Islands in the Bay of Fundy, ch. II, p. 52. Other agents had had distinguished diplomatic careers, and sometimes had served as the minister charged with negotiations for the resolution of the dispute in question. See, e.g., Northeastern Boundary, ch. IV, pp. 87, 90-91.

4/ See, e.g., St. Croix River, ch. I, p. 8; Geneva Arbitration (Alabama Claims), ch. XIV, p. 557 n.1; French and American Claims, ch. XXIV, pp. 1141-43; The Brig "Macedonian," ch. XXX, p. 1462.

5/ French and American Claims, ch. XXIV, p. 1160; Peruvian Claims, ch. XXXVIII, p. 1640 n. 2.

6/ See, e.g., Alabama Claims, ch. XIV.

7/ Id.

8/ See, e.g., Rights and Duties of Neutrals, ch. X; French and American Claims, ch. XXIV; U.S. and Mexican Claims, chs. XXVI and XXVII; Panama Riot, ch. XXVIII; U.S.-Chilean Claims, ch. XXXI.

9/ See discussion of the Halifax Commission case, infra; see also U.S. and Mexican Claims, ch. XXVII, pp. 1333-35 (investigation by Secretary of State of charges of fraud in the presentation of claims); Claims of Pelletier and Lazarre, ch. XLII, pp. 1793-1803 (report by Secretary of State on decision not to enforce unconscionable award). See also Frelinghuysen v. Key, 110 U.S. 63, 67-69 (1884), and La Abra Silver Mining Co. v. United States, 175 U.S. 423, 430-32 (1899), concerning the reopening of an arbitral award upon the recommendation of the Secretary of State

10/ Ch. XXIII, p. 1408.

11/ Impediments to the Recovery of Debts, ch. IX, p. 278.

12/ Claims of Pelletier and Lazarre, ch. XLII, pp. 1751, 1793-1803.

13/ See Panama Riot, ch. XXVIII, p. 1407 (11 Op. Atty. Gen. 402); Claims Against Costa Rica, ch. XXXIII, pp. 1557-58 (10 Op. Atty. Gen. 450); "Georgiana" and "Lizzie Thompson," ch. XXXVI, p. 1602 (9 Op. Atty. Gen. 140); Peruvian Claims, ch. XXXVII, pp. 1630, 1638 n.1(7 Op. Atty. Gen. 229; 11 Op. Atty. Gen. 52).

14/ Ch. XVI, pp. 751-52 n.1 .

Footnotes to Part II

1/ See the Agent's report in Shufeldt Claim, Department of State Arbitration Series No. 3 (1932).

2/ See Report of Robert W. Bonynge, Agent of the United States Before the Tripartite Claims Commission (1930).

3/ The Hannevig case (Norway vs. the United States) is no exception. Although pleadings of the U.S. Government were signed by officials of the Department of Justice, the case was in essence a Court of Claims proceeding. No international forum for settlement of disputes was involved. A 1940 agreement with Norway, 62 Stat. 1798, provided for an exchange of pleadings by the two governments. If the two governments were unable to reach a settlement within a stated period of time, the entire record was to be submitted, with Congress's approval, to the Court of Claims. The case was, in fact, decided by the Court of Claims in 1959. 172 F. Supp. 651.

4/ The affiliation of two of the gentlemen referred to in her memorandum, Messrs. Metzger and Udy, appears from the respective arbitral awards. See Norwegian Shipowners' Claims (Norway v. United States), 1 R. Int;1 Arb. Aw. 307 at 312 (1922); Kronprins Gustaf Adolf (Sweden v. United States), 2 R. Int'l Arb. Aw. 1239 at 1244 (1932).

5/ 16 R. Int'l Arb. Aw. 11, 3 Int'l Legal Materials 668 (1964); 16 R. Int'l Arb. Aw. 81, 4 Int'l Legal Materials 974 (1965); __ R. Int'l Arb. Aw. __, __ Int'l Legal Materials ___ (Award of December 9, 1978)

6/ See §102 of the Departments of State, Justice, and Related Agencies Appropriation Act (Pub. L. 96-68, approved Sept. 24, 1979, 93 Stat. 419), which provides that funds appropriated to the Department of State under the Act shall be available for expenses of binational arbitrations (another title of this public law contains appropriations for the Department of Justice).

Footnotes to Part III

1/ The agents in these cases were:

-- Adrian S. Fisher: Rights of Nationals of the United States of America in Morocco (France v. United States)

-- Herman Phleger: Monetary Gold Removed from Rome in 1943 (Italy v. United States, United Kingdom, and France); Treatment in Hungary of Aircraft and Crew of United States of America (United States v. Hungary); same (United States v. USSR); Aerial Incident of 10 March 1953 (United States v. Czechoslovakia); and Aerial Incident of 7 October 1952 (United States v. USSR).

-- Loftus E. Becker: Interhandel (Switzerland v. United States); Aerial Incident of 27 July 1955 (United States v. Bulgaria); Aerial Incident of 4 September 1954 (United States v. USSR); and Aerial Incident of 7 November 1954 (United States v. USSR).

-- Eric H. Hager: Aerial Incident of 27 July 1955 (United States v. USSR) (after resignation of Loftus E. Becker)

-- Roberts B. Owen: United States Diplomatic and Consular Staff in Tehran (United States v. Iran)

2/ The Co-Agent was Dallas S. Townsend, Assistant Attorney General.

3/ The cases in which the U.S. statement was unsigned are:

-- Competence of the General Assembly for the Admission of a State to the United Nations

-- International Status of South West Africa

-- Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide

-- Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa

-- Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO

-- Admissibility of Hearings of Petitioners by the Committee on South West Africa

4/ Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter); Reparation for Injuries Suffered in the Service of the United Nations

5/ These were:

-- Herman Phleger: Effect of Awards of Compensation Made by the United Nations Administrative Tribunal

-- Eric H. Hager: Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization

-- Abram J. Chayes: Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)

-- John R. Stevenson: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)

6/ In the first case in which an oral presentation was made, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, the President appointed as the U.S. representative Benjamin V. Cohen, a former Counselor of the Department of State and member of the U.S. delegation to the U.N. General Assembly. 22 Dept. of State Bull. 444 (Mar. 20, 1950). He was assisted by Eric Stein of the Office of U.N. Political Affairs and subsequently by Leonard C. Meeker of the Office of the Legal Adviser.

7/ See Constitution of the Maritime Safety Committee of IMCO, supra; Namibia, supra.

Mr. Fahy
Mr. Howard
Miss Whiteman

April 22, 1947

Handling of cases to which the United States is a party before the International Court of Justice.

Article 42 of the Statute, it will be recalled, provides that parties to a case before the Court 'shall be represented by agents', that they may have the assistance of counsel or advocates.

The Rules of Court also take cognizance of the appointment of ats, counsel or advocates, providing, inter alia, that the appoint- t of an agent must be accompanied by a statement of an address for vice at the seat of the Court to which all communications relating the case should be sent (Article 35-5); that the original of every ading shall be signed by the agent (Article 40-1); and that the er in which agents, counsel or advocates shall be called upon to ak shall be determined by the Court, unless there is an agreement ween the parties on the subject (Article 53-).

The manner of appointing agents, counsel or advocates is, of rse, left to the states parties to the cases. In the United States, ause of the fact that the settlement of a case arising between this ntry and another state, or its nationals, involves matters of inter- ional policy, whether the settlement be by negotiation, mediation, ciliation, arbitration, or judicial settlement, the conduct of the element lies within the proper province of the Secretary of State, ing for the President in the conduct of the foreign relations. The per settlement of an international difference or dispute to which United States is a party is the responsibility of the Secretary of te.

Agent and counsel for this Government, reasoning by analogy from field of international arbitration, may be appointed either from in or without the Department of State. If the Congress in appro- iting money for the conduct of the case before the Court provided the selection of the agent and his staff in a particular manner direction of Congress would presumably be followed.

In the past, agents of the United States, who of course sign pleadings, etc., have generally received Presidential appointments; er members of the staff have normally received certificates, de- ations, or even mere letters of instruction from the Secretary of te.

Jacob

Jacob T. Metager, an Assistant to the Legal Adviser for many years, received a Presidential appointment on December 22, 1931, as Agent of the United States in the United States-Swedish arbitration, under the special agreement of December 17, 1930, involving a dispute with reference to the alleged detention by the United States of two Swedish ships, the Kronprins Gustaf Adolf and the Pacific.

Bert L. Hunt, an Assistant to the Legal Adviser, formerly in charge of the handling of claims, received a Presidential appointment as Agent of the United States under the protocol of January 20, 1931, between the United States and Egypt, in the so-called Salem case. He also received a Presidential appointment (March 3, 1932) as Agent of the United States under the general claims convention between the United States and Panama of July 28, 1926.

Fred K. Nielson, Solicitor for the Department of State, was appointed Agent of the United States before the Arbitral Tribunal established by the United States and Great Britain for the settlement of pecuniary claims, under the special agreement of August 18, 1910. He was appointed November 25, 1921, by letter signed by the Secretary of State and without additional compensation. He resigned his position as Solicitor in 1932 and on August 8 of that year received a new appointment as Agent, this time an appointment by President Harding "by and with the advice and consent of the Senate." I find that the reason for obtaining Senate confirmation in that instance is contained in the Department of State Appropriation Act of June 1, 1922, wherein an appropriation was made for the expenses of the arbitration under the 1910 agreement between the United States and Great Britain, "including salary and expenses of the tribunal, and of the agent, to be appointed by the President, by and with the advice and consent of the Senate." 42 Stat. 599, 607. The act contained no such provision with respect to counsel and other assistants although they were specifically referred to.

Numerous counsel for the United States in international arbitrations have been named without Presidential appointment. Thus, Stanley H. Udy was appointed Associate Counsel for the United States under the Special Agreement of June 30, 1921, between the United States and Norway, for the arbitration of the Norwegian ships cases. Mr. Udy received a certificate naming him to that position, signed by Charles Evans Hughes, Secretary of State, and dated June 8, 1922.

Each of the

Each of the persons named as counsel in the United States-British pecuniary claims arbitration under the special agreement of 1910 (Robert Lansing, January 15, 1912, Charles F. Wilson, January 15, 1912, Herbert H. D. Peirce, February 10, 1912, Joshua Reuben Clark, January 15, 1913 (resigned as solicitor, Department of State, March 3, 1913), Arthur P. McKinstry, January 1, 1916, Stanley K. Hdy, September 6, 1922, James Renwick Sloane, March 1, 1924), received a letter from the Secretary of State or the Acting Secretary of State designating him as such. Mr. Sloane received a letter and a certificate. A certificate, I understand, is issued by the Secretary of State, with the approval of the President.

Many of the persons named in the past as Agent or Counsel, or both, have been drawn from the staff of this Office; whether this is desirable depends of course upon the work-load, appropriations, familiarity with the case, etc.

L:Whiteman:jdv

Tab G
24

Office of the Attorney General
Washington, D. C. 20530

April 21, 1980

Roberts B. Owen, Esq.
The Legal Adviser
Department of State
Washington, D. C. 20520

Dear Mr. Owen:

I have your letter of March 7, 1980, concerning representation of the United States in the International Court of Justice. The letter and attached memorandum raise the question of the applicability of the litigation responsibility of the Attorney General to cases in the International Court of Justice.

Two provisions, 28 U.S.C. §§ 516 and 519, reserve to the Attorney General "the conduct of litigation in which the United States . . . is a party." A third, 5 U.S.C. § 3106, states the obverse of the same proposition--that other agencies shall not conduct litigation in which the United States is party but shall refer the matter to the Department of Justice. All three allow for exceptions "as otherwise authorized by law."

It seems plain that bringing a contentious or litigated proceeding before the International Court of Justice, as was done in United States v. Iran, is the conduct of litigation in which the United States is a party. In any case concerning the interpretation of a statute, the starting point must be the language of the statute itself. Lewis v. United States, 48 U.S.L.W. 4205, 4207 (U.S. Feb. 27, 1980). You suggest, however, that this principle ought not conclude the matter, and we therefore turn to the reasons that you offer.

Your memorandum analyzes the legislative history of the pertinent statutes and concludes that 28 U.S.C. § 516 is not applicable here. You point out that the 1966 codification was not intended to change the law. S. Rep. No. 1380, 89th Cong., 2d Sess. 20-21 (1966).1/ Nevertheless, the analysis concerning § 516 of Title 28, states, "The section concentrates the authority for the conduct of litigation in the Department of Justice." S. Rep. No. 1380, supra, at 205 which now appears as 28 U.S.C. § 516, note.2/ In commenting on this provision, the courts have recognized that the Attorney General's litigation power was meant to be "pervasive," S & E Contractors, Inc. v. United States, 406 U.S. 1, 12 (1972), and "if any [litigation] is conducted, it shall be done by the Department of Justice." United States v. Daniel, Urbahn, Seelye and Fuller, 357 F. Supp. 853, 858 (N.D. Ill. 1973).

It is true that the section was revised "to express the effect of the law," 28 U.S.C. § 516, note. If there had been preexisting law "otherwise authorizing" the State Department to conduct litigation independent of the Attorney General, then a different result would be indicated. Such authorization must be specific, however, to be viewed as an exception to "the Attorney General's plenary power over government litigation." ICC v. Southern Ry. Co., 543 F.2d 534, 537-38 (5th Cir. 1976). Not only is there no preexisting

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1/ The statements you cite in the Committee Reports, which indicate that there are no "substantive changes," refer directly to the enactment of Title 5 and not to amendments to Title 28.

2/ The language of the law conferring litigating authority prior to 1966 was narrower, referring only to suits in the Supreme Court and the Court of Claims. 5 U.S.C. § 306 (1964).

statute, but it appears that there is no formal opinion or agreement covering this matter that could be viewed as having the status of law.3/

You suggest that the statute is limited in its applicability to domestic courts and that another interpretation would interfere with the ability of the Secretary of State to conduct the foreign affairs of the United States. The responsibility of the Attorney General has not, however, been limited to litigation in domestic courts. 28 C.F.R. § 0.46. This Department regularly supervises litigation in courts in foreign countries. Such litigation frequently raises questions of international law and affects foreign relations of the United States. Domestic litigation has also involved both foreign relations and international law questions fully as much as cases in the I.C.J.4/ This fact does not, however, lessen the responsibility of the Attorney General for the conduct of such litigation. At the same time, the Department of Justice recognizes the need for

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3/ The effect and relevance of the early practice cited is not clear since, with the establishment of the Department of Justice in 1870, the Attorney General assumed responsibility for the legal work of the Department of State. Until 1931, the Solicitor of the State Department was an employee of the Department of Justice. R. Bilder, The Office of the Legal Adviser, 56 Am. J. Int'l L. 633, 634 (1962). The last significant litigated or contentious case prior to 1966, when § 516 was enacted, was Interhandel, which lasted from 1957 to 1959, and where representatives of both the Justice and State Departments appeared as co-agents. See 1957 I.C.J. Reps. 105 at 107-08. The present case, United States Diplomatic and Consular Staff in Tehran, is the first contentious case in the I.C.J. involving the United States since enactment of 28 U.S.C. § 516. Other United States involvement in I.C.J. proceedings since 1966 has related to advisory opinions.

4/ For example, a proposed treaty would vest the I.C.J. with jurisdiction to resolve fisheries and Outer Continental Shelf boundary disputes with Canada. The issues closely resemble litigation conducted by the Department of Justice presenting the very kinds of issues, both factual and legal, that are raised in domestic litigation.

close cooperation with the State Department on matters affecting foreign relations or with any other agency which has specialized experience necessary to the conduct of litigation.

I conclude, therefore, that litigated proceedings before the International Court of Justice are within the supervisory power committed to the Attorney General by 28 U.S.C. §§ 516, 519, and 5 U.S.C. § 3106. This does not mean, of course, that this Department intends to carry out this responsibility without the fullest participation by your Office. We look forward to such a continuing relationship.

Sincerely,

Benjamin R. Civiletti
Attorney General

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Office of the Attorney General

Washington, D. C. 20530

May 7, 1981

Honorable Alexander M. Haig, Jr.
The Secretary of State
Washington, D.C. 20520

Dear Al:

I understand that representatives of the State Department, including attorneys in the Office of the Legal Adviser, are currently discussing with officials of the Government of The Netherlands issues related to the implementation of the arbitration provisions of the agreement with Iran. Because this Department is directly responsible for certain aspects of the agreement that may be discussed with the Dutch Government and the Government of Iran, and will have the responsibility of representing the United States before the Claims Tribunal, I feel that it is appropriate for the Department of Justice to have direct participation in these matters.

A matter of major concern to me is the potential vulnerability to attachment or seizure of United States Government assets located in foreign countries in satisfaction of awards that could be entered by the Iran-United States Claims Tribunal pursuant to paragraphs 16 and 17 of the agreement with Iran. I understand that this issue is at least implicated in the ongoing discussions with Dutch officials.

Because both this issue and others having significance to ongoing litigation in this country and to the domestic legal ramifications of the agreement with Iran will undoubtedly continue to be raised as we move forward to full implementation, I believe a representative of this Department should be participating directly in any meetings or negotiations that may occur either in the United States or abroad. I would be very appreciative if you could have your personal representative on implementation of the agreement with Iran work with Assistant Attorney General Olson of my Office of Legal Counsel in order to make the necessary arrangements.

Sincerely,

Bill

William French Smith
Attorney General