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RONALD REAGAN ORAL HISTORY PROJECT

FINAL EDITED TRANSCRIPT

INTERVIEW WITH ABRAHAM D. SOFAER

February 27, 2007
Charlottesville, Virginia

Interviewers

University of Virginia

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Sofaer: I know you people don't serve as judges. You record people's positions, and they're all over the place, I'm sure.

Knott: That's right. This is a chance to tell your story.

Sofaer: Exactly. It's been one of my problems in Washington that I did not know how to deal with Washington. I had no prior experience in politics when I came to Washington, D.C., and I came in at a level and with responsibilities that I think exceeded my capacities at the time.

[Break]

Knott: So, Judge, you wanted to add some things to the briefing book?

Sofaer: First of all, I have never asked anyone to call me Judge. It's interesting that my enemies in Washington seized upon that as a way of humiliating me. It was ironic, but I thought it was an honor to serve as a judge. One of the ethical premises of that service is that you don't use that title to give yourself inappropriate leverage, especially in the courts. I've been meticulous about that, so I invite you to call me Abe—

Knott: I'll make a note of that.

Sofaer: Or Professor Sofaer, if the Abe is too informal for you.

Knott: Great, that's terrific. Again, why don't we start off—you mentioned that there were a few things in the briefing book that you wanted to comment on.

Sofaer: There are several things in the briefing book, but in terms of material that would be useful historically, I sent you an essay I wrote on my time as Legal Adviser. That was my first chance to really think about my work as Legal Adviser in a comprehensive way. It broke down into three major categories of activity, and I thought that would be useful to you.

Morrisroe: It was.

Knott: I agree.

Sofaer: It would be useful to me if I could have a copy in front of me during the discussion.

Morrisroe: Don't mind my markings.

Sofaer: I don't mind at all. Also, you have, I see, the [George] Shultz biography, or the book of his years there, and he mentions several items that were important that we did together and that particularly pertain to the President. When something reached Reagan's level of importance, and I was involved, it pretty much winds up in Shultz' book because Shultz is involved as well.

Then third, I have written an essay on Iran-Contra. I'm actually in the process of writing a book about Iran-Contra, but I haven't gotten past the first chapter. The first chapter deals with the ethical issues that were posed by my knowing that [William] Casey was going to lie in the Senate and how I had to deal with that in the State Department, because there was actually a lot of opposition in the State Department to my becoming involved—to try to protect the White House from itself.

Morrisroe: Interesting.

Sofaer: It is a very interesting phenomenon that the State Department didn't want to touch the White House, even to keep it from self-destructing. I wouldn't be surprised if it goes back to the [Richard] Nixon period as well, and might explain why the President just went down that road of self-destruction.

Knott: I'm sorry—I'm not sure I follow you on that. The State Department was afraid—they wanted to just stay out of it?

Sofaer: Yes, stay out of it. They thought I was dragging the Secretary and the department into what they called "the gutter." The "sewer," actually. I think the word was used by one of the top officials at a very critical meeting. I have asked my assistant to fax you that article, so that should arrive today and should be helpful to us in talking about Iran-Contra. That's it.

Knott: We thought perhaps the best place to start would be to simply ask you how it was you came to become the State Department Legal Adviser, and then we'll take it from there.

Sofaer: I think you have that story in one of the articles you took out of the newspaper or something.

Knott: Is there anything else that needs to be added to that story?

Sofaer: I don't know that there are any mistakes in that story. I can tell you that what happened from my point of view was that I had heard of Shultz' speech at the Park Avenue Synagogue in 1982, where he said that we cannot always wait for terrorists to attack us, we have to go and

attack them and preempt their attacks. I thought this was the first sensible statement made about preemption and the need for an “active defense,” as he phrased it.

My kids were going to the Park Avenue Synagogue Day School at the time. I lived on the East Side of Manhattan. I didn't get to see him make the speech, but I read a review of it and I heard from other parents about, “Isn't George Shultz amazing? What's going on here? We thought he was a Bechtel Arabist.” Several months later, when I heard from Len Garment that Shultz was considering me to be his Legal Adviser, I remembered that story, obviously, and it made a big difference to me that I would be working for someone who had, I thought, made a penetrating evaluation of the need for a whole new approach to this kind of crime.

So when I was asked whether I would like to meet with him, which was after the [Ariel] Sharon trial was over—it's interesting that he waited until that was over, because it did have some diplomatic ramifications, I assume. I had nothing to do with them; I just did my job as a trial judge. But when it was over, would I meet with him in New York? We met in a hotel and spent about an hour and a half together just talking about legal issues. He had read my book on the first 40 years of American Constitutional history relating to foreign affairs and war.

Knott: It's a great book, by the way.

Sofaer: Thank you very much, Steve, I appreciate that. It's the best thing I've ever done. He loved it. He thought the book was objective and helpful. He just thought it was refreshing to learn about what really happens in these situations.

Of course since then, I have read many biographies of some of the people who participated in those years that I hadn't read before. I must say my own understanding of those years has been greatly enriched since that time, particularly about people like [Henry] Knox, about whom I knew nothing. Now I know the role he played with [George] Washington in the Revolutionary War, which so endeared him to Washington. It explains why a guy who seemed pretty much out of his league intellectually was in Washington's Cabinet. [Thomas] Jefferson of course—and why did [John] Adams' name not come up a lot in those days? It was because he was not close to Washington at all. It was really quite interesting. I had no idea, because he was certainly much closer in political philosophy to Washington than anybody else in that Cabinet.

Anyhow, he liked the book and he wanted someone as Legal Adviser who he felt knew something about history, knew something about law, and was going to take a role in policy definitely as a lawyer, but in policy. So his concept of it, as he told me, was that I would not be sitting on the sidelines commenting on legal issues. I would be with him and his team following the development of issues so that I could give my advice in a timely way to help on each of those issues.

I was really thrilled to be with him. I could see his qualities, which are Washingtonian, truly. He has a dignity and a balance, a seriousness about everything he does, and at the same time, it's clearly not personal. He is warm, but he has aims. He has a purpose in everything.

Knott: There's a toughness about him, too.

Sofaer: Absolutely.

Knott: He was an ex-Marine, wasn't he?

Sofaer: Definitely an ex-Marine. I think he's still a Marine. [*laughter*]

Knott: Once a Marine, always a Marine—

Sofaer: I am three doors from him, and I'm involved right now in two major projects with him, which we can talk about if you like. So I'm very involved with him and I love it. He's really an extraordinary man. I sensed that. I knew what I was getting into in that sense—the best thing that could ever have happened to me because of the quality of the man. He said, "I'd really like you to work for me."

I said, "I really would like to work for you," and it was a done deal right then and there. Then he started going into what he would do for me, all these promises. You will be at this meeting and that meeting. I stopped him because I knew now he was going into the realm of fantasy. There's nothing in Washington that holds up of that sort. Either you're useful in a meeting or you're not. Either you develop a good relationship with the Secretary of State or you don't.

So I said, "It's fine, whatever. I hope it all works out and that I'm involved with you in a close and helpful way, but I realize that these things are political and there's no need for you to make any kind of promises of this sort. I'm happy to have the chance to work with you and to prove myself, whether I can be a contributor." That was it.

He told me then, "It's going to take about five or six months before you're confirmed. Just be patient. Don't expect anything sooner." And that was that.

I did go to the White House to have an interview with Fred Fielding, but it was just with Fred, it was not with the President. Fred was interested in what I was doing coming into a Republican administration.

Knott: Yes, we wanted to ask you about that. What were you doing?

Sofaer: Well, by that time I was completely turned off Jimmy Carter. First of all, I thought he had done a great job with the Camp David talks. He's a zealous man and he certainly has, I believe, the interests of the country at heart. But I thought the way he handled the Iranian hostage-taking crisis, the statement he made that we would not use force under any circumstances. Essentially Cy Vance had gotten him to make that commitment. Later Cy Vance objected to his using force and resigned. But his statement, I think, did more to extend the hostage crisis than any single thing, because it removed the uncertainty that it would have been so useful to have, even if you weren't intending to use force in that circumstance.

I thought it showed an amateurishness based on my knowledge of American history and the way I would have thought any of the Presidents that I so greatly admire would have handled that.

Then he was a big disappointment to me in many other ways. The moralistic way in which he approached the energy crisis was a great disappointment to me when the market could so easily have, and did, rectify the situation by simply letting people raise prices. Energy consumption went down within days and the price moderated immediately, and all of that regulation—I don't think you people are old enough, maybe you are, Stephen—

Knott: I am.

Sofaer: —to remember that we were assigned positions, like what day of the week you could go to get gas, depending on the last number of your license plate. It was totally amateurish. Then the worst of it was the anti-Semitic statements being made by some black leaders, which were not condemned by a number of people who were close to Carter, including the Vice President, who was then going to run for President. I could not understand how he could appear on a stage with someone who had refused to condemn the statement that the Jews were “a gutter people.” So I really was ripe for the picking in terms of Republican ideology and foreign affairs.

Knott: Could I ask you—had you already converted by 1980? Did you vote for Reagan in '80?

Sofaer: I definitely voted for Reagan in '80, absolutely. Then they asked me in the White House—I remember it was kind of funny. They did a really thorough job of research—“How come you voted in the Democratic primary?”

I said, “Because Ed Koch ran for mayor and I wanted to be sure Ed Koch got the nomination.” I had been a Democrat since I was in law school and supported Ed Koch and the Village Independent Democrats in the battle against Carmine De Sapio and the machine, which was a Democrat-on-Democrat battle. So I was always a good-government Democrat in that sense. What happened to me was foreign policy; that is what I was concerned with. I care about Israel, but more, I care about the United States and its foreign policy and its strength in the world.

I thought that Reagan had done a much better job in the first term than Carter had been doing, and had restored American credibility. He had shown he could be very practical. Now he had put this great Secretary of State into office who was truly an intellectual, a professor like me. So I was excited about that. I figured it made a lot of sense. I could transform into Republican because I really did feel very comfortable with the President, the Vice President, and the Secretary of State.

I can't say I felt comfortable with every other member of that team, and I have never supported a number of domestic positions of the Republican conservative wing. They knew that. I'm sure that has had a bearing on my future in the Republican Party. But I'm what you would call a [Nelson] Rockefeller Republican or an [Arnold] Schwarzenegger Republican. I care about the environment, care about race, care about women's rights and all those things, and why the party of [Abraham] Lincoln has, I think, degenerated into a party that calls on government intervention to restrict the exercise of individual rights is beyond my comprehension, but I guess it's to win elections.

Morrisroe: In meeting with Fielding, did that signal to you at the time, or later, that that would be an important avenue for you in communications with the White House, or did you view it as such?

Sofaer: I knew he would be an important avenue because he was the White House counsel and he would be convening, and did over the years convene, the important legal meetings in the administration. At the time, I regarded it as a check on me. Was I sufficiently reliable, from the Republican Party's point of view and the White House's point of view, to be given this post? I just told them what I thought. Whatever he asked me I answered honestly. I certainly did not tell him that I favored putting women in prison if they got abortions or anything like that. He did not ask. So it was a very congenial meeting.

I told him my background and explained why I believed I'd be very comfortable working for George Shultz and Ronald Reagan in the foreign policy arena.

Chidester: You said you didn't meet with Reagan at this time.

Sofaer: I did not.

Chidester: When was the first time you met with the President?

Sofaer: I thought of this because of your questions. The first time that I recall meeting the President was the day we terminated our commitment to the ICJ [International Court of Justice]. It was pretty soon after I took office.

The issue came up because there was something that had to be decided, a deadline of some kind. If we did not terminate our submission to the court, additional people could sue us, as Nicaragua did. I've written an article on this subject, so you know my position on it. It is unaccountable to me how any lawyer representing the United States could favor that submission to the court's jurisdiction. It gave the United States nothing and exposed us to lawsuits by others. Anyone we sued would have the right, because of the condition we had in our submission, to invoke the same condition and refuse to allow us to sue them. But since we were going to be restrained in using that right, we were going to be subject to suit while not actually utilizing the submission for our own benefit.

I noticed that there was a statement in your materials about England being the only state, after we terminated, to have a general submission to the court. But I want you to know, the British are very slick. It is true they do have a submission, but every time they get sued they have 60 days or something like that to simply decline to answer. You read their submission and you will see that it has unilateral powers to prevent England from being dragged into the court that are very protective of their interests. So their submission is just a matter of show, and ours I think was very harmful to us. I had no confidence that the ICJ would be objective in dealing with the United States on use of force issues.

I read the opinion in Nicaragua and particularly the part of the ruling declining to allow El Salvador to intervene even though the whole thing was about exercising collective self-defense

for El Salvador. How they could refuse to allow El Salvador to intervene and still have the pretension of being objective was amazing to me. I represent the United States. I was not there to please my colleagues in the American Society of International Law or the committees at the ABA [American Bar Association] or the international Bar, or my former colleagues at Columbia. I was there with a duty to represent the interests of the United States. It was crystal clear to me that we should terminate our submission.

I told the Secretary that we should terminate our submission. I gave him the reasons. He said, "Write that up." I wrote up a one-page memo with the reasons for termination and prepared an order for the President's signature one morning. As soon as it was ready, he said, "Come with me." It was right after the morning meeting. We went right to the basement, got in his car, and went to the White House. There was no warning that I was going to see the President of the United States or anything like that.

Walked right into the Oval Office with the Secretary of State, and in there were Don Regan, and I guess the head of the NSC [National Security Council]—maybe it was [John] Poindexter. I have a photograph with them in it of me shaking hands with the President on that day. He said, "What's this about?" He read it. He said, "Well." He asked me a couple of questions about it, sensible questions. "What about the other treaties?"

I explained to him that we were still submitting to the court in about a hundred different treaties, at least 50, and that this termination would not end our submission to the court in those treaties and that perhaps we needed to reexamine those treaties, but we had every reason to go to the court where it suited our interests and suited the interests of international law. We, in fact, were preparing a case with the Canadians and another case with the Italians in which we would be submitting to panels of the court, where we would be reasonably confident that we would get an objective determination on an issue that had no national security significance.

He thought that was sound. He was not antagonistic toward the court. but he understood my point that the court was certainly not a place where we wanted our national security decided. He signed the order right then and there.

Morrisroe: Did you sense then or did you learn later, was there any opposition in the Counsel's office or anybody else in the White House or Department of Justice?

Sofaer: No, there was no opposition. The only opposition that I sensed was with some of the lawyers in my office, in the Legal Adviser's office. That opposition had been greatly diminished once the court came out with its ruling on the procedural issue of its right to reach the merits.

There was a young lawyer in my office who was on the brief—actually he's from Virginia, I think. His name has slipped my mind now, but I can find it. He later worked with me on the Taba deal and he was really impressive, very professional, a hardworking guy. I had no idea what his political background was, but he really cared about the court, cared about international law. Most of the lawyers in my office were there because they cared about international law. They were trying to build up international law. You don't go to that office trying to tear down international law.

He said to me one day, “When I read that opinion, the stars went out of my eyes with regard to the ICJ.” That’s pretty much what happened to those kids. They understood that this was politics and that no matter how cogent their briefs, no matter how you wished that John Marshall were on the ICJ, because maybe the court would have had the wisdom to develop a structure for its decision making that protected it from these allegations of politicization, there was no John Marshall on that court. There is no John Marshall on that court.

So when the order was entered, there were clearly a lot of people in my office who would not have done that, because they wouldn’t have wanted to be remembered in American history as the person who had recommended the termination of the U.S. submission to the ICJ. But you know, that’s part of my job. I had to make the call and I made the call. That’s the first time I met Reagan.

I went over there—it was a relatively short meeting, but it was substantive. He signed the order right then and there. I took it back to the department with me and that was it. It was entered and submitted to the UN [United Nations].

Chidester: So this is the first substantive discussion you’re having with the President. We’ve read some historical accounts that Reagan wasn’t very intellectually curious. Can you give your sense of the kind of questions he was asking, how interested he was? These are very complex legal issues. Was he curious about these types of issues?

Sofaer: By that time he was certainly satisfied the ICJ could not be trusted to be objective. He had seen these decisions, the result of the decisions, and it was a big disappointment to the U.S. that we were seen as aggressors when Nicaragua was the aggressor in El Salvador. He was savvy enough to understand what it meant when the ICJ wouldn’t let El Salvador participate in the case. It was as though they didn’t want to know the facts. And that’s exactly what happened. They did not want to know the facts and never learned the facts. Later of course the facts came out and it was shown that Nicaragua was an aggressor against El Salvador.

So he was definitely aware of that, and that cut down on the degree to which there was any kind of debate about the issue. One question was his authority. Do I have the power to sign this without Senate approval? The answer to that was clear and I reassured him that he did. Another question that he was really interested in was: What does this mean vis-à-vis the court for America? I explained that.

It was not an issue on which you could really test the question of whether the President was substantively alert and interested. I did have one encounter with the President where that clearly was tested, and that’s the [Nicholas] Daniloff case. But the ICJ issue was not a good vehicle to test that.

Knott: I hate to jump around, but maybe we should get into that while we’re going down this path. Do you mind talking about that?

Sofaer: No, I don't mind talking about Daniloff. Daniloff was my main encounter with the President. I had two other issues at least—I was just thinking of this—I haven't gone back and gone over my notes or gone over every issue to ask myself what connection does this have to the President. So just to keep them in mind—Daniloff, the Kristallnacht flight to Chicago with the President on Air Force One. There was the negotiation with Syria about the hostages, TWA 847. The [Ferdinand] Marcos thing was more with the Vice President than with the President. So let's go over those. If I can think of others I'll get in touch with you and let you know.

Chidester: I think the broader question that I'm trying to get to is Reagan's general engagement in issues.

Sofaer: Right.

Chidester: Was he a passive delegator? Was he really involved in the thought process behind these decisions? This is very complex stuff that he's dealing with.

Sofaer: I understand that. I'm just reminding myself and you where I might be deriving evidence that would help you, where I actually had either the President's words or I got clear indication the President had listened to me and had made a decision based on that, and I guess the ABM [anti-ballistic missile] treaty of course, where I was in a meeting with the President and where later the President did delegate the issue of what we ought to do about the Senate record to his subsidiaries, much to my chagrin, because I was not allowed to speak to the President on that issue.

So let's start with Daniloff. This was a very complex issue, and it's discussed in Shultz' book, and I don't need to go into all the details. But essentially, Daniloff was a reporter in Moscow who was set up by the FBI [Federal Bureau of Investigation] in effect, by our CIA [Central Intelligence Agency] and FBI. I don't know if the FBI was really involved, but our CIA agent in Moscow was responsible for what happened to Daniloff. He went to Daniloff and asked him if Daniloff could—no, what happened was Daniloff had been contacted by a priest of some kind who had in the past been a very important source of intelligence.

Daniloff is a good citizen—maybe a good left-wing citizen—but he's still a good citizen. He cares about America. He goes into the Embassy and tells them, "This Father whatever his name was got in touch with me, and I just want you to know that." They said, either then or later, "Please respond to him. See what he wants. Find out what's going on."

In the course of that they actually spoke to Daniloff on an open line in Moscow about their desire to have him pursue this contact so that they would be able to reestablish a relationship with this guy. It was all a setup. The KGB [Komitet Gosudarstvennoi Bezopasnosti] was following every—the KGB had put the priest up probably to speak to Daniloff to begin with. This related to the fact that—I don't know whether the Soviets got this thing going before the [Vladimir] Zakharov case in New York, or after the case, but we had an FBI informant who acted as a student in one of Zakharov's classes, essentially enticed Zakharov into asking for and receiving information that had classified markings on it.

[Break]

Sofaer: We were talking about Daniloff. So Zakharov was arrested in New York, and it was quite clear that while it wasn't legally entrapment—entrapment is very narrowly defined in Federal law. If you have a propensity to commit a crime, even if someone sets you up and gets you to commit it, it's not entrapment. You have to be able to succeed in convincing the jury or the judge that you didn't have this propensity to begin with. It's very hard to do that when you've done the crime. So it's a rather complex problem for a defense lawyer. They're far too loose, I believe, the entrapment rules. They should be more narrowly drawn.

Anyway, they got this guy, Zakharov, and the documents that he was given were stamped "secret" or whatever. They were just phony documents; there was no real secret there. It was just a prosecution made up—like a drug bust. It may well be that what the Soviets were doing with Daniloff was paying us back because we had focused on Zakharov. He did not have diplomatic immunity, so we could do this to him. So they used Daniloff to get back at us. When the CIA said, "Please, please talk to Father so-and-so, he may be able to give us very valuable information again, as he did the last time around," Daniloff, like a good citizen, went ahead and did it, and the Soviets set him up.

They had the priest give Daniloff documents that he said would be very interesting to his people, and some of these documents were stamped "top secret" or whatever, just like the documents we used with Zakharov were stamped. Daniloff knew he was doing something that the Soviets would certainly have not regarded as lawful, and he took the documents and gave them to the CIA people and he was arrested. So a huge, huge uproar occurred in Washington and everywhere about Daniloff.

The hard-right members of the Reagan administration didn't want to talk to the Soviets about Daniloff; they just wanted to embarrass the Soviets about Daniloff. Daniloff is not a spy. We know he's not a spy; they've set him up. This is ugly and horrible and just typical of those horrible people.

Morrisroe: Can you tell me—was this within the State Department?

Sofaer: Absolutely. They were in—particularly the White House—but they were definitely in the State Department too, and in the Defense Department. This was the view of Peter Rodman, for example, who didn't want us to talk to the Soviets about Daniloff at all.

Morrisroe: Where did Shultz stand initially on it?

Sofaer: Shultz—you never know where he stands initially. Shultz was the Buddha, as he always is, and he wanted to know what was going on. He wanted me to handle it, find out what's going on. Cyrus Vance came to see me. He represented *U.S. News and World Report* or whatever magazine it was that Daniloff worked for. It will be in the book there. He gave me documentary

proof of what had happened with Daniloff, what he had done, how he had been set up, and how he was likely to be made into a victim as a result of all this.

So then I studied the Zakharov case as well to find out what had happened there. I learned the facts. It happens that I was a former Federal judge. I was a former Federal prosecutor. This was my turf. So it wasn't like something I had to be trained to understand. I knew that Daniloff was dead in the water. He was completely nailed. The Soviets had done a beautiful job of replicating what we had done to Zakharov. I knew that if we just left him out there, let him stay out there and be tried, he would be convicted and he would be sentenced to life imprisonment or something and then it would be a bigger deal and more difficult to resolve.

I also knew that Shultz was, at that time, trying to make connections with [Eduard] Shevardnadze. Things were just on the move in that relationship. Roz [Rozanne] Ridgway and other people in EUR [State Department European desk] in the building were deeply concerned about this Daniloff flap. It was interfering with their ability to conduct diplomacy. Of course if you are dealing with a state that you shouldn't be conducting diplomacy with, that's fine. But if diplomacy is in the interest of the United States, and things are on track as they seemed to be—because we had gotten a few really positive steps in the arms control process and in the human rights process by that time—then it's a problem that needed to be managed, if possible.

So the department wanted to know, “What do you think? Is this manageable? Is there something that we could come up with for this?” I went to Shultz and I explained to him that with this evidentiary record, Daniloff would be convicted in an American court. Therefore, what followed from that is that he was an appropriate subject to discuss a trade with the Soviets relative to Zakharov. Not that you would trade one for one, but they were not unlike cases. People in the right wing who didn't want to deal with the Soviets wanted to stress the fact that Daniloff was not a spy and Zakharov was. My position was maybe neither of them was a spy. Maybe Zakharov was a spy, but it didn't matter. What mattered was they were both going to be convicted of espionage, both of them. On essentially the same record—

Morrisroe: Almost an exact similar fact set as well.

Sofaer: Quite striking, deliberately made so by the Soviets, I'm sure. But, in a Federal Court, both would be convicted; that was my basic point. Well, Shultz was very interested in this. This, for him, moved him off the neutral position he had taken waiting to hear. He understood the issues now and he wanted the President to understand this, because the President was out with statement after statement about Daniloff. “I give my assurance that Daniloff is not a spy. I have looked into this. What you've done is fraudulent,” etc., etc. He was hot to condemn the Soviet Union. That's what he was doing. He was using the Daniloff case to do that.

So one morning, after I explained this stuff to Shultz, he did the same thing to me again. “Come with me.”

Morrisroe: Although now you suspected where you're going.

Sofaer: Yes, down the elevator to his car and whisked right over to the White House. No preparation. I don't have my note cards or anything. I'm scribbling. He said, "You're going to talk to the President about Daniloff." So I take out my cards, I start scribbling notes to myself to try to figure out how to explain this to the President without a memo. Well, the memos I had written apparently had already gone, and the President was aware of this issue.

We went right into the Oval Office, and I think Poindexter was there. Regan was there, I'm pretty sure, and—

Riley: He's the Chief of Staff then.

Sofaer: The Deputy NSC Advisor I think was there, who was in charge of European-Soviet issues. There was someone there on the Soviet side in the room. The historical records will show who was there. This was a really meaningful meeting. The Secretary asked me to brief the President on the Daniloff case, which I did. I went through the facts. I explained the situation. He kept interrupting me, what about this, what about that? His basic point was these are bad guys. They've concocted this record, and I said, "You're absolutely right, but it doesn't matter. If it were in a Federal Court and we concocted the records and we gave Daniloff the documents, just as we gave them to Zakharov, he would be dead. He'd be prosecuted successfully in your own district courts."

"Well, how can we equate these things?" The President went on and on about that. It looked like we were losing the argument. I didn't quit. I just went on. Every time he asked me a question I told him what I thought.

Finally I said, "Mr. President, you keep talking about the truth. The truth has nothing to do with the judicial system. Sure, you always try to get to the truth, and occasionally you get it, but if you think you always get the truth as a result of a judicial process, you're wrong. That's not what you get. You get a finding. You get a finding of guilt or a conclusion of guilt. You don't get truth. This is not God. This is just people doing our best to make findings. I'm telling you, as a trial judge and a prosecutor, that what you would get out of the system for Daniloff is going to be the same thing you would get out of the system for Zakharov."

That had an impact on him. I could see that hit him square between the eyes. He's a very practical man. He prides himself, in fact, on being practical. I could see that. But he kept wagging his head the way Reagan always did. "Well, Abe, it doesn't seem sensible to me to equate a reporter just trying to be a good citizen, with a professional spy."

I said, "That's clearly true as a matter of principle, but in this case, with regard to Daniloff, the outcome would be the same." Shultz realized it was over, and he thought we had lost and we got up to leave. "Thank you, thank you." Polite—I can take a licking. I've shown that, because I went to boarding schools in England, and I went to Anglo-Scottish Education Society boarding schools as a little boy where I used to get trashed all the time. I've learned how to do that.

We were beat up—we were heading out the door. But I could see he wasn't comfortable with his position. He was anxious about it. He got up and walked us to the door. He didn't want us to

leave, almost. He kept asking questions. So I turned around, and I said to him, "You know, the difference here, the important thing for you to remember, is that Daniloff is an American citizen who didn't do anything wrong. He was brought into this by our own CIA, and he could spend the rest of his life in prison if we fail to understand that a reasonable deal could be made on his behalf."

It was like hitting him with a left jab. He's a very emotional man. This man clearly cares about people. He realized that there was a human being involved here. It wasn't just an abstract argument. I was very aware of this argument. Shultz was very aware of it too. He was standing near me, almost pulling me away, like I was pushing a little bit too hard, but I felt it was right to tell Reagan what I thought. He said, "Thank you, Abe," and we left.

We got in the car and Shultz was despondent. He seemed completely convinced that we had failed. I said, "No, you're wrong. We haven't failed. That's not how I read him." Shultz just said, "No, no."

So we went back and Nick Platt and Charlie Hill joined us and we all started talking about what had just happened. In fact, if you get Charlie's notes, I bet you that he's got the notes of what happened and the readout from that meeting, which would probably have in it a lot of the arguments that were made in the meeting, including what the President said. Nick agreed with me. He thought the fact that Reagan was so tormented by the issue, so uncomfortable with the results, indicated that we had made some headway with him.

Later in the day Shultz got hold of me and said, "We've got to get a Justice Department opinion that looks at the evidence and determines if you are right, that Daniloff would be convicted in a Federal Court."

So I said, "No problem." I called the number three Justice Department official, Steven Trott, who became a district judge later, now he's on the Ninth Circuit. Steve Trott, thoroughly anti-Soviet Republican from California, a Reaganite. I said, "Steve, you've got to do us a job. We're going to bring you a file. It has a record that the Soviets have on Daniloff. We want a simple answer from you. Would this man be convicted in a Federal Court?" He said, "Fine." He looked at it and said, "He would be convicted without any doubt."

That news came, and I passed it on to Shultz. It went right over to Reagan. Green light. "Make the deal." Then Shultz went to work and Roz Ridgway went to work and all the people in EUR who were very able negotiators went to work. At the time, one of the top people there, her deputy I think, [Thomas] Simons, was the guy who handled this. He did a very good job.

Then there was a woman in my office named Libby [Elizabeth] Keefer who was a career civil servant. She became my special assistant. She is now the general counsel at Columbia University. She did a phenomenal job of implementing my plan. What we did then, we had different tracks. The diplomatic track was to negotiate a deal. I contributed to that by pointing out that we didn't have to have Zakharov to plead guilty. The Soviets did not want such a plea. At this point there was virtually no trust between the two countries.

I came up with the idea of a *nolo contendere* plea, which is a plea that's the equivalent in law of a guilty plea, but it's not an admission of actual guilt. So I ran that idea by the Secretary. He loved that. "Put that down, *nolo contendere* plea." They didn't want any publicity. So I said, "That can be done. We can take him over there. It's a public courtroom, we can't change that, but we don't have to announce when the plea is going to be taken. We can take him from the prison, drive him to the courthouse."

I knew the courthouse. It was the Eastern District of New York, across the river from my courthouse. I knew the chief judge. I mean, I knew all the players, the U.S. Attorney. They were all my former colleagues. I had actually gone to the Eastern District as a volunteer for two weeks to try criminal cases when they had a backlog of cases. As a Federal judge, you don't have to try other people's cases, but I had spent two weeks trying criminal cases over there, so very good feelings existed.

What we did was we gave the Soviets a plan as to what was going to happen with Zakharov. We were going to drive him in an FBI car to the basement of the courthouse in Brooklyn. We were going to take him up the judges' elevator to a public courtroom where he would plead *nolo contendere* to the charge. He would be sentenced on the spot to basically a suspended sentence, then down the elevator, and back to prison. Or, if they wanted the deal to go down at that time, straight to the airport and to the Soviet Union.

So I set up these methods for dealing with the legal issues, but the rest of the Department did the diplomatic talks. Shultz cut a fabulous deal where we got—I think it was Zakharov, [Uri] Orlev, and two or three major dissidents that we got released from the Soviet Union in addition to the trade. And on top of that, we had a chance to demonstrate to Shevardnadze and [Mikhail] Gorbachev that they could do business with us, that we can deliver, that we were reliable.

Till the very end they didn't want to let Daniloff go until Zakharov was out. They just didn't trust us. Even then, after all the negotiations had happened. By the end they realized we were for real. We believed what we were doing was in our interest. We were going to deliver this deal. They were going to be able to deliver their side. We trusted them. I think something big came out of this Daniloff-Zakharov thing, not only saving Daniloff, who was a nice man, and who came to see me after he got released because he knew the role I played. You can read his book. He has some very nice things to say about me in his book. The big point, though, was it cemented the relationship of Shevardnadze and Shultz. They trusted each other at a new level, and that was really important for what happened thereafter.

Riley: I want to go back and ask a question. I'm Russell Riley, for the record, since nobody is expecting me to be here.

It was striking to me that the way you described President Reagan's turnabout on this is that you were able to change the narrative for him. The narrative up until that point had been the evil Soviets were doing us in over again. The outcome of that narrative though was still a bad result, and there's a practical element to Reagan's thinking here that makes him responsive to your ability to change the narrative for him in a way that allows him to see a better outcome. The

narrative becomes no longer a story of the Soviets doing us badly, but it's the story of our own agency mishandling something to the detriment of one of our citizens.

I guess I'm sort of musing on this, and wanted to throw it out—whether your sense of Reagan was that it was helpful for him to—you mentioned the practical versus the idealist, which is something that scholars are constantly debating. Was he more of a pragmatist or an idealist? He was somebody who had a Hollywood background, and he's somebody who thought in terms of stories as opposed to more rationally. That's not exactly the right term, but somebody who proceeds from logic from point A to B to C, something like that.

Sofaer: He came out with fire and brimstone in that meeting. It was a classic Reaganite diatribe against the Soviet Union. But he realized well into the meeting that he was dealing with two Reaganites, Shultz and Sofaer. It was preaching to the choir. We were part of his group and we thought that way about them too. Our point, he gradually understood, was not the qualities of the Soviet Union but the interests of the United States. That gradually sank in.

It was a serious meeting over 15 minutes long. It was not a short, perfunctory meeting. This was my most substantive exchange with the President. You could see that these arguments were having an impact on him and he understood them. He gradually understood our points have to do with the consequences, diplomatically, legally, the legitimacy of equating the two cases functionally, professionally, as opposed to morally. We were, in effect, calling on him to show a little cold-bloodedness in the evaluation of an issue for the benefit of the United States. What's really going to help us the most? To hammer them continuously, publicly, with truthful statements, or to make an appraisal of the situation based on what the facts were?

Then the moral element, the human dimension, had its impact with him. In fact, to a fault, I think he would care about human beings, as Iran-Contra later showed. He truly, I think, was reached by Casey and the rest of them who stressed the human consequences of the hostages. But it is appropriate to take human consequences into account. In this case you have a totally innocent person who really shouldn't have helped us, America, in the way he was asked to. If he had any sense, he would have said, "Wait a second, you're going to get me in trouble with the Soviet government here." But he couldn't say no to the CIA agent there.

He was going to be made to pay the price of all the self congratulation that was going on among the more ideological members of the team. "Let them bleed" essentially was the idea. "Let the Soviets bleed over this issue. Let us just keep hammering it and it will hurt them." Well, it would hurt them, but we knew it would hurt us too, and it wouldn't be as good an outcome for us and it would certainly not be a good outcome for Daniloff.

So I thought the President showed that he was very clever and really fully in command of the issues. He understood the consequences of every argument and the benefits and downside of each position. He didn't switch suddenly. You could see him come around gradually, and as the program took shape he realized that this was the thing to do. Even as perceptive a person as Shultz couldn't see initially the President turning, although Shultz took a pessimistic view sometimes, to evoke discussion. When he came out of that meeting he wanted to talk. He wanted to know what had we done, what were the chances of a good outcome here. Sometimes he would

trigger that sort of discussion, even though he probably did know that we had had an impact on him.

Clearly not to be underestimated, this man Reagan, in terms of his ability to shift from what was, for him, conceptually a very easy position to maintain. Now if he shifts, and he accepts Shultz' approach, he's telling people in the White House who are doing Soviet affairs, "I am going to make a deal with the Soviets, even though we know they set up an American, because this makes sense for America." It infuriated them. I mean, over and over again he infuriated them, and Shultz infuriated them, because Shultz convinced him to do things like this.

In negotiating with the Soviets generally, Shultz—when they formally abandoned conditionality, the same thing happened. That was an indispensable diplomatic step, which was taken in public with testimony that Shultz gave to the Senate Foreign Relations Committee. You could see that it was all part of one cloth. The President is ideologically committed against Communism and against the Soviets, but he wants to succeed and win. He wants to beat them. How do you beat them? Well, you've got to convince them to do the things you want them to do. You're not going to blow them up; that's settled. So how do you convince them? Well, one of the things you have to do is accept that they will do bad things, and you're nonetheless going to talk to them.

So we don't make the release of Daniloff conditional on our discussion of Zakharov. We make a deal, we sit down, we talk, and what comes out is something that neither side has to feel embarrassed about. In fact, it's very significant that Shultz, in negotiating the extras that he got out of the Daniloff deal went out of his way to make sure no one talked about them. He wanted Shevardnadze to know, "If you give us some extra things, we're not going to rub it into your face. Thank you. We're going to thank you for enabling us to make this deal and you know there is a moral difference between setting up a professional diplomat and setting up an amateur reporter. I think it was a really good outcome. I'm so grateful for having had the opportunity to help do that for the country and for Daniloff personally. It was just one of the great stories, one of the fine things to be involved with.

Morrisroe: Why don't we return to your first week as Legal Adviser? You had a bit of a trial by fire, a clearly difficult first week, with the TWA 847. Can you talk a little bit about how that event came to your desk and your role in the negotiations?

Sofaer: Sure, literally my first week. I think I started on the 11th and it happened on the 14th, or something like that, of July. Initially, we were all stunned. People didn't know what to do. We were just following what was happening on the ground. People started staying up all night. Teams were put together. There was an emergency unit set up where we were collecting information, etc. There was a tremendous amount of frustration that we couldn't do anything.

I was just starting to get familiar with the issues, but I quickly learned that there was a hijacking convention. My people told me about it and I started studying it. It was disgraceful. The Greeks basically made a deal with one of the hijackers in exchange for the Greek nationals on the plane. I saw that. I was sickened by that. I started to work on the case. I sent memos to the Secretary and others about what was going on, what the rules were, who was violating the rules. They

started to pay a little bit of attention. Then the plane ended up in Lebanon and they were all on the tarmac there. The question became: What can we do about this?

For some reason, Nick Platt, who was executive secretary at the time, he's sort of the king of paper in the department, at the morning meeting or some other time, responded positively to something I said. I said something to indicate that I felt people were not giving the Secretary any alternatives. The building was just not providing options to the country, to the administration. We needed to get serious. We needed to make more of an effort.

So a big memo, an action memo, with options, was written. Everybody in the building was told to get to work, write all the options. Of course there was the option of using force. We wrote the portions of the memo that related to the use of force, and then we wrote the portions of the memo related to other legal issues. By that time the terrorists started making demands for all sorts of things—the release of the people who had been convicted of murdering a diplomat in Kuwait; they were under sentence of death—a U.S. diplomat, all sorts of crazy demands. But among the demands was the demand for the release of Lebanese prisoners being held by the Israelis in prisons in the north of Israel.

So we started filling the Secretary in on all those issues, and we were pushing the idea that when a country like Lebanon will not enforce the law against terrorism, and it has signed on to these conventions and it is supposed to be preventing these kinds of terrorist acts, the United States could take the position that it could use force unilaterally to defend its nationals abroad. Self defense didn't have to be a geographically national issue. A deliberate attack, not on an American who happens to be an American, but on Americans because they are Americans, I argued, could be considered an attack under Article 51 of the Charter of the United Nations.

An attack by terrorists who are supported by states might not be an attack by a state, but if a state doesn't do something about it, then the state cannot assert its sovereign right to prevent people from coming within its borders to deal with the problem. These are all new arguments, I acknowledged. But these are the kind of, I thought, very respectable arguments that you could make in that context.

Riley: There was not a lot of precedent at the time for terrorist acts that would have permitted you to draw on that body of—

Sofaer: Oh no. There was the Entebbe raid that the Israelis had conducted in Uganda, which some people had condemned, but which most states had acknowledged was probably defensible. The U.S. had not condemned the Entebbe raid. So that had some of the components of the situation we faced in Lebanon. Then you have domestic law analogies that you could use.

Morrisroe: But this is really the precipitating event where this legal issue started coalescing for you.

Sofaer: Definitely. I had not worked on these kinds of issues. I had read about them, but I had not worked on them. At the same time we were developing the pro-use-of-force tough line. I have a deputy named Alan Kreczko who was an assistant legal adviser at that time, smart as hell,

really experienced in the Middle Eastern issues, and very articulate, sincere, intelligent. He started explaining to me the Geneva Convention arguments about the Palestinian prisoners. I said, “You mean to say we’re already on the record that these prisoners are being held illegally?”

He said, “Oh, yes.” He got out all the statements of the State Department since the Lebanese war, ’81, that these prisoners who had been taken in violation of the Geneva Convention, away from their national territory, had not been given a hearing or a trial. They were being held illegal under international law and we had said so, before the hijacking.

So I started to tell Shultz, “The law doesn’t change because the terrorists are telling us they want these people released. The propriety of releasing them doesn’t change because the terrorists now demand it. These people should be released. We have taken that position. That is our position; it’s the right position. It would be unfair to the prisoners to now drop our position that they should be released just because a bunch of terrorists are making the argument in their behalf. Do something to the terrorists if you want, but why take it out on the prisoners?”

I then added: “If in some way we can get Americans released because something happened that we called for before the Americans were captured, where is the shame in that? That does not equate with capitulation to terrorists. You’re not exchanging something for the release of hostages. That’s something you shouldn’t have exchanged anyway. It’s sort of like saying, ‘Please don’t kill me and I’ll release your prisoners,’ and you have no intention of killing the guy. So you say: ‘Okay, I won’t kill you.’ You’re not being asked to do something wrong, to take a position that these people should be released that’s improper. On the contrary, you have already said they should be released.”

I wrote a memo to this effect. The Middle Eastern people were shocked. I’m the Jewish legal adviser, anti-terrorist, all this stuff, and here I write this very strong memo saying that it was inexcusable for us to not do our best to get these people released. If that was part of a negotiation with these terrorists, we should give the President the ability to negotiate on that basis. We should give our Ambassador in Syria the chance to negotiate with the Syrians and give the Syrians that argument to put on the table so that the terrorists might get something out of it—release our people and we could save their lives.

Of course all of this was heightened by the fact that the terrorists murdered an American Seaman in cold blood, threw his body down on the tarmac. So it became politically impossible for the department to take a position above board, open to public view, that we agreed that if the Syrians can negotiate an end to this it means that we would see the release of these people in northern Israel, who should have been released before, as being proper; that there’s nothing wrong with that result. We couldn’t take that position publicly. Shultz told me it won’t fly. Politically we just couldn’t do it, which was unfortunate.

Morrisroe: Can I ask you—when you had sent out the memo, you said the people at the Middle East desk were surprised, given who was writing the opinion. Did they find merit in it?

Sofaer: They certainly did, but they were very anxious about it. They could see that publicly we’d have our heads handed to us somehow, that this would be a very difficult thing to justify.

President Reagan had been saying that we would agree to no conditions, no exchange, nothing. We're not going to talk to terrorists, was the Administration position. Lebanon should not talk to terrorists about hostages, etc. Well, despite all that, my memo got to the President.

Morrisroe: Through Shultz?

Sofaer: I have no idea. I did not send my memo to the White House. It is conceivable that I did have conversations with people at the White House and they wanted to know what I thought about the prisoners, and I told them. But I know that they found out about my legal rationale for putting this idea on the table. According to your papers you have some sort of report that says I negotiated with Syria. I did not negotiate with Syria. I set up this argument that a deal limited to this benefit could respectfully be made. Indeed, that we would be advancing international law by doing so because the Israelis had no business holding these people. So that idea got out there for the President to consider.

Meanwhile, we kept a holier-than-thou attitude in the State Department. We were so holy we were not going to talk to the terrorists. We were not going to authorize talks with the terrorists, we were not going to tell the Syrians to talk to the terrorists. But the White House is looking at us, and did not agree. We're being more Reagan than Reagan. It was classic. Reagan, of course, saw that the prisoners' release made all the sense in the world.

He said, in effect, "I'm going to let our Ambassador in Syria pass this on to the Syrians." We asked the Israelis, I think the White House also did a lot of this, because the Israelis knew one of these demands was in their hands to deliver. The Israelis told us they would have no objection to releasing those people if it would help us. They've been telling us all along they wouldn't release them and we were telling them to release them. Now they tell us, "If it will help you, we will release those people," even though we had not yet asked.

So my view was: why should we take the position, "No, no, don't release them now because it will look like we're giving in to the terrorists"? We're not giving in to the terrorists. We were for their release all along. Now all of a sudden we're against the release? It seemed an absurd result. I was sitting in the State Department listening to this. We could not tell the Israelis to release these prisoners. Indeed, the argument started being made, "We have to tell the Israelis now *not* to release these prisoners," so that no one can claim we gave in to the terrorists.

Morrisroe: Who was making these arguments?

Sofaer: There were several people making the arguments. I bet you can find memos saying, "We must not—we have to tell the Israelis not to release them. It would be capitulation."

Morrisroe: This is inside the State Department?

Sofaer: Yes, this is inside the State Department. I'm sure it was also coming out from some channels in different parts of the administration. But Reagan knew this made absolutely no sense. I know that Shultz agreed with me. I could feel it. He said, "Abe, I just can't do this. It's too late"

in the process.” We had already taken such a hard line on all the issues that we couldn’t bring ourselves to shift ground on this matter because it made us look like we were capitulating.

I was really disappointed until I realized that it was happening anyway. The White House took over the negotiations.

Morrisroe: Was it the White House? Somebody at the White House then contacted the Ambassador in Syria as opposed to the normal diplomatic channels?

Sofaer: Yes. I’m sure that’s what happened. She was the Chargé. We had, I think, pulled the Ambassador. It was April Glaspie, I believe. She did a fine job. She was the one who later got accused of telling Saddam [Hussein] that we would do nothing if he invaded Kuwait, which is clearly not true. So she did a very competent job of conveying these positions, and I’m sure that the diplomatic record will show that the White House became involved, that they took over, that they passed the message to Syria supporting the prisoner release through her or through someone in the Embassy. It could have been the CIA person in the Embassy. [Hafez al-] Assad realized that this was something he could use.

He got the terrorists to agree. It was a big face-saver for them. By that time the prisoners had all been scattered throughout Beirut, because we had threatened to bomb them and the airport, and they realized that we might bomb, and they didn’t want to lose control, so they spread the people out. It would have been impossible after that for us to send a commando squad in to release the hostages that way. So this argument concerning prisoner release became even more imperative.

People have a distaste for using diplomacy with distasteful people, and it goes way back. There are memos between Jefferson and Adams while they were Ambassadors in England and France, where they talk about dealing with the Barbary pirates. You can see they’re both disgusted at the thought that they would talk to these guys. They were pirates. They did not see those people as people that you should have a civilized exchange with. That was the feeling about these terrorists in Lebanon. Why should we be contaminating ourselves with this?

I must say I think this sort of pride is misplaced in diplomacy. This was a perfect example of how misguided such reactions can be. Here we had completely turned ourselves around in terms of our position on an issue of humane importance to hundreds of prisoners who were being held illegally under international law. Instead of saying, “Okay, you know what, you guys? You’re horrible people, murderers, and if we ever catch you we’ll kill or imprison you. But you happen to be right on this one, and we acknowledge that and we’ve said it all along.” Instead of being straightforward, honest, we twisted ourselves in knots over it. Ronald Reagan wasn’t going to buy that.

He was so independent a thinker. He was not going to kowtow to any line. In fact, his willingness to do Iran-Contra is a flaw in a sense, to be so willing to act on instinct. But there we go far beyond doing things that we had already said were appropriate. Here, this was a very limited diplomatic engagement that I was proposing based wholly on a position we had already taken. And it was completely successful. The terrorists agreed. Then there was a big crisis

because they were going to hold the Jewish passengers. The President did the absolutely right thing. No deal, he said. He was appalled.

We went into Assad and said, “This would be worse than anything. You cannot do this.” Assad didn’t allow it to happen. So the Jewish prisoners were released with the non-Jewish. There were four or five—several of them.

Morrisroe: You mean Jewish-Americans?

Sofaer: Yes, Jewish-American hostages. They were going to hold them. So Reagan and Shultz took a very principled position on that and it was over. Of course we went on chasing these terrorists and caught a few of them over the years, prosecuted them, put them in prison for a long time. But my point about Iran-Contra was, in a way, I’ve always felt that this event gave the President a sense that the State Department was not creative enough and that with the right approach he could really do wonders. I think it led him to think that it was easier to deal with terrorists than it is. The TWA 747 negotiation was a very lucky set of circumstances, very special. I’m just speculating now, but it may have created a mindset in the White House that the State Department is too rigid and lacks creativity, and we in the White House can directly do things sometimes that would have a monumental effect by disregarding what the State Department recommends.

Riley: The other thing that comes to mind—at least from the outside, the mantra seemed to be throughout, “We don’t negotiate with terrorists.” That’s the single principled position that would be the default setting anytime anything comes down the pipeline. You’ve actually described two circumstances already in which it’s conceivable that with something—maybe you don’t call it negotiation—but you deal with a problem terrorists present. Maybe we can do that without being in violation of the fundamental principle. In this case, you weren’t negotiating anything, because the position had already been taken.

Sofaer: What you were negotiating was the release of the prisoners in exchange for Israeli conduct that you had called for all along and that was proper under international law and humane vis-à-vis the prisoners that were getting released.

Riley: I guess my question then is, if this is an exception to the general rule, and once you make an exception, does it make it easier to justify internally more exceptions later on?

Sofaer: Yes, I think to someone who isn’t sufficiently aware of the subtleties of this kind of thing it can lead you to have a sense of hubris about your capacity to negotiate that is not justified. I did not have that sense at all. I never accepted that you shouldn’t negotiate with terrorists. I think it’s a ridiculous statement and I don’t think it was ever intended to mean that. What you should never do is capitulate to terrorists.

If you can talk terrorists out of killing an American in exchange for something that doesn’t qualify as a capitulation, like a roast beef sandwich or something, or being able to go to the john and not be shot—something minor or humane or proper or lawful, you should do it. I keep thinking of Governor Rockefeller’s raiding of the Attica prison, where he refused to talk to the

prisoners and sent in the National Guard, and God knows all kinds of people were killed. Over 50 people were killed in the raid or something. It was a terrible outcome, terrible, where if he had negotiated it's very clear that with time and patience, everything could have been achieved without capitulation on any important point.

Now, would you have agreed, as you ultimately did anyway, that some food would be provided to prisoners better than had been provided, because the food was totally inadequate? Maybe you would have, and maybe it would be better if you did. If you're wrong, you should admit you're wrong. So, yes, I think it's very easy, when you start out with principles that are too broad and you have to qualify them because of the practical needs of the world, you suddenly maybe get misled if you really believed in the broad principle. You can get misled by that practical accommodation into thinking, *There's nothing to the broad principle at all. You really can deal with terrorists. It's okay.* You may end up getting ahead of the game. It's a mistake and it's a very dangerous outcome.

You certainly can't equate anything we did through Syria on this issue (releasing prisoners from northern Israel who should have been released) with giving arms to Iran in the middle of a war with Iraq. We shouldn't have been giving the Iranian government arms under any circumstances. It was clearly a different thing, but you could see how one thing could lead to another.

Morrisroe: We have a little over an hour left, so I think in the interest of time today, we'll jump over some things that if we get you back I'm sure we'll want to touch on, like the *Achille Lauro*—

Sofaer: That was the next terrorist incident, right.

Morrisroe: And Jonathan Pollard and some of the others. But why don't we jump ahead to the ABM. We can try to get through that in this session. As I said, if you can indulge us by coming here or us meeting you somewhere else, we can get back to some of those other ones and some of the later events too.

Sofaer: The ABM treaty dispute was certainly the most painful chapter in my service as Legal Adviser, because never before in my life had I been accused of doing anything improper. I had had a very good career. I was a Federal judge at the age of 40 and I was an immigrant at the age of 14, so it was a pretty successful life. I think there were three articles in the *New York Times* about me before I became Legal Adviser and they were all laudatory. I had settled this huge case between GE [General Electric] and the Department of Environmental Conservation over PCBs [polychlorinated biphenyls], the Sharon trial. I had done a variety of things as a relatively young man that were considered good.

But when I went to the State Department, certainly I got criticized for the ICJ decision. I got criticized for other things, but no one ever said, "You're a liar. You made up something. We can't trust you." I was so naïve at the time that I thought that given my own patriotic feeling about my work and everything I did, and given my belief that ultimately we were in the Cold War and Americans were agreed that we were one side and the Soviets were the other side. I just didn't think my good faith would be called into question.

So I was surprised by this. I was not ready for such accusations. It really did have an impact on the experience. But the experience was an extremely important one for me and for the country, and I think many important lessons can be learned from the ABM treaty dispute. I'll try my best to explain the history to you, starting with the context in which my work took place.

How did I get involved? You even raised that question, because it's so important to ask a lawyer, how did you get involved? What were you asked to do? I'm not an arms control expert. I had no desire to get involved in the ABM treaty dispute. One day I was called into George Shultz' office and the Secretary said to me, "I would like you to look into the negotiating record of the ABM treaty and I'd like you to look at the treaty. I want you to tell me: What is the scope of the President's power under that treaty?"

He clearly meant by that question, "You are the lawyer of the President of the United States." I'm one of his many lawyers. I happen to be the principal international lawyer in the administration and in the department. The President of the United States has a program. Some people call it Star Wars, he calls it anti-ballistic missile defense. My assignment? "He wants to know from you the extent to which this treaty prevents him from implementing his program."

This sort of thing happens every day to lawyers in every company in America, in every institution, including the University of Virginia. You're called in by your boss and you're asked to please tell him what the limit of his authority is under this law or that law. So I wasn't asked, "What do you think of Star Wars, or what do you think of the narrow interpretation of the ABM treaty? Should we give it up?" I was asked to what extent is the President bound by the ABM treaty, a very specific question and very carefully put by Secretary Shultz. There was no doubt in my mind that that is what he wanted to hear. He didn't want to hear a philosophical rendition or a thorough but abstract analysis, or anything like that. He definitely wanted a thorough job, but he wanted an answer to his question. What do we tell the President he is limited to by the ABM treaty?

Okay. So I started working on it. I got all the stuff together. Shultz said to me at the time, "I want you to work closely with Ambassador [Paul] Nitze on this issue." He was one of the principal negotiators of the treaty. Wonderful. Ambassador Nitze was a giant of American diplomatic history and arms control history. He was the man who many believe was responsible for the Marshall Plan, so many things that we did right in the history of our country. So to be assigned a job that was obviously very important and to have to work with Ambassador Paul Nitze seemed to me a great opportunity.

It was indeed a great opportunity. I wish I had the experience that I now have when I started then. Not because I would have reached a different result; I would not have. I am absolutely confident I would have reached the same result, but I'll tell you later at the end of this what I would have done differently. What's important is I did a thorough study of the treaty and its negotiating history.

Riley: Nitze at this point is a private citizen?

Sofaer: No. He's in the State Department as a special ambassador for arms control and assigned to work on the arms control negotiations in Geneva.

Riley: A naïve question.

Sofaer: Special Assistant to the President I think was his title, maybe to the Secretary. I'm not sure what his title was.

Riley: If he's the person who was responsible for the development of the treaty in the first place, is there a reason why you don't ask him directly to provide the answer to the question that you were tasked with?

Sofaer: I did ask him, repeatedly, but he didn't have a familiarity with the whole record.

Riley: That answers the question. It just wasn't clear to somebody coming green from the outside, why, if you have the world's number one source on this, you don't just write a letter and—

Sofaer: He started out with the assumption that the so-called narrow interpretation applied.

Riley: He, being Nitze?

Sofaer: Nitze. The issue was, a lawyer in the Defense Department had come out with an opinion saying that the narrow interpretation was wrong and that under Agreed Statement "D" of the treaty we could develop, test, and deploy any ABM system that was not a conventional system consisting of a missile, a launcher, and a radar.

Riley: So there's a controversy already existent when you come in.

Sofaer: Oh, yes.

Riley: Party A says you can do this, and party B says you can't.

Sofaer: Absolutely. So I have his opinion too, the Defense Department—and I have lots of opinions from people in the arms control community who were writing books and articles. They were in high dudgeon over this issue. They are totally devoted to the ABM treaty. They believed it was necessary to save the world, and maybe they were right. I have no idea. I certainly think mutually assured destruction seemed to work. The idea was the Soviets would know that they'd be destroyed, we'd know we'd be destroyed, if we ever struck each other. But if you developed a missile defense system, someone might be under the illusion that they could actually strike and not be destroyed. That was the idea.

So I started my work. Paul Nitze was my senior partner on this job. I had a staff that worked with me consisting of Boris Feldman, Nick Rostow, Mike Matheson. There was this guy, you mentioned him— [Nicholas] Sims, whom we borrowed from the Arms Control Disarmament Agency and who was obviously devoted to the narrow interpretation. But it was okay with me. I

didn't mind having people around who were committed to one notion or another as long as they were willing to get to the bottom of the record and to be objective and thorough in our answer to the Secretary.

Everybody had access to every bit of reasoning and research that we did. There's nothing that went on in that building about the ABM treaty that wasn't an open book. Everything I said, all the questions I raised, I would raise with all my team. We would work together. Every couple of weeks we would go and see Nitze. I'd give him a briefing on what we found out, send him memos. Gradually we saw the picture emerge on this. We got more and more deeply into the classified records of the negotiating history.

To make a long, difficult story short, it became increasingly clear that the U.S. negotiators went to this negotiation with very clear instructions that would have led them to obtain the narrow interpretation explicitly. The treaty language that they were authorized to negotiate was crystal clear. We put it on the table and it would have been absolutely clear that the prohibition in the articles relating to nondeployment—no testing, no development, and no deployment of ABM systems and their components—that language included ABM systems that did not have missiles, radar, or launchers. In other words, ABM systems that came to be defined in the treaty as ABM systems based on “other physical principles.” That is the magical phrase that the parties agreed represented that category of ABM devices, whatever they ended up being, that did not constitute either an ABM system or an ABM missile, or an ABM launcher, or an ABM radar.

So with regard to ABM systems—made up of launchers, radars, and missiles—the treaty was clear. No testing, no development, no deployment. The language that we put on the table at the beginning of the negotiation was clear that this prohibition applied to any ABM system or device based on other physical principles. But the Soviets throughout the negotiation insisted that they would not deal in this treaty with any system or device based on other physical principles. They wanted this treaty to apply only to ABM systems and their components. And to a significant extent they got their way.

They convinced our negotiators to deal with non-ABM systems and devices, things based on other physical principles, in Agreed Statement D, which is part of the treaty but it's an addendum to the treaty, an agreed statement. It essentially says the parties agree that if they want to develop, test, or deploy systems or components based on other physical principles, they will discuss it with each other. It doesn't say they're prohibited, doesn't say they can't do it, but it does say they're going to discuss it with each other.

You can get Agreed Statement D and take a look at it. It's nonmandatory language. It clearly indicates the parties are concerned about these things, but it also implicitly indicates that the parties aren't ready to agree to the same language of prohibition with regard to these things as they did with regard to conventional ABM systems and their components.

So gradually, looking at the record, we saw that this differentiation was very deliberate, and the Soviets were adamant about it and we were adamant in not accepting it. So we gradually worked our way in the negotiation to getting the Soviets to agree that Agreed Statement D would mean something. You couldn't really, having a treaty with this objective and being agreed, allow it to

be completely undermined by some different way of achieving the same thing. You can see the record being developed for the proposition, and toward the end of the negotiation, the Soviets, I think, basically agreed that Agreed Statement D does mean that you cannot deploy systems or components based on other physical principles.

But whether it means you also don't develop and test them became, for me, the important issue. So I disagreed with the Defense Department lawyer who said that Agreed Statement D does not lead to any kind of result with regard to these systems and components. But I also disagreed with the people who supported the narrow interpretation. It became absolutely clear to me that the Soviets fully intended to continue their research on laser systems. There were also several different kinetic energy systems. There were all kinds of new systems that could potentially become ways to blast missiles out of the air. These debates were great to read. It was so clear.

They were saying, "You can't stop science. You're just going to ruin the treaty. The treaty will be undermined if you don't allow science to develop." So you have to have this, in effect, loophole, to let things develop. Then you have this agreement that you're all going to sit down together and figure out what to do about those new things as they come along. Every couple of weeks, I went in to see Paul and presented him with what I had learned. Quite often, the exchanges we were studying involved him. He was the one raising these issues with the Soviet negotiators and cutting the deals ultimately, and he basically agreed with my conclusions. At a certain point he came to the conclusion that I was right.

In a way, he came to the conclusion that I was right before I came to the conclusion I was right, because I wasn't going to come to that conclusion before he came to the conclusion. *[laughter]* I mean, I'm not going to go into the world and say the ABM treaty means X instead of Y, which everyone said is what it means, and Paul Nitze disagrees with me. Forget it. This is what amazed me about this thing. I was certainly willing to work very hard on this assignment, but I wasn't going to second guess Paul Nitze. He is so smart. He was completely in command of the negotiating record by the time we finished our exercise. He understood everything that was going on. So he agreed with me. And I agreed with him.

We went to the Secretary and told the Secretary that we thought the proper reading of the treaty gave the President the ability, with notice to the Soviets, under Agreed Statement D to test and develop, but not deploy, devices based on physical principles other than those that underlie ABM systems and their components. The Secretary said, "Fine," and everything was fine.

Morrisroe: Was the culmination of that the October memo? What you referred to as the October '85 statement or study that you completed?

Sofaer: Could be. I wrote a memo to the Secretary saying that. Nitze told [Robert] McFarlane about this, or someone found out about it, because everyone wanted to know what was our position. We didn't say in there, "You should do this." We didn't say, "You should do it now. You should do it six months from now." Nothing. We just said, "You asked me a question—what are the limits of the President's authority? These are the limits of the President's authority under this treaty."

On a morning news program soon thereafter, Bud McFarlane was asked, “What is the President going to do about Star Wars?” He said, “We’ve looked at this and we’ve concluded that the President is not limited by the ABM treaty as people have said. We’ve concluded that the President can test and develop devices based on other physical principles.” The whole world changed that day for me.

We didn’t go through a process where the Secretary told the President our conclusion, and then a policy was adopted, and then we told the Soviets and we briefed the Hill and we went to our allies and all the things that should have happened happened. Instead, we had the head of the NSC, who is not even supposed to be involved in politics in the same sense that other members of the Cabinet are supposed to be involved, drop the news like a bombshell on national TV.

He is a great guy in many ways. I liked Bud McFarlane. In my article you’ll see that I think I saved his life in the Iran-Contra affair by telling him to tell the truth. In my article you’ll see I raised the ethical issue: Was I right in preventing Bud McFarlane from talking to Secretary Shultz and in informing him that the story that the CIA was telling was false? So you’ll see I have no animosity toward Bud McFarlane. He’s a guy I care about as a human being. He was very smart, but clearly this was a major blunder in my view. In a way it exposed us prematurely to a position that I think could have been sustained.

In retrospect I firmly believe this premature disclosure led to the destruction of the ABM treaty. It created the impression that we were out to undermine the ABM treaty and that we didn’t care about the Soviets, the Senate, or anybody, and that we were going to do this. That was that. That couldn’t have been further from the truth as far as Nitze and Shultz were concerned.

Riley: Did McFarlane in any way factually misrepresent what the conclusions were, or was it just the way that it was rolled out that completely bollixed up everything you wanted to do?

Sofaer: Right—he put an interpretation out there without a program. No one had decided what it meant that there was a broader interpretation or what it would lead to. So he did something that prematurely told the world that we had this broader interpretation of the treaty and therefore implied that we were going to implement it willy-nilly without regard to any of the other problems. It put us on our heels.

Meanwhile, in 1986, the Senate had turned majority Democrat, so the chances of getting a hostile reaction there had gone up. The Chairman of Armed Services was Sam Nunn, the Chairman of Foreign Affairs—I don’t know if it was [Joseph] Biden at the time, but he was very highly ranked. No—it was Senator [Claiborne] Pell from Rhode Island. Then the battle began. People started to castigate me. What was ironic was that I knew they hadn’t read the record. They hadn’t even read my memo, and they were so absolutely clear that I was wrong.

Then things started to happen that gave me a sense of what kind of trouble I was in. Rick Burt one day came down to my office unannounced, stormed in. He was the Assistant Secretary for European Affairs before Roz Ridgway. He’s one of the most sophisticated, intelligent, well-meaning, great guys in the world. I really like Rick Burt. He comes barging into my office, “What the hell are you doing? Are you crazy?” The reason he can talk to me like this is because

he knows me. He knows I like him. He knows I'm okay, that it's okay. I'm not Judge Sofaer, I'm Abe, and I'm there trying to do my best and also that I'm pretty inexperienced in the way of Washington.

He said, "Abe, this is insane that you've put out this opinion. Insane." I said, "What do you mean insane? Have you read it?" He said, "No, and I'm not going to. It's totally insane, like this is the Ten Commandments, the ABM treaty, the Ten Commandments of American national security and arms control. You have now tried to repeal the Ten Commandments." I said, "Rick, look. I have a job. I'm asked a question, I give an answer."

He said, "I understand that. I'm just telling you what the political reality is. This has got nothing to do with your legal analysis, your ability as a lawyer, what you saw, your integrity. It has nothing to do with it at all. This is a catastrophe for us. You have undermined what was regarded by the arms control community as one of the great documents, one of the great achievements of mankind."

Morrisroe: What was Shultz' response after McFarlane's statement?

Sofaer: Shultz was very upset by McFarlane's statement, very upset. I have no doubt that Shultz did not want to implement the broad interpretation without using it to—with the Senate, using it with the Soviets, developing a strategy around it to get some flexibility for the President's program, rather than announcing it and trying to unilaterally implement it. Now why do I know that? Because I saw the man was not smiling. *[laughter]* He was—

Riley: Something the paperwork often won't help us with.

Sofaer: He just closed his eyes when this issue came up. He just was so pained about the issue. He was pained for me because he saw what was happening. He thought it was terrible to be drawn into this kind of a fight that was needless and that ultimately was going to be harmful.

Morrisroe: To what do you attribute McFarlane's decision to make such a statement? He couldn't have been naïve about what the consequences would be.

Sofaer: I think that McFarlane has always wanted to do something very important in the world. You can see with Iran-Contra what he did. He wrote an op-ed piece right after it was revealed, essentially comparing his effort with Iran to Nixon and China, comparing himself to [Henry] Kissinger. So he does have a pretty strong desire to make a difference. He certainly made a difference there. The fact is that I disagreed with what he did. I like him, I respect him, I think he should not have announced that interpretation at that time, and he certainly created a terrible environment for us to work in.

So the next issue that arose—and I need to get through this story today—was, "Okay, give us the negotiating record. If you say the negotiating records show this, give us the negotiation record." Well, it took me months to convince the administration to put the negotiation record into a room on Capitol Hill to let the Democratic Senators and their staffs read it. I thought that was the right thing to do because they have the right to check on the President, oversight. But the fact is there

were Senators who made statements about the meaning of the ABM treaty after spending seven minutes in the room studying the negotiating records that I had studied for six months, and with a staff.

What followed was a clear, cold-blooded effort to destroy the treaty interpretation by destroying my reputation. That's what they set out to do. I helped them do it in the sense that I made a mess out of the Senate issue. Because the next issue that arose was the issue of what interpretation of the treaty was presented to the Senate. Assuming you're right about the meaning of the treaty, can the executive branch depart from a meaning that was presented to the Senate?

Well, that's a very easy issue for me. Of course the executive branch cannot depart from the meaning that it presented to the Senate if that meaning was clear, and as a result of that, the Senate is counting on the executive branch not to depart. But that didn't mean that the treaty meant what we presented to the Senate, and it didn't mean that the Soviets were thereby bound by what was presented to the Senate. So these very complicated issues started to arise.

Senator Nunn initially made the argument, which was an absolutely ridiculous argument—and he only got away with it because he's so widely respected, and he abandoned it within 30 days or something—but he made this grandiose argument about how what is presented to the Senate is part of the treaty. Everyone in the world should know that America's treaties are presented to the Senate, and the Senate record is therefore binding on every other state in the world.

Morrisroe: As a matter of international law, that's difficult to enforce.

Sofaer: Outside the context of the ABM treaty debate, the position is a joke. But because of the ABM treaty debate, this was taken absolutely seriously. "It is clearly the meaning of the treaty, because we presented it to the Senate, and Sofaer, you are a dishonest lawyer because you made this argument. In fact, we're going to call it the Sofaer Doctrine."

To this day, if you look up in the *Encyclopedia of the American Presidency*, you will see the Sofaer Doctrine. There is an entry. That is the doctrine that a treaty is not the treaty presented to the Senate but the treaty negotiated between the parties. Can you imagine? What a wild idea. That a treaty, an international agreement, is the agreement negotiated between the United States and the parties of the treaty. Well, it was just amazing. My head was spinning with this. I just couldn't believe that people would be willing to essentially give up on reason and logic and history and law in order to attack me, but they were and they did.

But as I said, in the rush over this work there was a memorandum written to me by one of my assistants. Turned out to be a very smart lawyer who was at the top of his class. I hired him as my law clerk and he came as a special assistant. He was not one of the professionals in the office. He wrote this memo giving me the history of the presentation to the Senate. I read it and it just fit with what I knew about the treaty. It seemed clear that there was no evidence at all that we had supported the narrow interpretation. The issue came up in an NSC discussion when I was in attendance. The President was there, the Secretary of State, Treasury, the Attorney General, the whole NSC.

The issue came up as to what was in the Senate record. I had been given this internal memo. I hadn't presented it to anybody, and I said, "I have a memo that has been given to me by my staff that indicates that the narrow interpretation was not presented to the Senate in a binding manner. But I haven't finished my study. It's going to take a long time before I do." Well, the House Foreign Affairs Committee found out about this memo and they wanted this memo, and I frankly saw no harm in giving it to them. It wasn't my final study. I didn't know that it was inadequate at the time, and regrettably—it was one of the biggest mistakes of my professional career—I gave the memo to the chairman. I said, "This is the memo. This is what we found out so far."

Nobody knew that the memo did not have one or two quotes or some language that is in fact in the record, that I think points in the direction of the narrow interpretation. Not in an authoritative way, but definitely points in that direction. Any piece of work by me that purported to represent what was presented to the Senate would have had all those quotes in it. After that meeting in the House Committee on Foreign Affairs, I wrote an article in the *Harvard Law Review* or the *Harvard Journal of International Law*. I think it was the *Harvard Law Review*.

Abe [Abram] Chayes wrote an article about the ABM treaty and I wrote a reply. By then we had found these quotes. I couldn't understand why the quote wasn't given to me by my staff, because one of the quotes was adjacent to one of the quotes they had given me. They gave me a document that was incomplete. I told them that this was a very bad mistake. They said, "Well, what are you going to do?" I said, "We're going to put it in the article. We're going to reveal this language." We did. We put it in there. We said there is some evidence in the record that the narrow interpretation was presented to the Senate.

Well, needless to say, Sam Nunn gets hold of that. He knows then that my memo that I presented to the House is inadequate because I've already revealed in an article in the *Harvard Law Review* quotes that weren't in my memo and that I'm working on a comprehensive study of the negotiating history and the subsequent history. I finished the study of the negotiating record. He is now going to attack me on the Senate floor. I had a discussion with him on the phone where I said to him, "Senator, are you going to start with the negotiating record? Because I've finished there and I haven't finished on the presentation to the Senate and I will be soon. I thought the right thing to do is start with the negotiating record and then look at the Senate presentation issue."

He said, "Yes, that's what I intend to do." This was a personal conversation that I had with Sam Nunn because I was concerned about the memo that I had given to the House. He said, "If your memo is not adequate, don't you think you should let me know that?" I said, "Absolutely. I'd be happy to let you know that." I wrote him a letter telling him that the memo that I had submitted to the House was inadequate and that I was working on a complete study of the record.

He got up on the Senate floor and said, "I'm not going to talk about the treaty. I'm not going to talk about the negotiating record. I'm going to talk about the presentation to the Senate. I'm going to prove to you that the Legal Adviser's memo was totally inadequate." Then he spends hours going through my memo and then going through the complete quotes, which I had already revealed in the *Harvard Law Review* article, to demonstrate in fabulous forensic style that I had

misled the House, provided the wrong legal memo to the Congress, and that the whole thing was just a fraud and a charade. End of speech, walks off the floor. Press leaves the gallery.

Sam Nunn walks back onto the Senate floor and says, “For the record, I want to introduce the letter written to me by the Legal Adviser a week ago, or two weeks ago, telling me that he agrees, to his credit, that the memo that he gave the House Foreign Affairs Committee was inadequate.” No one, no one, I mean no one, no newspaper, no magazine, was there or cared, because everybody only cared about his attack on me. “Judge Sofaer, the Judge” [*Sofaer mimics a Southern accent*]*—and it was just a massacre on the Senate floor, especially since I wasn’t going to defend the memo I considered inadequate.*

Morrisroe: Were there any Republicans in the Senate who were being kept apprised of this who stood up?

Sofaer: They stood up after he had finished, but it was all over. They stood up and said, “What are you talking about? You know he’s not done with that part of the study. Why didn’t you start with the negotiating record where he is done?” Then Nunn came back to the negotiating record. His attacks on me over the negotiating record were much more careful. I firmly believe that we could have convinced Sam Nunn to agree to the broad interpretation. To this day I firmly believe it.

Every time he sees me he throws his arm around me. He’s basically, I think, a very intelligent guy. I find him very attractive in many ways, a strong American, an intellect, a very strong man. I just cannot doubt that he was massacring me because he thought it was proper. He thought it was in the public interest, he thought it was good for the party. He thought it was good for his Presidential ambitions. Maybe he thought I deserved it coming out there with a half-baked memo with the House Foreign Affairs Committee. That’s what I exposed myself to, and it was really regrettable. It was the worst professional fiasco of my life. That was the only time I’ve ever felt that I wasn’t careful enough as a professional. I should have insisted that nothing leave my office—even a memo that I said was incomplete—until it was done.

I have never to this day revealed the name of the lawyer who wrote it. There’s no doubt that I didn’t write it, because this lawyer knows and everyone knows that he wrote it. Senator Nunn’s assistant at the time called this lawyer in my office, because they knew he was the author. They found out. They had the decency not to reveal his name, I’ll say that.

He called me that night at home. When my blood was all over the newspapers. He told me they had said to him on the phone: “Sofaer is telling the world that someone else wrote that memo, and the world knows that you wrote that memo. You have your chance, tell us. Didn’t Sofaer approve that memo? Didn’t you give him the memo with the full quotes in it, and didn’t he take out the pro-narrow interpretation language?”

They were trying to put the words in his mouth in order to get him to be able to testify that I had doctored the memo. That way it would make him a hero, like Sims tried to be a hero testifying, and I’ll get back to Sims’ testimony. I’m then the villain and this clearly proves it. I don’t know, maybe they really believed I had done that. Maybe they thought despite Abe Sofaer’s whole

record, his whole life, he's just a crummy lawyer who will do anything for his client. I don't know. Maybe they did. But it was deeply offensive.

This young man, he's a decent fellow. He called me up. He said, "What should I say? What should I do? I wrote the memo. You didn't take out the quotes. You want me to say that? Of course I said that to them, but you want me to say that publicly?"

I said, "No, just hold your fire. The State Department has to agree on what's going to be said publicly and what isn't." I wrote a public release for the Secretary to consider saying that this young man, without naming him, had been called by the Senate staff to try to get him to make this statement and that he had refused to do so because it wasn't true. I was urging the Department to do something to combat what they had done.

I was told, as I had been told over and over again in the State Department, stories only last longer if you try to fight them. You go out there, you say there's nothing to it, and you stop, because the longer you fight, the more stories there are, the more blood is shed. That's what I was told. Anyway it was not my judgment to make. It was my blood, but it wasn't my judgment. So I said, "Yes, sir." I went on doing my work on the presentation to the Senate and what it meant.

Morrisroe: Can I ask a quick question, jump in here? To what extent is anyone in the White House, whether in the Congressional liaison operation or the counsel's office, or their press operation, was there any involvement in the White House in any of these discussions you were having with the Senate or involving the Secretary?

Sofaer: There wasn't anyone from the White House as such, but there were people from the Defense Department who were extremely interested in what I was doing. Doug Feith in particular, who is very ideological, kept coming over to find out what I was doing, what conclusions I was reaching. It was very aggressive on their part to try to find out what we were doing and what our position was going to be.

Morrisroe: Did OLC [Office of Legal Counsel] or anyone at the Justice Department seek to weigh in in their capacity as someone who interprets?

Sofaer: Yes, on the presentation to the Senate they did weigh in on the treaty negotiation issue and agreed with me. Every department agreed with my interpretation of the treaty—the Attorney General's office, the White House counsel, the Defense Department counsel, who was Will Taft. He thought it was a no-brainer. He couldn't understand how anyone could reach a different conclusion. Every single national security legal officer in the department, plus Nitze, plus—and this was most important to me—Max Kampelman, who read it and said, "Abe, this is clearly correct."

Now they've all written biographies. Max Kampelman has written his biography, where he agrees explicitly with me. Paul Nitze maintained his position in his biography, and when he left the department, agreeing with me. Every single person in the administration agreed with the interpretation. Now on the presentation to the Senate side, I wrote my memo, and my conclusion was that some evidence did exist that the narrow interpretation was presented to the Senate and

some Senators had concluded, including [James] Buckley, who was a Senator from New York at the time, that the narrow interpretation was the correct interpretation.

The reason Buckley concluded that was because he wanted to attack the treaty to try to get it killed. Anyway, the fact is that there was some evidence of the narrow interpretation, but the evidence was really weak. I concluded that the United States, and the President of the United States as an interpreter of treaties, was legally free to disregard the narrow interpretation; that the Senate record was not adequate to bind the United States, the President, under U.S. law or international law, but that it was sufficiently strong so that the President should discuss this issue with the Senate and deal with the political ramifications.

The Department of Justice wrote a memo, looking at the issue from a different legal point of view, that is, as a sort of equitable estoppel idea. The test they used was: Did we lead the Senate to approve the treaty by proposing the narrow interpretation? They concluded that the narrow interpretation was not pivotal to the treaty's approval, and therefore there was no estoppel effect from the presentation to the Senate.

This is the part that you want. This is the confidential real thing that went on behind the scenes, that was not in my memo, very deliberately, and which I have maintained confidence over, not because it's classified, but because I felt my duty as a lawyer to a client required me not to undermine my client's capacity to do what he wanted to do. I went to Nitze and said, "This is the record."

Paul thought that I understated the weakness of the record. He thought the record was even weaker than I did. He thought that the President was easily free by this record to do what he wanted. But in fairness, that was not his expertise, it was my expertise. I said to Paul, "Listen, Paul, no matter what the record shows, it is ludicrous for us to abandon the narrow interpretation without the Senate's approval, and the Senate is controlled by Democrats who are not going to accept this. It's going to lead to a battle instead of an agreed program of change. This would be unwise." Paul couldn't have agreed with me more; he completely agreed with me.

Meanwhile, we're getting signals from Nunn, because we're reaching the end of our study. He wants to know how we were going to come out. We had the sense that he was suggesting if you come out correctly on this issue, maybe we have something to talk about. I firmly believed we did have something to talk about. I really did. I went to Shultz and I said, "Secretary, Sam Nunn is a serious guy." Shultz knew it; boy, did he know it. He had a good relationship with Sam Nunn.

He brought him over one day for tea and he had the three of us sit in a room together drinking tea and not talking about the ABM treaty. It was one of the great Washington moments for me. He just wanted to show Nunn that I had his confidence and that I was a decent person. Nunn got the message. So we had the ability to negotiate with Nunn. I have no doubt about it.

I wrote at the end of my first draft, the draft of the report, my personal judgment as a lawyer, that the President should not exercise his discretion to implement the broad interpretation without the Senate's approval, and Nitze agreed with me. I presented it to Shultz.

Everyone in the administration came to Shultz and said, “You can’t do this. If Sofaer puts that in his report, you’re not telling the President the scope of his authority, you’re adding that his principal international lawyer is telling him that he can’t do it even though his opinion says that he can do it. Politically you’re essentially killing the President of the United States’ right to implement his policy without this cloud of your personal opinion, as a professional.” If you want to express that opinion, the argument was, you can do it. You should be able to do it. You can do it in a separate document, in a separate meeting. You should not put it in a professional opinion about the President’s power.

Paul Nitze told me that he agreed with this view, that that was the right argument and that I should take that language out and put it in a separate letter to the President, to the Secretary, to be given to the President, a separate memo. So I did. We were told that we were not to talk about our personal position because that was not probably going to be the administration’s position.

Morrisroe: Told by whom?

Sofaer: The White House staff. The Secretary didn’t say it in so many words, but we had to go to brief Sam Nunn on our conclusions. We couldn’t have been more clear without explicitly saying to him that we agreed that we should sit down and talk but that we could not speak for the White House as to what was going to be done with this opinion. Nunn was furious, furious. Now he knew that even though we agreed with him that the political way to do this was jointly, with the Senate, we had been told to shut up, Nitze and me. The administration was going to do what it wanted to do.

Morrisroe: Do you think that those in the White House who were recommending the course—

Sofaer: Oh, I know, I went there. I asked for an appointment at the White House. I wanted to see the President. I did not get to see the President. I wanted to see the NSC advisor. I did not get to see the NSC advisor. I got to see the head of arms control, who was a naval officer whose name slips my mind right now, but he was the guy very much in favor of the attack on the ABM treaty, Star Wars. They heard me out.

Actually, you know, come to think of it, I may well have had a chance to see the NSC advisor. He may have been at the meeting. I’m trying to envision it now. I laid out my position. I think it was [Frank] Carlucci. I laid out my position. They nodded, they said they understood, and that was it. They didn’t argue with me, but they understood me to be a good soldier who was going to keep his mouth shut and let the President try to do what he wanted to do.

Morrisroe: To your knowledge, did Shultz ever go to the President with your argument?

Sofaer: I think he did. I don’t recall what he writes in his book about it, but he strongly opposed trying to implement the broad interpretation without the Senate’s consent, without negotiating with the Senate. He and Kampelman were trying very hard to get the White House to sit down with Sam Nunn and the others to try to work out something on the ABM treaty. They just

couldn't do it. The White House was totally adamant that they were going to try to implement the broad interpretation.

Now let me say, even in all this turmoil that went on, I realized that there could be a strategy in play that served the White House's interest and served the nation's interests in their view that involved totally alienating the Senate on the ABM treaty. The strategy was this: We had created the legal basis for implementing a revolutionary change in arms control, in armament. This has created a pressure on the Soviet Union such as never had existed and was not even contemplated. It had also attracted the attention of the Democrats in the Senate like no other issue. They were totally fixated on this issue, and the issue was not important.

We had no capacity whatever to implement the broad interpretation. There was nothing to test. There was nothing developed to a point that you would call it development. There was stuff going on in laboratories, and everyone agreed that you could do that. Everyone agreed, no matter what interpretation governed. So to push the broad interpretation was an enormous distraction from everything else that was going on between the Democrats in the Senate and the administration.

There was a sense that they wanted the Democrats to use up all their ammunition on the broad interpretation. It looks bad, but so what? They're going to be approving everything else. We're going to be getting what we want here and there and this and that. I went up to see Charlie Hill one day and said, "God, this is insane what they're doing. They're ruining this interpretation. We could actually get Nunn to agree to it."

Charlie looked at me and he said, "Do you know what you've done?" I said no. He said, "This is worth 5,000 missiles." I said, "What do you mean?" He said, "What's playing out is a negotiation between the world's two superpowers. You're just grist in the mill. Shut up. No one told you to come down here. You came down to the gutter of American politics. You stepped off the pavement. You were a Federal judge. You chose to do that. Just shut up and do what you have to do."

I understood that kind of steely quality that existed in Hill, Shultz, Reagan. There were a number of them who had this sense that you know what? We don't get the Senate to agree with us, we don't have anything anyway. There is no technology to launch. Not a bad deal. Sofaer gets hung up, quartered, chopped to pieces. *[laughter]* But in fairness to them, they concluded that my reputation could take it and I was a tough kid and I was going to survive. In retrospect they were right. I didn't survive the same way I wanted to survive.

I wanted to continue to be regarded as a moral, principled, capable, inventive but capable lawyer. That was out the window because I got people who swore eternal enmity to me—Biden, [Carl] Levin, they just—I can tell you it takes my breath away to hear them talk about me. I just can't—what happened? Who are you talking about? But that's how it is.

Riley: So how do you work your way through something like that, personally?

Sofaer: It was very difficult. It was very painful.

Riley: You had people that you confided in?

Sofaer: Sure, I talked to people. I have a wife who is very loving. I have a family. I was free after the administration was over and I left 18 months later to have a family that I got much more engaged in. That has been incredibly sustaining. In fact, the moment was just right when I left the [George H. W.] Bush administration. That helped. Also success helped.

I had one negotiating success after another. While people were critical of me, I did Taba, Ras Burka, Allende, the Chile thing. I did the Stark negotiation in Iraq, recovering for the seamen who were killed. That was the surface stuff. I did so many other things. I had so many ideas that could have even gone further if I hadn't left. I negotiated successfully with the Iranians.

So in a sense I was able to reassure myself that even though this had destroyed the image that I had had when I came into the government, and I would have loved to have preserved, I had had fun.

Riley: I guess politics is a little bit more like baseball than football—you hit 300 in politics, you're doing fabulous.

Sofaer: That's right. In a sense, I mean, I was a big hitter. That's what everyone said about me, even my enemies. But I didn't want enemies. I had a very simplistic kind of professional view of myself. I didn't want any enemies. I thought I could get through Washington without it. In retrospect, if I had handled things better, if I had had more experience—this is what I meant when I talked to you earlier—if I had had political line jobs that were of lesser importance, of lower visibility, and I could see how Washington worked and I wasn't just thrown into the hottest issues.... I still, to this day, think the thing that alienated Biden from me was not the ABM treaty, but the British extradition treaty, where I favored the extradition of IRA [Irish Republican Army] terrorists. Biden is a deeply emotional man, even though he's very smart and very committed to the notion that the Irish have suffered.

He had no idea who I was. He didn't know that I know Irish history really well, that I really cared about the Irish and really loved the Irish. I'm not going to be able to stop in the middle of a Senate tirade against me to tell Biden, "Hey, look, you're wrong about me. I care about Ireland. I care about the Irish, and, moreover, if you would just calm down and see what we're doing with Margaret Thatcher here, you'll see that we're setting up the freedom of Northern Ireland. This is just a matter of time, once you have majority control in place and a separate election." I couldn't talk to him about that. That was not my job. My job was to get the extradition treaty passed and to eliminate the political offense exception. There was no reason not to eliminate the political offense exception. It was the right thing to do. There had to be a way. If I had known Washington, I would have gone and seen [Daniel Patrick] Moynihan, who appointed me a judge, who knows I'm a good man, a good person. I would have gone to see Moynihan. I would have fallen on my knees. I would have said, "Pat, save me from this guy Biden. He's got me all wrong."

He would have taken me by the arm, walked me into Joe Biden's office, and something else could have happened. Something else would have happened. I just had no idea you could do that. It was a shame. I really wish in retrospect that I had it to do over again, but I don't. I still think it's a great system. You get battered, but you'd better learn. I would have still gotten battered, but it would have been a more professional battering. *[laughter]*

Morrisroe: Less bloody.

Sofaer: Less personal. I wrongfully thought that this was sort of like going into the headmaster's office. You have a position and the headmaster has the rod. He can beat you up, but he can't change your position. I'm a very tough guy. No one can change my positions—not Ronald Reagan, not Joe Biden. That's the message he got. You know what? There was no need to send that message, none at all.

I should have been sitting down with him explaining the situation and worked something out. That's what I did in my negotiations. But the way Washington works, it's so hard to know how to do that. George Shultz knows how to do that, he really does, and that's why he's done so well in Washington. Jim Baker knows how to do that. Someone ought to write a how-to manual, what not to do. In a way, that's what you're doing here by recording all these things. What not to do. You can take your position, and at the same time you can reach out to these people and not let your own staff and your own PR [public relations] guys and your own legislative people prevent you from opening lines of communication with "the enemy." Because there was no reason for Sam Nunn to be the enemy.

The fact is the Soviets were right. This is really the killing fact. By insisting on a narrow interpretation, which is what the Senate ended up doing, the Democrats made the treaty a rigid document. Then, as you're developing the anti-missile systems based on other physical principles, and you need flexibility, you need to be able to know that you're not violating the ABM treaty. Instead of having that flexibility in Agreed Statement D and a broad interpretation, without the ability to deploy—which is what the Soviets wanted all along—you had a rigid system where people could block the most obviously appropriate things.

They started putting all sorts of artificial limits on how much energy you could use on a laser, what angle you could approach objects with in a test, all sorts of picky things that made these tests very difficult, very expensive, etc. So by the time George W. [Bush] came into office, there was absolutely no patience for this anymore. He just eliminated the treaty, and this is exactly what the Soviets predicted would happen with a narrow interpretation.

Morrisroe: Thank you very much.