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NEGOTIATION OF THE SETTLEMENT

Mark Feldman: I would like to thank you, Alan, for your kind invitation to these gentle climes at this time of year. It is a fascinating subject for me. I have been working on virtually nothing else for the past several months, but it is always good to get new perspectives. I have never been in a gathering like this from which I have failed to learn something new about these agreements and the problems that we have ahead of us in implementing them. To the extent I can recall and have the information, I would like to share with you a bit about the negotiating history of the agreements. It is hard to say whether it is all terribly relevant to the legal analysis but it may be of general interest.

Those of you who saw the ABC spectacular on the failed negotiation efforts over the months know as much as I do about those endeavors. Most of those negotiations were very closely held and generally came to naught. The efforts leading to the successful release of our people have really received much less attention in the media. They began roughly in September with some private contacts made through a German channel. These resulted in some very secret meetings, held in Germany, all of which coincided approximately with the publication in Tehran of Khomeini's four conditions for the resolution of the crisis. The question which I think political scientists and historians will be debating for years to come is, "What led to this change in thinking on the part of the Iranian authorities over the past many months?" In retrospect, I think the American officials conducting this diplomacy were well aware from the beginning that the problem was severely compounded by the absence of any kind of recognized authority in Iran capable of taking the responsibility or political risk of doing business on a matter this sensitive. As the Iranians began to go through their constitutional process—the process of forming their institutions—President Bani-Sadr's office took on the hostage question. I suppose it did so on the basis of the rational judgment that it was not in Iran's interest to isolate itself from the international community, and possibly also out of a political judgment—which may have been a misjudgment—that keeping the crisis going would strengthen the hand of the Islamic Republican Party. As it turned out, the hostage issue became a weapon in the hands of the fundamentalist coalition in its power struggle with Bani Sadr. For a

3. The four conditions were: waiver of claims; release of the assets; nonintervention in Iran's internal affairs; and recovery of the Shah's wealth.
long time it seems to me—and it is only a personal view—that their need to have that instrument in the domestic political conflict really made it fundamentally impossible to have any kind of negotiated settlement. But over time, once the mullahs achieved their political dominance in the Majlis and in the Prime Minister’s office, there came a point at which they no longer needed the hostage crisis. Perhaps they may have seen it as a weapon in the hands of still more radical elements in the political spectrum in Iran.

There was also the sanctions program. One should not underestimate the effect on Iran, economically, of the asset freeze\(^4\) and related trade sanctions.\(^5\) Although our allies did not do all that we wanted, they did more than some people expected. That, I think, was a problem for Iran.

In any event, for whatever reason, by September they seemed to have made a decision to resolve the crisis. Then the Iraqi war intervened. At first no one really knew how it was going to affect the situation. It cut both ways. For a while, the war suspended forward movement on the matter, but in the end, perhaps it gave solution of the crisis greater urgency.

Since Khomeini had decreed that the decision was in the hands of the Majlis, the first important step to getting the negotiations underway was for the Majlis to act and to interpret, in a formal way, Khomeini’s four conditions. This it did. The Majlis’ four conditions were basically consistent with what Khomeini himself had said, but spelled out in more technical detail the waiver of claims, the release of the assets, nonintervention in the internal affairs of Iran, and recovery of the Shah’s wealth, with some elaborations on those four themes. In that context, the negotiations eventually started. They became serious with the proferred good offices of the Government of Algeria.

Next, it became necessary for Lloyd Cutler,\(^6\) Warren Christopher,\(^7\) Bob Carswell\(^8\) of the Treasury and the others to decide how to respond to the Majlis’ points. They decided, as I perceive it, to position the United States as accepting the demands laid down by the Majlis, and then, since the demands were general enough, to make specific responses explaining exactly how we intended to implement each. In the process of articulating the details we would be able,

\(^{4}\) Exec. Order No. 12170, 44 Fed. Reg. 65, 729 (1979) [for text, see infra Appendix at 61].
\(^{5}\) 31 C.F.R. § 535, Subpart B (1980) [for text, see infra Appendix at 141].
\(^{6}\) Counsel to the President.
\(^{7}\) Deputy Secretary of State.
\(^{8}\) Deputy Secretary of the Treasury.
appropriately, to hedge the commitment of the United States. This was done initially by preparing a full-fledged set of Executive orders to carry out the various points of the program with many qualifications. At one point, consideration was actually given to having the President sign these Executive orders and having them carried, fully executed, over to the Iranians.

One must realize the very difficult conditions under which these negotiations were being carried out. We had no direct access to the Iranians. There was no opportunity for the exchange of views. We were still uncertain whether they could get themselves together and take responsibility for any compromise of any kind. We were totally dependent on the Algerians for communicating between the two negotiating teams. Under these circumstances, the Carter Administration perceived that it was going to be a difficult negotiation, with only a limited amount of time to carry out a very complex operation. The effort was made, therefore, to position everything as much as possible so it could just be accepted without a lot of exchanges. Moreover, the Iranians weren’t too happy about the details. They had a lot of trouble, from both a technical and bureaucratic point of view, coping with the flood of paper we sent over there. They just wanted to have some very basic principles. They had laid down the law, we would do what they asked, and that was all.

Another interesting aspect is the Iranians’ consistent choice of negotiating through the media. At one point they were unhappy that the United States would not make a public statement. Instead, we kept giving them documents, secret explanations, and so forth. That was not their style at all. Nevertheless, our negotiators held firm. We did not accept the premise of negotiating through the media. Also, of course, there was a bank negotiating track to the settlement process which began in private channels but in the end merged into the official negotiations. I would prefer to let Bob Mundheim tell us about that effort. He was in those negotiations at an early stage and then in the final days.

Skipping a lot of details, the negotiations were progressing reasonably well, given the difficult circumstances, until December—just before Christmas. The Algerians had spent quite a number of days in Iran and we were bringing the negotiations to a head. It, therefore, came as a great shock to everyone in Washington to learn that Iran was demanding a $24 billion fund as a guarantee for the United States commitments with respect to the restoration of Iran’s assets and recovery of the Shah’s estate. I am not sure we know, even now, how that set of demands developed, but the general impression is that they were
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added at the very last moment by the more radical elements in the Islamic Republican Party coalition who just were not ready to see the hostages go. Of course, it is also true that they did not trust us to honor any negotiated agreements once we got our people back. This was particularly the case with respect to the return of the Shah's estate. The Iranians asked—if I remember the figures now—for almost $10 billion in assets of theirs, which was just a little off the amount we had computed for their assets in this country. They asked for another $4 billion in an escrow fund as a guarantee for other assets which they thought might be out there somewhere in the United States, but which we did not know about or were not telling them about. Finally, they demanded a $10 billion reserve fund as a guarantee that we would live up to our commitments in regard to the return of the Shah's assets.

It was striking that the Algerians did not bring this proposal to Washington personally, as they had been doing up to then. They sent it to their embassy in Washington and the Ambassador then brought it over. It may be that they understood just how impossible the proposal was. I do not know whether the Algerians wished to disassociate themselves from the proposal, whether they thought the negotiations were over, or whether they were just plain exhausted because they had been working around the clock for days and days. But they did not come with it and there was deep pessimism in Washington; some even thought of breaking off the negotiations. A serious question arose over whether we ought to continue the process in the face of this kind of behavior. Finally the judgment was made not to break the link. It had taken almost a year to develop the channel of communication with Iran through the Algerians, and it was decided that, while we were going to reject the proposal categorically, we would continue the negotiating process. When that position was communicated to Algiers, along with a few substantive points as to how we might respond to the demands, the Algerians immediately came to Washington and began some very serious negotiations.

I do not necessarily have access to all that went on in that period, but I wondered at the time, and I wonder now, whether the Algerians had not talked with the Iranians about backing off their proposal. Also, when the Algerians made their decision to return to Washington, I suspected then and I suspect now that they may actually have had some indication that the Iranians would back off. The Iranians must have realized that they had made a fundamental error in predicting the U.S. reaction. Maybe it was something they could not control. But in all events, they must have known they would have to
back off the request for the $10 billion reserve. There was a fire storm of reaction against the proposal, particularly in the European and Japanese press. At no point in the whole affair, except at the time of the original hostage taking itself, was public opinion so spontaneously and universally angry with the Iranians. That had to have had some effect. All of their lawyers, from Europe and the United States, must have advised them that it was impossible for the United States to accept the proposal from a legal, as well as political, point of view. So I do not exclude the possibility that they reassessed the situation and gave the Algerians some incentive to go forward with the negotiations.

Then ensued a process which did not culminate until January 20, 1981. In this process, Iran never answered the question, and we never knew, whether they had withdrawn the proposal for the $10 billion reserve. They just kept doing business with us on all the other issues, and gradually we began to get the idea that they had effectively abandoned it and that we were not going to hear about it anymore. One never knew until the very last moment, however, whether that shoe would drop and ruin the whole thing. How they managed to deal with it internally I cannot say.

In any event, between Christmas and New Year’s Day, when the discussions had progressed on the asset issues, it became opportune to take up the claims settlement agreement as an agenda item. We presented a draft agreement to the Algerians and had a substantive negotiation with them in Washington. Several of the less than optimal features of the final agreement were the result of compromises made in response to Algerian advice on how the Iranians might react to particular issues. Then the Algerians took a package back to Tehran which included a claims settlement agreement. By this time the documents were in the form of proposed declarations by the Government of Algeria. It was clear the Iranians were not going to sign an agreement with the United States and that was the form in which it was thought that the agreement could be concluded.

There came a moment in mid-January, around the 12th of January, when it became clear that the Iranians were prepared to release the hostages upon the recovery of their own assets. But they wanted those assets—all of those assets—to be put into an escrow account before the hostages were released. It was a proposal close in concept to our own, but we had hoped that the hostages could be returned and the details—the claims settlement and other issues—worked out afterwards. Here, for the first time, the Administration had to come to grips with the question of what we could do before the hostages were
released; what conditions we would accept for the release of the hostages.

It was perceived that we had control, or at least more control, over the Iranian assets in the overseas branches of U.S. banks. These assets were not subject to attachment by non-bank claimants, although there were set offs against those deposits by the banks themselves. We also thought we could move the bullion and securities being held in the Federal Reserve Bank of New York. There was much less certainty about our control over the other deposits subject to attachment. It would take time to litigate the validity of the Treasury orders revoking the attachments. There was great concern over how long that litigation would take, and whether the hostages could be released in a reasonable period of time. Then finally, the presidential transition came into focus. President Carter had lost the election; January 20th was approaching. If the United States accepted Iran's proposal, the Reagan Administration would have to implement Carter's commitments, and it was not clear that they would do so.

This issue was reviewed with President Carter; an assessment was made of the attitudes of the incoming Administration, and the President made a decision that he would only approve a deal that would bring the hostages home by January 20.

So, a message was sent off to Algiers telling them that our figure was on the general order of $7.5 billion. They came back and said: "No deal." We came to a real crisis in the negotiations and, as a result, Warren Christopher was sent to Algiers. The purpose of this trip (it was originally to be a two day visit) was to explain to the Foreign Minister of Algeria why the United States could not go beyond that figure and that we really meant it. It was not an easy task. It was not the least of Warren Christopher's many achievements in these negotiations that he did persuade the Algerians of this fact. The Algerians are very sophisticated people, but the peculiarities of the American political and legal system are not easy to grasp. In the end the Algerians did accept the fact that this was the limit of the U.S. negotiating position, and the negotiations proceeded from there. Christopher never returned home until after the change of power in Washington.

Now, the other major points in the negotiating history revolved around the banks. Perhaps Bob Mundheim should tell us something about that. Would you, Bob?

Robert Mundheim: The best current reference with respect to the involvement of the banks is the testimony that John Hoffman⁹ gave

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before the Senate Banking Committee. Early in the game, Citibank thought about settlement as a way of resolving the problems it faced. In February 1980, its representatives came to the Treasury to discuss generally some principles on which they were working and to explore the Government's view. At the time, Citibank had litigation going in four countries: the United States, the United Kingdom, France, and Germany. It was looking for a signal from Iran on whether settlement of those suits was possible. In other words, it viewed the lawyer-to-lawyer channel as an additional channel through which problem-solving talks might go forward. John Hoffman initially felt that France would probably be the place he would get the signal because the litigation in Paris seemed to be moving along at the most rapid rate. But, in fact, the signal came through the German lawyers toward the beginning of May 1980. As the discussions with the German lawyers, and, ultimately, with the Bank Markazi proceeded, the English and American lawyers got deeply involved and a basic approach was formulated. The notion was to use Iran's overseas deposits to pay off the liquidated debts, with the further notion that when this was done there would be something left over to give back to Iran. That was the carrot to make the deal. The concept was also that the domestic bank deposits would be used to pay off unliquidated claims.

Those discussions and the actual drafting of documents went forward, I understand, until the middle of November 1980. During that time Hoffman kept the Treasury and State Departments informed about the negotiations. It was always understood that a sine qua non of working out any bank settlement had to be the release of the hostages.

In the middle of November, word came from Tehran that the basic plan to use the overseas assets to pay off liquidated debts in full was unacceptable. The explorations then moved toward a so-called "bring current" formula for dealing with loans from the banks. The "bring current" formula essentially meant that Iran would pay off the interest and principal owing on the loans up to the date of settlement and then give some form of further promise to pay the balance of the loans that were still outstanding in accordance with their terms. The formula also anticipated the negotiation of additional security for those promises. Work on this "bring-current" formula went forward for a month-and-a-half until the Iranians, sometime during the sec-

ond full week of January, indicated that they were rejecting the plan. On January 15th, the Iranians, for reasons I cannot fully explain, although there is a good deal of speculation about why, suddenly reverted to the first plan. And that was the plan that ultimately provided the basis for settlement. So, on January 15th, through a very unexpected Iranian initiative, the negotiations were back to the original plan, and the negotiators had basically five days in which to prepare the documentation.

Mark Feldman: Let me just comment before you go on. From my perspective, as one player, this announcement of Iran’s proposal to pay off all of the U.S. bank loans was the moment when the possibilities for settlement really crystallized. That was the turning point. The Iranians were having a great deal of trouble agreeing to the guarantees—collateral and so forth—for which the banks were asking under the “bring current” plan. There was a requirement to go to the Majlis for some of those guarantees. That was definitely not on. This was clear and it may have been one of the considerations that led to their ultimate rejection of that plan. I don’t know. But, in all events, we got the strong message, as of that moment, that the Iranians wanted to get this problem off their back. They wanted to deal. In the process, however, they came up with an asset figure that was more than we had available from the sources I described earlier. It was more than $8 billion; $8.1 billion, I think. We thought about that. I have not told this to Bob, but we finally decided that the reason why the Iranians came up with that figure, and would not move off it, was because over a period of several months the coordinated Government position to the press was that the Iranian assets exceeded $8 billion. We believe that it was because of that position the Iranians insisted upon $8.1 billion.

At this point I just want to describe briefly what happened when, on Thursday night, January 15th, the Iranians announced their willingness to pay-off the bank loans in full. Bob Carswell and his colleagues at the Treasury Department got on the phone and brought the bank negotiators—the bankers and their lawyers—to Washington for an all-day meeting presided over by [Treasury] Secretary [G. William] Miller and Secretary [of State Edmund] Muskie at the State Department on Friday, January 16. It was really a tremendous undertaking. While Iran’s announcement was a great step forward, it represented a total change in signals. There were only five days left until the inauguration. The figures and documentation were not available. There was real doubt whether the United States could pull the deal together in five days’ time. There were twelve principal depository
banks and more than fifty lending banks. The Treasury decided that the only way to get the job done was to bring representatives of the depository banks together. They worked all day on two big issues: first, how to get from $7.5 to $8.1 billion, and second, since the Iranians had proposed paying $3.7 billion immediately and holding $1.4 billion in escrow, who was going to get the $3.7 billion and who was going to wait. Both of these issues were worked out during the course of that one day. The bottom line on the numbers was $7 billion and Iran finally accepted that. On the order of payment it was agreed that the syndicated loans would be paid off immediately in full and the nonsyndicated loans would be paid out of the escrow. Bob, if you would pick up the story from there. You were in London at that time.

Robert Mundheim: Yes. I had gone to London on Wednesday, January 7th, and met the following morning with the officials from the Bank of England. The purpose of the mission was to persuade the Bank of England to be the stakeholder. If we were going to have an escrow agreement pursuant to which funds would be deposited and then distributed according to specified instructions and on the happening of predescribed events, somebody had to hold the money. That had to be someone in whom both sides had confidence and who had experience in the kind of complicated financial transfers involved. Since most of the overseas money was in England, it seemed sensible to explore the matter first with the Bank of England. Next, having had some discussions on Thursday and Friday with the Bank of England, Ernie Patrikis, who is the Deputy General Counsel of the Federal Reserve Bank of New York, and I went to Frankfurt to explore the willingness of the Bundesbank to act as stakeholder. Then, on Monday morning [Jan. 12], we flew back to London to pick up again our discussions with the Bank of England. As the process wore on, the Bank of England indicated that it would be willing to serve. Indeed the Germans had indicated that they too would be willing to serve, but the Iranians ultimately felt that the Bank of England was the preferred stakeholder. That judgment was based on an assessment of the safety of the funds from attachment. The worry was that once the funds were transferred to the stakeholder, and while the parties waited for the primary condition to be satisfied—namely, release of the hostages—someone would attach the funds so that if and when the hostages were released the funds could not be paid over. It was thought that the funds would be more secure from attack in London than in Germany. Obviously, things were moving so quickly that it was questionable whether anybody could get into court fast enough to do anything about it, but we all worried about it and, being careful lawyers, it became an important issue.