

**NOMINATIONS OF ROBERT E. HERZSTEIN, C. MOXLEY  
FEATHERSTON, WILLIAM M. FAY, CHARLES R. SIMPSON,  
EDNA PARKER, AND SHELDON V. EKMAN**

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**HEARINGS**  
BEFORE THE  
**COMMITTEE ON FINANCE**  
**UNITED STATES SENATE**  
AND THE  
**SUBCOMMITTEE ON INTERNATIONAL TRADE**  
**NINETY-SIXTH CONGRESS**  
SECOND SESSION  
ON  
**THE NOMINATIONS OF**  
**ROBERT E. HERZSTEIN TO BE UNDER SECRETARY OF COM-  
MERCE FOR INTERNATIONAL TRADE, C. MOXLEY FEATHER-  
STON FOR REAPPOINTMENT AS JUDGE OF THE U.S. TAX  
COURT, WILLIAM M. FAY FOR REAPPOINTMENT AS JUDGE OF  
THE U.S. TAX COURT, CHARLES R. SIMPSON FOR REAPPOINT-  
MENT AS JUDGE OF THE U.S. TAX COURT, EDNA G. PARKER TO  
BE JUDGE OF THE U.S. TAX COURT, SHELDON V. EKMAN TO BE  
JUDGE OF THE U.S. TAX COURT**

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**APRIL 29, MAY 12 AND 14, 1980**

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**NOMINATIONS OF C. MOXLEY FEATHERSTON  
FOR REAPPOINTMENT AS JUDGE OF THE U.S.  
TAX COURT, WILLIAM M. FAY FOR REAP-  
POINTMENT AS JUDGE OF THE U.S. TAX  
COURT, CHARLES R. SIMPSON FOR REAP-  
POINTMENT AS JUDGE OF THE U.S. TAX  
COURT, ROBERT E. HERZSTEIN TO BE UNDER  
SECRETARY OF COMMERCE FOR INTERNA-  
TIONAL TRADE**

TUESDAY, APRIL 29, 1980

U.S. SENATE,  
COMMITTEE ON FINANCE,  
*Washington, D.C.*

The committee met, pursuant to notice, at 10:20 a.m., in room 2221, Dirksen Senate Office Building, Hon. Russell Long (chairman of the committee) presiding.

Present: Senators Long, Ribicoff, Byrd, Bentsen, Baucus, Bradley, Dole, Packwood, Danforth, Chafee, Wallop, Heinz, and Durenberger.

The CHAIRMAN. Let me call this meeting to order.

I would like to ask the three reappointments to the U.S. Tax Court, Judge C. Moxley Featherston, William M. Fay, and Charles R. Simpson, to have a seat.

Let me ask, Judge Featherston, how long is a term on the Tax Court?

[The biographical data follows:]

**BIOGRAPHICAL DATA—C. MOXLEY FEATHERSTON**

July 1967 to present: Judge, United States Tax Court. Appointed July 24, 1967; designated by the other Judges as Chief Judge, July 1, 1977, to present.

1945-49 and 1951-67: U.S. Department of Justice. Trial attorney; Chief of Review Section; Assistant for Civil Trials with responsibility for general supervision of all tax refund trial work in the district courts and the Court of Claims.

1949-51: Institute of Inter-American Affairs. Assistant General Counsel.

1942-45: War Relocation Authority. Attorney.

1940-42: U.S. Department of Agriculture. Attorney.

1940: Practice of law, Hereford, Texas.

Education: George Washington University Law School. J.D. degree (1939); Order of the Coif; Law Review; Hardin-Simmons University, Abilene, Texas. A.B. degree (1935); Magna Cum Laude.

Personal background: Born June 6, 1914, Texas; married Rose Ross Featherston (1938); three children.

Residence: 2010 Lorraine Avenue, McLean, Virginia 22101.

## BIOGRAPHICAL DATA—WILLIAM M. FAY

July 1961 to present: Judge, United States Tax Court. Appointed July 24, 1961, for an unexpired term; in 1968, reappointed for succeeding term ending June 1, 1980. 1948 to 1961: Internal Revenue Service, Chief Counsel's Office. 1948—Attorney, Review Division; 1949-52—Trial Attorney, Division Counsel's Office; 1952—Asst. Head, Civil Division; 1953-57—Asst. Head, Appeals Division (now Tax Litigation Division); 1957-61—Asst. Regional Counsel in charge of Wash., D.C. Office, Regional Counsel's Office, Philadelphia, Pa.

1946 to 1948: United States Senate. 1946-48—Executive Secretary to U.S. Senator Brian McMahon of Connecticut; 1946—Asst. Counsel, U.S. Senate Atomic Energy Commission.

1942 to 1946: Military Service, U.S. Navy. Naval Intelligence Officer, Gunnery Officer and Legal Officer.

1936 to 1942: Georgetown University and Catholic University. 1942—LL.B., Catholic University School of Law.

Personal background: Residence: 5809 Highland Drive, Chevy Chase, Maryland 20015. Married to Jean Burke Fay. One son, W. Michael Fay. Born in Pittston, Pa. on May 14, 1915.

Memberships: American Bar Association, Tax Section; Bar Association of the District of Columbia; Kenwood Country Club.

## BIOGRAPHICAL DATA—CHARLES R. SIMPSON

September 1965 to present: Judge, United States Tax Court. Appointed Sept. 2, 1965, for an unexpired term; in 1968, reappointed for succeeding term ending June 1, 1980.

October 1952 to September 1965: Internal Revenue Service, Chief Counsel's Office, Legislation and Regulations Division. October 1952—Began as an attorney in the Legislation and Regulations Division; 1957—Special Assistant to the Director; 1959—Staff Assistant to the Chief Counsel; 1961—Chief, Special Income Tax Branch; November 1961—Assistant Director; April 1964—Director.

July 1951 to October 1952: Office of Price Stabilization. Served as attorney drafting legislation and regulations.

1949 to 1951: Harvard Law School. July 1950 to July 1951—Teaching Fellow; September 1949 to June 1950—Graduate legal work; received LL.M.

1947 to 1951: Illinois General Assembly. Member for 2 terms.

1945 to 1949: Champaign, Illinois. Private practice of law.

1940 to 1945: University of Illinois. 1943 to 1945—College of Law; received J.D. with high honors; 1940 to 1943—College of Liberal Arts; major—political science; received B.A. with highest honors; honors—Phi Beta Kappa, Phi Kappa Phi, and the Order of the Coif.

Personal background: Residence: 2500 Virginia Avenue, N.E., Washington, D.C. 20037. Married to Ruth V. Simpson. No children. Born in Danville, Illinois, on June 16, 1921.

Awards: 1969—Tax Society of New York University Achievement Award; 1968—Federal Tax Forum of New York City Award for distinguished service in tax field; 1965—Justice Tom C. Clark Award as the outstanding Government career attorney for 1964; 1965—Meritorious Service Award from Secretary of the Treasury Dillon.

Memberships: American Bar Association and Tax Section; American Law Institute; American Judicature Society; Union League Club of Chicago; International Club of Washington, D.C.

## STATEMENT OF C. MOXLEY FEATHERSTON, NOMINEE FOR REAPPOINTMENT TO THE U.S. TAX COURT

Judge FEATHERSTON. Fifteen years.

The CHAIRMAN. Are you willing to make the sacrifice of 15 more years?

Judge FEATHERSTON. I am willing, sir.

The CHAIRMAN. Are you willing to make the sacrifice, Mr. Fay?

## STATEMENT OF WILLIAM M. FAY, NOMINEE FOR REAPPOINTMENT TO THE U.S. TAX COURT

Judge FAY. I certainly am.

The CHAIRMAN. Are you willing to stay for 15 more years, Judge Simpson?

**STATEMENT OF CHARLES R. SIMPSON, NOMINEE FOR REAPPOINTMENT TO THE U.S. TAX COURT**

Judge SIMPSON. If I am allowed to do so, Senator, yes.

The CHAIRMAN. I am not aware of any opposition to your being reappointed. I think it speaks very well for you. You can't decide those cases for everyone. It seems to me that only half the time, on the average, can a lawyer win.

That is one thing I learned from Mike Mansfield. He said, all he knows about lawyers is that in every lawsuit there are lawyers on both sides, and somebody wins the somebody loses. That being the case, he concludes that lawyers are right 50 percent of the time. About the best you can do is give the average lawyer a 50-percent batting average before your court.

I know of no opposition to your reappointment.

Senator Danforth, do you care to ask any questions?

Senator DANFORTH. No.

The CHAIRMAN. Senator Baucus?

Senator BAUCUS. No questions.

Judge FAY. I guess we are so tough nobody wanted to come in to face us.

The CHAIRMAN. I knew a judge down in Louisiana who seemed to get along with people very well. He came from a small parish. They started talking about what he would do when people wanted to discuss a case. They said to him "you must not discuss a case with the contestants." This judge answered, "where I come from, people wouldn't understand that. It is a small parish. I have to let people discuss their cases with me. Whoever comes up, I tell them I will try to help them. But I tell them it sounds bad, it sounds bad. When the other side comes to me, I tell them the same thing. As a result, almost all my cases are compromise."

Are there any further questions, gentlemen?

[No response.]

The CHAIRMAN. Thank you very much, gentlemen.

We will hear from Mr. Robert Herzstein, nominee to be Under Secretary of Commerce for International Trade. I believe we have a résumé here from Mr. Herzstein.

Mr. STERN. Senators Stone and Chiles had asked to testify on this nomination. I don't believe they are here yet.

The CHAIRMAN. I understand they are on their way.

Mr. Herzstein, will you tell us a little bit about your background?

[The biographical data follows:]

**BIOGRAPHICAL DATA—ROBERT E. HERZSTEIN**

April 1980 to present: Under Secretary of Commerce for International Trade (serving under 60-day appointment; awaiting confirmation on permanent appointment).

1958–April 1980: Law practice with Arnold & Porter, Washington, D.C., the last ten years as a Senior Partner. Experience has included:

(1) Problems of foreign trade and international business; Counsel for U.S. and foreign companies, trade associations, etc., concerned with U.S. exports, imports, tariff negotiations, regulation of unfair or discriminatory practices by foreign governments or companies, private international financial transactions, public regulation of foreign-owned banks, agricultural trade, East-West trade, regulation of international commodities trading, private and public international law questions.

(2) U.S. constitutional litigation, Federal court cases concerning rights to U.S. citizenship, immunity of foreign governments from suit in U.S. courts, government ownership and control of Presidential records, etc.

(3) Corporate law, securities regulation, anti-trust law, and the law governing federal administrative regulation.

1955-58: Assistant to the General Council, Department of the Army.

#### *Educated*

Harvard Law School, LL.B. magna cum laude, 1955. Recipient of Endicott Peabody Saltonstall Award (for potential social contribution as a lawyer); Editor, Harvard law review.

Harvard College, A.B. magna cum laude, 1952. Member of Phi Beta Kappa. Editor, Harvard Crimson.

Public Schools in Clayton, New Mexico; Dallas, Texas; San Francisco, California; and Denver, Colorado.

Born: Denver, Colorado, 1931.

#### *Professional affiliations*

Member of Overseers Committee to Visit the Law School, Harvard University.

Member of Board of Governors, Antioch School of Law, Washington, D.C.

American Bar Association: Chairman of the Standing Committee on Customs Law, 1976-79; chairman of the Committee on International Trade, International Law Section.

American Society of International Law: Vice Chairman of Study Panel on International Trade Policy and Institutions (report published September 1976); member of Study Panel on Effects of Environmental Trade.

Trustee, Institute for International and Foreign Trade Law, Georgetown University. (Chairman Board of Trustees, 1976-79.)

#### *Articles and conferences*

Author: "The Role of Law and Lawyers Under the New Multilateral Trade Agreements," Georgia Journal of International Law, August 1979.

Various other professional articles and reviews.

Chairman: Airlie House Conference on Application of U.S. Antidumping and Countervailing Duty Laws to Imports from State Controlled Economies and State Owned Enterprises, sponsored by U.S. Departments of State and Treasury, July 1978.

### **STATEMENT OF ROBERT E. HERZSTEIN, NOMINEE TO BE UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE**

**Mr. HERZSTEIN.** Yes, Senator.

I believe a copy of my résumé has been submitted.

**The CHAIRMAN.** I am looking for it.

Here it is. Well, let me see. You are presently serving as Under Secretary of Commerce for International Trade, a 60-day appointment awaiting confirmation. You served as Assistant to the General Counsel of the Department of the Army. You have an impressive educational background here. For the last 10 years, you have been in private practice dealing with trade problems.

**Mr. HERZSTEIN.** That is right. About 20 years I have been in practice, much of that time involved with international trade matters.

**The CHAIRMAN.** Have you undertaken to clear up any potential conflict of interest that might remain as a result of your prior service?

**Mr. HERZSTEIN.** Yes; I have. I met with Mr. Stern of the committee staff and went over my financial statements with him. I also went through the rather extensive clearances process in the White House, and the Commission on Government Ethics, and also submitted the forms to the Senate Banking Committee that also will be reviewing me, and so I think that part has all gone well.

I would like in that connection to mention that the papers I submitted do disclose that I will be receiving some retirement payments from my old law firm pursuant to the partnership agreement of the firm. Those payments are related entirely to services rendered prior to my resignation from the firm, and the amount of the payments has been established based on the formula that is set forth in the partnership, and those payments then will be paid to me over approximately 3 years, I believe it is, in the future.

The CHAIRMAN. I see. I see you are accompanied by my colleague, Bennett Johnston. I hope he is here to speak for you. If he is here to speak against you, I know you are in bad shape. I know he has a lot of influence with me. Senator Johnston, do you have a word to say on this? Are you for or against this nominee?

**STATEMENT OF HON. BENNETT JOHNSTON, A U.S. SENATOR  
FROM THE STATE OF LOUISIANA**

Senator JOHNSTON. I am for Bob Herzstein, very strongly for him. We have been friends for 25 years. I hate to say it has been that long since we have been in the Army together. We have been very close friends since that time. Bob is one of the most exceptionally qualified people I know from the days when he was editor of the Harvard Law Review, from the days of his practice.

He just has a special quality of judgment that I have not found in most people in Washington, even people who hold very high positions. I think we are exceedingly lucky to get him in this position, and I hope the committee will look very kindly and enthusiastically not only on his confirmation but on this whole new position. I think it is overdue in the administration or any administration, to have a position to Assistant Secretary for Foreign Trade as a professional position with continuity, with a staff who will go from year to year, from administration to administration. I think Bob Herzstein is the kind of man who can get that Department started well and successfully.

I very enthusiastically support him.

The CHAIRMAN. Thank you, Senator Johnston.

Mr. Herzstein, it says here you were the editor of the Harvard Law Review. Is that magna cum laude? Does that mean you were valedictorian of the Harvard Law School class or is that the next thing to it? What is a magna cum laude? I know it is Latin, but what does it mean in Latin? Were you first or second in your class?

Mr. HERZSTEIN. It means approximately the top 5 percent, I believe.

The CHAIRMAN. I am always suspicious of these people who have a better scholastic record than I have. [Laughter.]

Mr. HERZSTEIN. It used to be pornographic books could only be printed in Latin.

The CHAIRMAN. Any questions, gentlemen?

Senator DANFORTH. Yes, Mr. Chairman.

The CHAIRMAN. Senator Danforth?

Senator DANFORTH. Is this a new position, or is this Mr. Wiles' old position? Is this part of the reorganization of trade responsibilities in the executive branch or a continuation of something old?

Mr. HERZSTEIN. This is a new position, although my friend, Frank Wiles says, what has happened is, they created an Under



Secretary and three Assistant Secretaries to take on his work, but it is a part of the reorganization which, as you know, I believe, Senator Danforth, brought new responsibilities to the Commerce Department, to Treasury and State, and also consolidated various functions that were in the Commerce Department and attempted to build a critical mass that would be more effective in the executive branch in administering trade policy. As a part of that policy, they created an Under Secretary and two additional Assistant Secretaries. I would be the person responsible for the trade responsibilities of the Department, and there are three Assistant Secretaries reporting to me.

Senator DANFORTH. This past weekend, Senator Ribicoff was instrumental in putting together a conference at Harvard on American competitiveness. He was there, Senator Moynihan, Senator Bentsen, Senator Roth, and myself, and the Finance Committee, and a number of economists, a number of business and labor people.

Really, there was a great concern about America's competitive position in the world, and the fact that during this century we always had a trade surplus until the 1970's; now we have been running a very substantial trade deficit, about a \$30-billion deficit per year, and a tremendous concern about the effect that this has on the country, and I think a real commitment on the part of those at the conference, those Members of Congress who were present to try to redress this situation.

One of the comments made by one of our Members during the conference was disappointment that the Commerce Department had been given this, that the Commerce Department has not been one of the stronger Departments in the Cabinet, and putting this function in the Commerce Department was a way of sloughing the responsibility rather than taking it seriously.

What would be your response to that? Do you view this as a real crusade on your part, an all-out effort by the administration? Or is this just a job where people can send memos to somebody?

Mr. HERZSTEIN. I certainly did not come into the Government to preside over a sloughing responsibility. I would not have come in if I did not feel that I was at least going to have a chance to make it a first-rate and high-priority project. The first weeks that I have been sitting down there have satisfied me that as far as the rest of the Commerce Department goes, the rest of the executive branch, the new program has been taken very seriously.

Secretary Klotznick has established trade, improving the competitive position of the United States in world markets as the No. 1 priority for the whole Department. We are going through a process now where we are trying to locate resources throughout the Department that can help in this objective. Needless to say, I hope it will be a high visibility program, and I will do the best I can to see that it is.

Senator DANFORTH. Some of us have for more than 1 year been pushing amendments to the Webb-Pomerene Act. I have been impressed with Secretary Klotznick's commitment to those amendments. I think he has been very effective working within the administration. There has been a difference of opinion within the administration as to exactly how the amendments be formulated

and he has been, from what I can see, a very able advocate of making the Webb-Pomerene Act a more effective tool in our efforts to do business in world markets.

Do you share that commitment?

Mr. HERZSTEIN. Yes; I do. In fact, I have been working very heavily on that particular project with Secretary Klotznick. I was at a meeting with him at 7 o'clock this morning, as a matter of fact.

Senator DANFORTH. Was he smiling?

Mr. HERZSTEIN. Yes; he always smiles at that hour more than the rest of us.

Senator DANFORTH. I understand that looks good. Is that right?

Mr. HERZSTEIN. That is right. I think we are very close to having a resolution of all the problems as far as the Justice Department problem goes, I think. That is 99 percent worked out. We are working on the little details now.

There is a meeting going on at 10 this morning. Some of my colleagues are attending it to try to iron out the banking aspects of the Stevenson bill, which is closely related to your bill. We are hoping the whole package will be in good shape.

Senator DANFORTH. Let me just say this in conclusion. I think that your job is potentially, maybe actually one of the most important jobs in Washington. I think it is absolutely essential that we take international trade much more seriously than we have as a country. I am not just talking about the Government, but our whole attitude toward it has been a little bit flabby, I think, over the years. I think it is past time to straighten up our act, and it would be my hope that you and the Commerce Department would become not one of the weaker Departments in the Cabinet, but one of the stronger, and one of the most useful, that you would view your role as being one of a real advocate and supporter of the cause of international trade.

Mr. HERZSTEIN. Thank you, Senator. If I could make brief comment on this, I think that I certainly share your feelings about the job and its importance, and your aspirations. My own hopes and objectives are very high also. I have encountered a lot of high expectations around town. For one thing I would like to say I think it is a big and a long process, that we are not going to see instant results.

The position that I would like to take with the Congress is that I would like to be perfectly candid at any point about how much I have been able to accomplish and how much we feel we are going to be able to do, rather than saying that we have taken care of the problem and we are going to be able to do everything. I think there will be a lot of frustrations in terms of getting the right people in place and getting them to do the right thing.

So, I am not going to be claiming to be an instant coffee machine. Just put the quarter in and get the result out. I would like to take a position of being able to explain just where we are at any point and have your help in going forward.

Senator DANFORTH. Absolutely. I think that is absolutely right. I think really the question is whether or not this administration and future administrations are going to be committed to the whole question of improving our posture in trade. Some of the concern

that has been expressed not only by myself, but a number of other people around the Congress, indicates that not only this administration but it seems to be the mindset in the executive branch opposing any kind of an initiative designed to improve our position, so that procedural changes in last year's trade bill, the Treasury tended to be the No. 1 problem, Webb-Pomerene. The Justice Department has been the No. 1 problem, and it just seems as though the answer to everything has been no.

Some of us feel that what we would really like in the executive branch is really the spirit of an advocate, of people who would say, look, America's interests are in improving our position both in improving our exports and not going the protectionist route but enforcing those laws that are on the books with respect to unfair trade practices, and the position in the executive branch too often has been one of resistance to a more aggressive approach to international trade.

I don't think any of us expects instant solutions. What we would like to see is some people who are really committed to improving the situation, rather than battling against any suggested improvements.

Mr. HERZSTEIN. We certainly hope to be advocates for that kind of change within the executive branch.

Senator RIBICOFF. If the Senator would yield at that point, I have talked to Mr. Herzstein. He has come up to the office to talk with me. I think he is very well aware of the problems and the philosophy generally expressed by this committee in its desire to expand American export policy and American trade.

Just glancing at this biographical sketch that we have before us, I am very much impressed with the experience and background in all of the problems in foreign trade, not only as counsel in a distinguished law firm, but noting here that he has been chairman of the Standing Committee on Custom Law for the American Bar Association, chairman of the Committee on International Trade, International Law Section of the American Bar Association.

He is vice chairman of a Panel on International Trade Policy and Institutions, the American Society of International Law. He is a trustee of the Institute for International and Foreign Trade Law, Georgetown University. Chairman of the board of trustees, which indicates a background and awareness that he can well use in this position to encourage American trade policy.

I would commend the President for designating Mr. Herzstein. I personally had recommended others for this position who I thought were very well qualified, but I could not take exception to Mr. Herzstein's qualification for this position.

Senator BAUCUS. Mr. Chairman?

The CHAIRMAN. Yes.

Senator BAUCUS. I would like to follow up on Senator Danforth's point. I am curious as to what the Endicott Peabody Saltonstall Award was for potential social contribution as a lawyer. But the main point I am making here is that some people tend to be too cautious. They tend to look at all sides, tend to say no to somebody's initiative, tend to look for the problems that might arise in somebody's initiative.

I think the Department of Commerce has been a little disinclined to work aggressively and effectively to promote commerce and trade. I agree with you that you are not going to be able to be an instant coffee grinder to produce instant coffee. I understand that.

But frankly, I don't know how much time we have left in this country to sit around and contemplate everything. I would like to know more precisely what ideas you have to promote American exports. It is good to say you are looking at the problem. What precisely do you have in mind?

Mr. HERZSTEIN. Well, I think the problem has to be approached comprehensively. That is one of the advantages of this organization we have, that we can work on the different aspects together. I see basically four general programs, and I will run through them very quickly, and you can elaborate on any that you want.

One, a system of implementing the rules under which international trade is conducted, both domestic laws, antidumping, countervailing duties, export control laws, and the international rules—

Senator BAUCUS. I don't want to take a lot of time here. More definitely, what are you going to do? Are you going to get out there? Are we going to see your name in the paper? Are you going to be talking to businessmen in the country, Members of the Senate and House?

Mr. HERZSTEIN. I hope, Senator, to spend half my time getting the organization in good shape, the other half of my time letting the world know what we are doing, building up support in the business community, and communicating with other Government departments and the Congress, yes.

As far as the export promotion activities go, we have some wonderful new possibilities in this organization plan, including the foreign and commercial service that I am working on very intensely. That came on stream on April 1. That should be a new, strong international arm for the United States to encourage and work with the smaller and middle sized businesses that have not been aware or have been unable to enter exporting in a big way. Only about 1 out of 10 of our manufacturing firms export at the present time. More than half of our exports are handled by 100 companies. There is tremendous potential among the smaller companies if we can wake them up.

Senator BAUCUS. I want to wish you good luck, and I want you to know personally I am concerned about trade posture and the deficit balance of trade. I am also concerned that a lot of people are talking about it and not doing anything about it. You are in a key position. Senator Danforth is absolutely right. You have the potential.

The Endicott Peabody Saltonstall Award is there. I hope they will wait.

Mr. HERZSTEIN. I hope to live up to their and your expectations. I look forward to your help, Senator.

The CHAIRMAN. Senator Chafee?

Senator CHAFEE. Mr. Herzstein, I would be interested in some specifics. I share the deep concern that has been voiced here about our foreign trade situation. And when a great industrial country like ours imports more manufactured goods than we export, some-

thing is out of kilter. I don't believe in my own judgment that the problems lie out there as much as they lie right around here in this building and the other building, and I think a lot of our problems are due to the law on the books. I would be interested in your views on some of those statutes. Section 911, Taxation of Americans Abroad. Do you have any thoughts on that?

Mr. HERZSTEIN. Yes, I do, Senator. That is one of the so-called disincentives that has been getting a good deal of attention, that the Department and the executive branch as a whole are studying now. My own feeling is, based on my experience in law practice, where, of course, I worked a great deal with international companies, it probably is important for an American company working abroad on a construction project or whatever to use a substantial amount of its own employees. Those provisions in the tax law do make it more expensive to use an American than to use a foreigner.

Where there is a connection between that and U.S. exports has never been established. Speaking personally now and not for the administration, I would say—intuitively I would say it seems to me sensible to assume if you have Americans working for your construction firm abroad you are going to be more effective in supplying U.S. equipment for that project.

This is a question which we are attempting—the Commerce Department. I should say “they.” I really have not gotten into it yet. Attempting to get a better fix on, with the help of the business community.

Senator CHAFFEE. The problem I find when we come here—it has been mentioned before—is that the answer of the Treasury Department is always no to everything, and we have got to have some strong voice from the Administration saying yes, and trying to work on it. We are trying to work on these problems.

Section 911 to me—I have no equivocation on it at all. I think it is clear both from my experience and the testimony, from the conversations I have had. Obviously, it not only affects jobs for Americans but also affects workers coming back to this country, and literally millions and millions of dollars. What about the Foreign Corrupt Practices Act? Do you have any thoughts on that?

Mr. HERZSTEIN. I have encountered situations in law practice where there was creating great consternation for American companies operating abroad. It has inserted a new element of discipline for them, when that law was established, I think most of them, and I personally don't feel one has to just do businesses abroad according to whatever standards prevail in a local area—there is something to be said for a standard of conduct that one takes with him around the world, and there is certainly something to be said about being able to know what those standards are clearly and certainly in advance.

I think that has been a severe problem. Certainly I have experienced myself in law practice a very severe problem for American business.

Senator CHAFFEE. Taking the Foreign Corrupt Practices Act by itself, obviously this does not deal with your Department directly. In other words, the problems arise between Justice and the SEC,

and they go their separate ways. You can get an approval from Justice and it is overruled by the SEC.

What are we going to do about that? Who is going to be in there pitching, trying to resolve these problems which dramatically affect overseas exports of this Nation? Is that you?

Mr. HERZSTEIN. Yes, Senator, One of the programs I was going to list among the four I mentioned is an effort on the part of the Commerce Department within the executive branch and within the Government working with the Congress to create a climate, a regulatory and legal and policy climate that is favorable to the health of American business in general and particularly those involved in exporting.

This involves our looking at the tax laws, the regulatory programs, the provisions you mention in particular but also others, to see what the total impact of our legal and regulatory system is, what the total burden is on these companies. It does not mean that you eliminate clean air regulations or any of the other regulations, but it does mean that you look at the impact of them and you make a critical judgment overall whether you want to keep all of those things, especially in the form that they are operating in. I think we have tended to view the private sector as sort of a cornucopia that keeps pouring out benefits and needs to be regulated to eliminate excesses. We are coming to a point now in the international markets where we are realizing that we lay down too many burdens.

I hope that the Commerce Department can look at that overall perspective and be effective in alleviating some of those burdens.

Senator CHAFEE. I would certainly hope so. It seems to me that somebody from the administration has to take the lead. I know the President has his Export Council headed by Mr. Jones coming up with some recommendations, but constantly we see up here impediments based on exports. Taking the Exim bank, the restrictions placed on them, if the country that were seeking the credit failed to observe human rights, whatever that is, nobody from the administration seems to be biting the bullet in trying to take the lead in helping our exports, and I certainly hope we can look to you to do that.

For instance, are you prepared to wrestle with the Treasury on 911?

Mr. HERZSTEIN. No question about it. On other tax measures, it might be stimulative, for instance, for research and development or capital formation, certainly one of the critical elements of competitiveness at this time. A tax policy, we should not just look at the revenue effects, but also the entire economic effect on our society.

Senator CHAFEE. Have you given some thought to the 10-53 proposal?

Mr. HERZSTEIN. Some. Frankly, Senator, I am not a tax lawyer, so I did not encounter that in my previous incarnation. I would certainly be looking at it in my new job.

Senator CHAFEE. We certainly wish you well. You have left a very prestigious post to come into the Government. We are grateful the Government was able to attract you. I hope you will be a very vigorous proponent of exports for this Nation.

Also, I know the gentlemen from Florida are going to have some words. I hope you also pay attention to the other side of the coin, the enforcing of the antidumping statutes, and seeing that our exporters get a fair break in the nations that we are dealing with.

Mr. HERZSTEIN. Thank you.

Senator CHAFEE. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Bradley?

Senator BRADLEY. Mr. Herzstein, I would like to pursue some of the things that we have talked about in the last several weeks, in particular the thought that there is a tension between aggressively promoting the international position of the United States and identifying and preserving those industries in the United States that would be essential in the event of a strategic crisis. Specifically, you know, we say we really cannot become aggressive in our promotion of competition with the Japanese because of their geopolitical position, because of our long-term relationship with them. At the same time, we have industries in the United States that are very vulnerable to the Japanese competition.

In fact, if you accept the comparative advantage theory, it would not exist in the United States. But I would like to know in your judgment which industries which are under the severest competition abroad are strategic industries and should be preserved in the United States for our own national security interests.

Mr. HERZSTEIN. Let me backtrack on one of your premises for a moment. I would not have any hesitancy at all to say we should compete as vigorously as we can in world markets with the Japanese or anyone else. I do not think we have to worry about geopolitical considerations or economic considerations in that.

Senator BRADLEY. You do not support blocking the import of Japanese cars into the United States, do you?

Mr. HERZSTEIN. I do not view that as a limitation as to our competition in the world markets, and the United States is a part of the world market as far as cars go and many other things. What I am distinguishing is between competition and limitations on competition by them. I don't think we should have our gloves on, or our hands tied behind our backs, as far as competition with them in the home market or in foreign markets.

As far as import limitations go, to try to answer your questions, I think that probably most industry if you reduce it low enough may raise problems of a strategic nature. Obviously, our Nation needs in some kind of emergency or other that one may anticipate, we need a whole range of consumer and industrial and agricultural products. The difficult question would be deciding at what level the market share where you should demand that the market share is from domestic, not imported sources.

That is a complex, not only a strategic problem, but economic question. I do not think that it has had a great deal of attention on a systematic basis in the past, from my experience. This question is usually raised only in the case of a very limited number of products perhaps by the Pentagon or perhaps by a petition from an interested industry under the trade laws seeking protection under the so-called national security provision.

I am not aware of a broad ranging study of that question. Certainly if you take something like steel or aluminum or even auto-

mobiles, even though that is a consumer product, obviously a vital one, we need a basic industry in this country.

Senator BRADLEY. If you are going to develop an aggressive trade policy on behalf of the United States, and you want to maximize comparative advantage, then you want to reward firms that have an opportunity and the ability to compete internationally, and to do this, as you have said, there is a certain tension between what is a national security interest and what might be our optimum economic interests. You said it is usually done on an ad hoc basis, the Pentagon identifying this or that industry rarely.

In preparation of an industrial strategy for the United States to prepare this strategy who will be doing the thinking on the development? What percent of the market is necessary to retain our competitiveness and our national security? Would you give this a priority in a sectoral approach to international trade?

Mr. HERZSTEIN. Senator, there is a great deal of attention being given to the question of sectoral policy or industry policy by a small group of very able and rather high-level people in the executive branch at this time. It is a new idea. It frankly has not been one that either the business community or the Government has been very interested in.

Senator BRADLEY. Where is that group now?

Mr. HERZSTEIN. I have just come from a meeting of the Commerce counsel, this meeting where one of our Assistant Secretaries briefed all the high officials of the Commerce Department on what is going on in the industrial branch on industry policy. There is a great deal of it going on in the Commerce Department now.

The Council of Economic Advisers has an interagency study going on on the possibilities of getting into industry analysis or industry policy. Treasury, I suspect, is involved. I can't speak for the other agencies too well. It is at that interesting stage where it is capturing the imaginations of a number of people, but it has not gotten institutionalized.

Senator BRADLEY. When sectors are identified which could be competitive internationally in the most optimum way for the U.S. interests, would you recommend greater Government cooperation with those industries in promoting their efforts abroad as opposed to other industries?

Mr. HERZSTEIN. I think that is one of the very interesting new questions. I would not want to commit myself on it now. The reason I would not want to commit myself, I think it is going to be difficult in a democratic society and in a society used to free enterprise thinking for the Government to come out in support of one industry rather than another.

Again, if I could speak personally based on my past experience rather than putting myself in the position of speaking for the administration—

Senator BRADLEY. Speak as an individual in an open hearing.

Mr. HERZSTEIN [continuing]. I think there are certain industries in trouble and other industries which are running ahead of the pack, which would be very useful for the Government to understand better. If we at least have our eyes open, we will find that the facts often make the decision for us. One of our problems in the past, we have had a hands-off policy. Also it has been what one of



my friends calls an eyes-closed policy. If we start to look at these industries, steel, auto, semiconductors, textiles, and so on, look at them closely and find out what their problem is, I think we may find that there are tax measures, there are trade promotion efforts, or regulatory relief of one kind or another, or even import protection in particular situations that we can afford to extend on a specific industry basis.

But an effort to generalize on that at this stage is difficult.

Senator BRADLEY. Well, the general principle of favoring some industries over others because those industries that would be favored maximize national economic benefits, you are in favor of?

Mr. HERZSTEIN. If you can identify those economic benefits, I would certainly support the principle.

It is a job that we really don't have the tools for yet, but I would like to see us acquire them.

Senator BRADLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Are there any further questions from members of the committee?

[No response.]

The CHAIRMAN. Let me ask you one or two questions that occur to me, Mr. Herzstein.

You come in here with real credentials. You had to be making a good income practicing law. I would assume if you were not, you had to be a lousy lawyer, or else you didn't have the guts to ask for a big fee. I always heard that the difference between a lawyer who lives in a big house and a lawyer who lives in a little house is that the former has the courage to look his client in the eye and ask for a big fee. But coming from where you do, you obviously were doing very well indeed in the field of free enterprise.

Since you could continue to sit up there and practice law and tell people to go to hell if you don't agree with them, what made you decide you would be interested in serving in this job where you are obviously going to catch quite a few brickbats, some of them starting right away? Why would you come down here and make yourself available for a job like that?

Mr. HERZSTEIN. My wife has been asking me that same question over the last couple of months. I've been in law practice for 20 years. Probably it is appropriate for me to stretch my energies a bit. That's the first answer.

The second is this is an area that has had the predominant part of my professional attention, and I have acquired a number of personal interests in how it should effectively be executed in the executive branch. I was one of those over the last 5 or 6 years who talked a good deal about the need to reorganize and consolidate these functions and create a few high officials who thought that their entire professional and public life turned on how effectively international policy was implemented.

So when this opportunity came along it seemed like one hard to turn away from.

The CHAIRMAN. Some of what might follow you may disagree with. If that is the case you could submit a memorandum in writing. You may disagree with what our colleagues from Florida might say about your service and provide us with your answer. I don't plan to have a debate here before the committee, but I would

invite you to submit a memorandum explaining your position with regard to their views on the appropriateness of you holding this position.

I will excuse you at this point.

Mr. HERZSTEIN. Thank you, Mr. Senator.

Senator RIBICOFF. The only thing, Mr. Chairman, on that, it is obvious that the Senators from Florida feel very deeply on the subject, as I have looked at this memorandum. They are going to make their position and knowing the efficacy of those two distinguished Senators, it could very well be taken up on the floor of the U.S. Senate in the event that this committee votes this nomination out.

And I would feel that I would think that it would be better for the record that Mr. Herzstein would publicly explain to the Senators or to us the difference of his position.

The CHAIRMAN. Why don't you stay, Mr. Herzstein? After they make their statement, if you care to explain your view about the matter, we will allow you the opportunity.

Let me call on Senator Chiles.

#### STATEMENT OF HON. LAWTON CHILES, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you, Mr. Chairman. We appreciate the opportunity to come before this committee and have the opportunity to make a statement in regard to Mr. Herzstein's nomination. And I will say at the outset that we think that Mr. Herzstein is an outstanding lawyer. We think he is a person of high character and morals, and we have no objection at all on his appointment or his qualifications in that regard.

Listening to some of the comments around the Finance Committee I find that many of them sort of jibe with my own, and I know that with Senator Stone's, that is in regard to what we thought we were doing in the Reorganization Act, that as we reorganized the act, we were trying to provide some efficacy for American trade and also for American business. And many of us, I think, are too tired of having the answer at every turn well, we would like to do this, but the State Department objects to that, or the Treasury objects to that, or this might somehow hamper our foreign policy, or we might make the Mexicans upset, or we might make the Japanese upset, or we might make someone upset.

And I think that what we were trying to do for a change was that we wanted somebody to speak for the American business community, and the fact that what we need to do in trade and what we need to do in our own domestic industries to see they are given a fair shot.

Looking at Mr. Herzstein's qualifications, certainly he has had tremendous experience and understands all of the ramifications of trade very, very well. It seems to me that if we are trying to give a message to the American people that we are about to do something on this, then it is kind of important as to how we shape the office and what players we put in. And I think that it is perhaps in the area in which we are talking about Caesar's wife—not enough that she be chaste; she must appear to be chaste.

When from Florida we see the experience of Mr. Herzstein and the fact that he's been a very successful advocate for the Mexican competition to the tomato industry in Florida, to the other parts of the fruit and vegetable industry in Florida. Being a successful advocate is a high mark, and I, being an attorney myself, think that an attorney ought to be representing his client; but in the areas that I look at here, Mr. Herzstein has been an advocate in representing clients. He has also been active in lobbying for changes in the law or on legislative matters. He has been very persuasive in public arenas and developing public information again in representing his clients, which in addition to the Mexicans there have also been many other fine clients.

It seems to me that he basically has a record of having been very successive in doing the things that we are the most concerned about, and that is not protecting our trade interest.

I see you laughing, Mr. Chairman. Maybe if we thought Mr. Herzstein or we were convinced that he were going to turn, a term they sometimes use, if you can turn somebody's who's become a master of doing one thing and have him deal on the other side. I think he knows all the secrets of the Swiss, the Mexicans, and the others, and that might make him very good; but I'm not sure that in Florida we have that kind of confidence now. He's been too successful in thwarting us from the other side.

The CHAIRMAN. If he were up here to change sides, you would feel differently about the nomination?

Senator CHILES. I think that is exactly it, Mr. Chairman. I would say in terms of what Senator Ribicoff had to say, we understand completely that it's the province of the Finance Committee to ask questions, and certainly I want Mr. Herzstein to be able to comment on anything that Senator Stone and I might say; but we do have a list of questions that we would like very much if someone on the committee could submit to Mr. Herzstein so we could have some answers to them.

There are a couple of other rounds before another committee and perhaps to the Senate floor. It may be that some of those answers might be helpful to us in making our decision.

One other thing that I would point out, I listened carefully to what Senator Baucus had to say and Senator Bradley, and my understanding is Mr. Herzstein—and he can comment on that—he has written a law review article in which he spells out that he feels that the executive branch action in international trade decision-making should be considerably less discretionary and removed as much as possible from the pressures from any politics or domestic interests, that it should just be a rule of law and that we should govern all these matters just on the basis of what we think the rule of law should be.

I should say I don't take a lot of comfort that the Japanese, the Germans, and a lot of other of our competitive friends have always viewed international trade in that regard, that they would just settle these questions on the basis of a rule of law. And I think we've been looking for someone that would speak for domestic interests, that would speak for the political interests when it was in the national interest of our country. And I think it's very important under those circumstances—and as I say, I would like to

submit those questions—Senator Stone and I have grave reservations as to whether we're sending the right signal to the American business community that we are ready to do something about trade with the nomination of Mr. Herzstein.

The CHAIRMAN. Senator Stone.

**STATEMENT OF HON. RICHARD STONE, A U.S. SENATOR FROM  
THE STATE OF FLORIDA**

Senator STONE. Thank you, Mr. Chairman, Senator Chiles, members of the committee.

Let me be specific. For the last several months Mr. Herzstein has been acting in the capacity for which he is now nominated, and at the very least consulting with the Commerce Department in the same area and he has been over there full time.

During that time and in March specifically, the Commerce Department ruled that the antidumping petition filed by a number of Florida winter vegetable growers was not well grounded, and that the basis the Commerce Department used was the most outlandish yardstick that I've ever heard of, and it relates and can relate to the understanding and interest in every one of your States.

Specifically, the basis of that ruling was that since the Mexican import prices were similar in America to those that they were charging in Canada; therefore, there was no dumping. I wonder what the Japanese are going to do when they are confronted with the United States Steel dumping petition and say it doesn't matter whether we sell steel in the United States for less than it costs us to make it. It doesn't matter if we sold steel in the United States for less than we charged to our customers in Japan. Just look at what we charge in Canada.

Take the sugar dumping case last year, which was successfully resolved, and sugar is a perishable product after a few years. It has a shelf life and a storage life. And it was successfully resolved.

Suppose it were brought today under the precedent of that Commerce Department ruling, ruled on since the nominee was acting over there at the Commerce Department. Now instead of saying we will not allow you—the European Economic Community heavily subsidized growers to sell in the United States, Savannah, Ga. or elsewhere for less than it cost you to raise that crop and market it here. Oh, no. We are not going to worry about whether you're selling it here for less than you sell it in Europe. Oh, no. All you have to worry about now is don't sell it for less than you sell it for in Canada.

The nominee testified before the House Ways and Means Committee last year that perishables should be exempt from dumping laws. The dumping laws are very similar to the Sherman antitrust law and the Clayton Antitrust Act, because under those acts it is not proper for a subsidizer or a very heavily financed producer to run his competition out of the business by selling substantially below cost for a long period of time.

Why? Because it's the public policy in our competition experience that when you run the competitor's own business, you monopolize the industry, and you can monopolize the price.

People who think that it's in the shortrun interest of the consumer to have the lowest possible price at that one transaction and

who ignore entirely what happens to the competitors, and what will happen to the consumers after there are no competitors, are indeed shortsighted.

The dumping law is one of the main protections that we have for not allowing America's essential industries or any industries to be run out of business by sales below cost or what is charged by that overseas producer in some market.

And that is not the position of the nominee. He not only has represented frequently overseas producers who have sold below cost and below their own pricing at home in our market, but he has attempted legislatively to exclude perishables from the dumping protections of every other industry.

One of the Senators here, I believe it was Senator Baucus, said do you want to protect essential industry? It might have been Senator Bradley. I don't know anything more essential than eating, and I don't know a stronger industry than agriculture. It is wrong to allow an overseas, extra heavily subsidized or more heavily subsidized agricultural industry to come in the United States and sell below cost or below home market and to try to twist the dumping law to say it doesn't matter if you dump in two places. If you dumped in two places, you did not dump here.

It is wrong, and I am very concerned, and so are our growers. To confirm this nomination is to confirm that approach, a very novel approach indeed. It has been argued that perishables are unique and have never really been protected by the antidumping law. I have a list from 1922 through 1974 of three pages of cases brought under the previous agency that had this jurisdiction, Treasury, some in which dumping was found, many in which dumping was not found, all of which it was considered under the two normal yardsticks: Did they sell it here for less than they sold it at home; did they sell it here for less than it cost them to raise it and market it here?

And yet we are going to confirm, if we do confirm this nominee, someone dedicated over years, and not just over weeks or months, and someone who has been at the Commerce Department when this ridiculous ruling which now has to be appealed in the Customs Court, to prevail. I think it's wrong, and I think it's a classical case for what Herman Talmadge is frequently provoked to demand at the Agriculture Committee: What this administration and other previous administrations need is an American desk. We need an American desk looking over this issue, not someone who believes oppositely and who has clearly either acted that way or in the way he has recused himself during his consultation period.

To that extent, while we do not object to Mr. Herzstein's character, to his intelligence, to his legal training, to his legal affiliation, to his individual integrity, his philosophy, his record, his point of view, are very, very inimical to an important segment of the American economy—agriculture. And I think that it would be a disaster to send the kind of signal that this confirmation would send in the face of continuing dumping which I believe hurts the American consumer over the immediate sale at that point and clearly hurts our American producers.

We have a list of questions. The first two—and I won't go through the list—would be: question 1, If you support the fair and

equitable application of the antidumping law, then question 2, Why did you support efforts to amend the Antidumping Act in April and May of 1979 before a closed session of the House Ways and Means Committee in order to eliminate perishable commodities from the jurisdiction of the antidumping law?

This is a very serious matter to us, and there are many other States. It is not a question of one appointment. It's a question of are we going to be run out of our own American market by unfair trade practices.

Senator RIBICOFF. I am curious. During the 1979 period was Mr. Herzstein representing a client when he made that point of view?

Senator STONE. That is right. In the statement for completion by Presidential nominees to this committee, the nominee lists that representation as a potential conflict of interest in item No. 8. We're on notice as a potential conflict of interest in what he has filed before the committee.

Senator RIBICOFF. I mean has he or has he not said if he came up against a problem involving perishable commodities that he would recuse himself from participating? I don't know.

Senator STONE. Yes. He said he would recuse himself, but to recuse yourself from an organization you built—I just heard the nominee say he's going to spend half his time putting the organization together, the other half traveling around elsewhere. To recuse himself from people he hires and puts together in an area such as this doesn't give us any satisfaction.

We further do not have satisfaction based on the ruling in March after Mr. Herzstein went over there.

Senator RIBICOFF. I think you have a basic problem. I have been listening with interest to the questions of Senator Chafee and Senator Bradley. What would you do, what does the executive branch do, and we could take on the State Department.

Frankly, gentlemen, frankly it's a kind of a going away thought. Anything we accomplish in trade, in my 18 years on the committee, has been accomplished by the leadership take by this committee. This has been a constant battle. It is not what the State Department or the Commerce Department or a special trade representative is going to do. What are we going to write in the law as we make the policy by the statutes we pass, and of course it's the duty of those who work in the executive branch to carry out the laws.

We have that responsibility. We have tried to exercise that, but the responsibility is basically ours. With Mr. Herzstein here's a man who is a lawyer, and he represented clients. There are many lawyers around this table who have represented clients, and they are advocates. Now they come in a public position.

I think it would be tragic if we eliminated men of ability, knowledge, and character because at some time in their career they represented a client, because a successful lawyer will represent many clients.

Also you run up against a situation that if you're dealing with a man, a loner, and probity and character, if he reaches a position where he feels that the views and the laws are inconsistent with his beliefs and he can't carry them out, then he will get out.

That is the classic case of the Secretary of State, and I think it is a problem that every man in the executive branch must face sometimes. If you reach a situation where the policies of your chief executive are inconsistent with your own policies and philosophy and belief, as a man of honor you must resign. And that is the role that Secretary Vance took because he could not advocate the position of the President of the United States on a very important issue.

What I am concerned with is whether Mr. Herzstein is a man of character, morals, and probity. And both you and Senator Chiles have indicated that you do not question his character and his morals and probity.

As I look at his background—and I never knew Mr. Herzstein until he came around the office, and I think Senator Johnston introduced in the hall to him a couple of months ago. But I read with great interest his experience, his education, the positions of trust that he holds; and there is no question in my mind as I look at the character and ability of this man, if he ever reached a situation where he felt he could not consistently advocate a position, he would get out.

I would assume the matter you talk about, Senator Stone, he will either recuse himself if such a matter like this comes before the Commerce Department in the future; if he finds out he cannot carry out the laws and statutes of this Nation, he will tender his resignation to the President of the United States. That's the dilemma we have, Senator Stone.

Senator STONE. Mr. Chairman, may I briefly comment on what Senator Ribicoff said?

The CHAIRMAN. Yes.

Senator STONE. You have a spokesman for two principles, and the best he promises the committee is he will recuse himself from one of the most important areas of his responsibility, the enforcement of the dumping laws.

The principles that he espouses are, No. 1, that perishables should not be protected; and No. 2, unless he repudiates the Commerce Department ruling since he has been acting over there that you can find no dumping if you find the prices here are the same as the prices in Canada, as compared with the traditional approach which I think is important to this committee.

When you write the laws, and this committee writes that law largely, if it is sold here for less than it cost to make or sold here for less than it's sold at home, that it's dumping. I think that when you confirm Mr. Herzstein, all integrity to the contrary notwithstanding, you confirm a point of view in the Commerce Department in which he has espoused personally that is very detrimental to many industries and many agricultural sectors that you represent. That's what you're doing wrong.

It's not a question of whether he's a personally honest person. You always question a nominee on what is his approach, what is his philosophy, what is his policy.

His policy is hostile to the agricultural industry that produces perishables in this country. His only defense is that he is going to recuse himself because he has a continuing potential conflict of interest, as he has reported to this committee.

So while I can praise his law experience, his law school, and his marks in school, all of which were excellent, in fact, better than mine; nevertheless, it is going to hurt the agricultural sector. It is going to hurt those who want to protect against unfair predators' trade import practices. If you want an exporter, don't hire an importer.

What you have is a counsel mainly for importers, and I am concerned about what the policy will be when and if he is confirmed.

Senator RIBICOFF. Is it your contention and Senator Chiles' or yours or Senator Chiles' that Mr. Herzstein was the man who made the decision in the Commerce Department concerning the Mexican tomatoes?

Senator STONE. I have considerable concern that his presence there did have an impact. Obviously I'm not privy to the discussions that went on in the Department, but I have never heard of a ruling like this one in order to get out of the evidence which showed, at least to our satisfaction—and it was excluded by saying that there was no evidence, no substantial evidence—that the imports were sold below cost or below that they charge in the Mexican markets.

Senator RIBICOFF. Is it your contention that Mr. Herzstein was the man that made the policy in this particular case?

Senator STONE. We are concerned that it may be the case.

Senator RIBICOFF. Let's ask him right now.

Mr. Herzstein, do you want to comment on this?

Senator STONE. I would like him to answer not only on that but on what is his approach to this?

Senator RIBICOFF. You've heard the discussion, Mr. Herzstein. Do you want to comment?

Mr. HERZSTEIN. Senator, I appreciate the opportunity to. Obviously the tomato controversy, which went on for 10 years, and I was the lawyer for the American importers, and at one later stage for the Mexican industry also—obviously that case was a very intense one, intensely fought on both sides, and one that gave rise to deep feelings on the part of the clients on both sides.

I do not feel that this committee cares to hear about the respective merits of the legal and economic arguments that were made on both sides. It is the case, by the way, that only the last incarnation of it was a dumping case that involved efforts in getting legislation, involved court battles. It involved administrative proceedings in other parts of the Government such as Agriculture, and it went through many phases.

Suffice it to say that the market share of the Florida growers throughout the last 10 years has remained substantially stable. Their profits, according to the information at least that we had as advocates for one side in which we submitted, their profits remained good. Despite the fact that 10 years ago they were saying they would be going out of business unless they got the relief they were seeking from the Government, they are still a prosperous and very effective industry, supplying about 50 percent of the winter market, as they were then.



I can just note also that the U.S. consumers and a broad perspective of American business were supporting our case. The only opponents we ever had were this small group of growers in Florida.

I won't go on on the merits of the case. Let me get down to my role. I was in practice, doing the best job I could for my clients. That was my professional duty. And what my own views were on the merits of the case was totally irrelevant to my function as a lawyer. It would have been improper for me then and improper for me now to say how I personally feel the controversy should have been resolved. That simply had nothing to do with my function; and it would be a violation of my ethical duty if I pronounced on it, because it would put me and other lawyers in the position of being exposed to situations where we either had to say we did not sympathize with a client personally or where our refusal to say would be interpreted as a lack of sympathy.

The only thing a lawyer can do is divorce his own views from those of the client for whom he is serving as advocate. That is what I did during that phase, and that is what I continue to do at this point.

I am and have been a deep and strong advocate of the dumping laws, their importance to American trade policy, their importance to American economy. The article I wrote which Senator Chiles quoted from was a plea for carrying out the law as mandated by Congress and for establishing legal procedures that would limit the discretion of the executive branch by diverge to make decisions on its own outside of or uncontrolled by the mandate of Congress.

It was a rule of law plea, and it was a description of procedures, both at the domestic and the international level, which could help establish these fair trading rules as effective, more effective rules than they had been in the past.

To the extent that my personal philosophy is relevant here, that is the part that is relevant, not my feeling about a particular case in which I serve a very specialized role as a counsel under our legal system.

Now, it might help to describe my position if I also note that other years I did also represent domestic interests. I represented, and I believe just as vigorously and just as effectively as I represented the foreign interests when I had them as clients; but my representation of the foreign interests is more visible because one has to, in most of those cases you have to file a foreign agent's registration; you have to spread your entire affairs on the record.

Frequently when you're representing a domestic company, you're doing it in the way of quiet advice, advice on strategy as to how to compete internationally. And I must tell you that I represented many clients on that aide. And as I say, I feel I did so effectively.

One of the visible cases that I was involved in involved filing a brief in the Supreme Court on behalf of the Ford Motor Co. in the famous *Zenith* case involving the application of the U.S. counter-vailing duty law, the so-called Japanese commodity tax. In that case I sided with one of our major domestic companies.

One of the conclusions I argued in my role as advocate in the case went as follows: "We believe it likely that investigation of these facts on remand"—we were urging the Supreme Court to send the case back to the Treasury Department for further investi-

gation—"the investigation of these facts on remand would lead to the conclusion that the Japanese tax remission constitutes a bounty or grant." That means constitutes a violation of the countervailing duty law.

I cite that as one example of a situation where my role as advocate was called upon.

Senator RIBICOFF. Do you have a complete understanding of the 1974 Trade Act and also our decisions in the MTN Agreements that were approved by this committee and the Senate?

Mr. HERZSTEIN. I'd like to think I have as good an understanding as anybody.

Senator RIBICOFF. Is there any problem in your mind in carrying out the pronouncements of the Congress and the Trade Acts that they have passed in recent years concerning dumping and countervailing?

Do you have any problems carrying out, navigating the position written into the law, especially written into the law by this committee?

Mr. HERZSTEIN. None whatever.

Senator, I think the codes and the new Trade Act represent a distinct advance in those laws, both at the international and domestic stage, and I'm looking forward to playing a role in enforcing them vigorously.

I should note that I worked with a group of lawyers in the private sector here that assisted the staff of this committee and Ways and Means Committee in advising them on the technical aspects of the codes and the legislation at that time.

Senator RIBICOFF. Would it be a violation of your duty as a lawyer to disclose some other domestic clients that you served, in addition to Ford?

Mr. HERZSTEIN. I would have to look through my records, Senator, and pick a few where the representation was sufficiently public that I could disclose it.

Senator RIBICOFF. I think it is important if a question has been raised that all of your experience has been oriented to people who export to the United States to indicate that you do represent basic American industries who are concerned with that position in the economic spectrum.

If you could, for the purposes of the record you should supply that.

Mr. HERZSTEIN. I would be glad to, Senator.

[The information referred to follows:]

Amcord Corporation (antidumping case against imports from Japan).

Amtrack Corporation.

Andrea Radio Corporation (New York).

Coal Exporters Association (removal of legal problems impairing U.S. exports).

Coca Cola Corporation.

Drummond Coal Company (Alabama).

Dumont Oscilloscope Laboratories, Inc.

Fairchild Camera and Instrument Corporation (various international trade problems).

Ford Motor Company (Zenith countervailing duty case involving Japanese commodity tax rebates).

Great Western Sugar Corporation (antidumping proceeding against imports from Korea).

Harvard University.

Metcalf and Associates (U.S. architects performing projects abroad).

Philip Morris Corporation (various international trade matters).  
 Survival Technology Corporation (Maryland).  
 Tamper Corporation (representation of U.S. manufacturer of railway track maintenance equipment in antidumping case against imports from Austria).  
 U.S. Slide Fastener Industry.

**Mr. HERZSTEIN.** If I could add one more point that Senator Stone raised that I should not allow to go unanswered. That has to do with my participation or influence on the decision in the tomato case.

On the day that the President announced his intention to appoint me to this position, the law firm where I was working immediately took rather elaborate steps to isolate me from all contact with that case, with the tomato case at the law firm. That was before I even put one foot into the Commerce Department. I no longer had access to the files. I no longer talked to any of the lawyers who were working on the case, and no longer from that day forward had any interest in the process or in the fees collected on that case.

I literally did not hear about the case from people at the law firm. When I stepped into the Commerce Department they, of course, knew already that I was involved in the case, but I made clear to everyone; they knew it, you know. Before I was appointed I made it clear to everyone I was obviously not participating in the case, and I had no conversations there concerning the case with anyone. Everyone simply steered around me.

I literally read about it in the newspapers. I have not to this day read the decision that was rendered in the case. I am curious about it, but I just felt I would just as soon not even follow it that closely any more.

I think that the officials in the Commerce Department are quite capable of making decisions independently of my views on the case.

One other fact that is relevant. That is that the preliminary decision in the case was not made in the Commerce Department; it was made in the Treasury Department. Before the new law took effect the case was transferred. Obviously I was not an official of the Treasury Department at the time. I was an advocate. The Treasury Department also decided the case the same way.

**The CHAIRMAN.** If I could interrupt, let me make this suggestion. I do not believe that we can conclude action on this nomination this morning and take care of any other matters.

I think we should be fair to the Senators from Florida, and the questions they suggest ought to be asked and responded to by the nominee. Just speaking as one member of this committee, I'm extremely impressed by the nominee's talent and ability; and I think that at the same time that the points made by the Senators from Florida should be carefully considered.

I would like to suggest that the Trade Subcommittee have a further hearing on this matter, and that the nominee be asked the questions from the Senators from Florida as well as other matters.

We need to act on another important matter where we have a time limit on this matter you are interested in, Senator Bentsen, this multi-insurance employer pension bill.

Would that be all right with you, Senator Ribicoff?

**Senator RIBICOFF.** Yes, I would be pleased.

Senator Stone and Senator Chiles, any questions you would like to submit to me will be asked publicly of Mr. Herzstein.

Senator STONE. I thank the Senator. I'll submit a copy to Mr. Herzstein so he can prepare for you.

The CHAIRMAN. Perhaps the Senator might be willing to let Senator Stone and Senator Chiles ask the questions themselves, interrogate the witness.

Senator RIBICOFF. I would say that both Senator Stone and Senator Chiles are welcome to sit here with the Trade Subcommittee and themselves, and ask whatever questions—

Senator STONE. You are mighty kind, and we appreciate it.

Senator RIBICOFF. We would be pleased to do that. I will check with both you and Senator Chiles in fixing a date when both of you will have an opportunity to be present.

Senator STONE. We appreciate it.

[The prepared statement of Senator Stone follows:]

#### STATEMENT BY SENATOR RICHARD STONE

Mr. Chairman, I thank you for allowing me and the very distinguished Senior Senator from Florida to appear before your committee this morning.

The Presidential nomination of Robert E. Herzstein to be the Under Secretary of Commerce for International Trade has caused me personally very serious concern.

As Lawton and I noted in our letter to you of April 15, which at this time I would like to request that it be made a part of the hearing record, we have no objection to Mr. Herzstein's nomination on character or moral grounds. However, we do strongly object to this appointment.

On March 24, 1980, the Department of Commerce ruled that the antidumping petition filed by a number of Florida winter vegetable growers against certain Mexican imports had not been proved and the petition was dismissed.

As a partner in the law firm of Arnold & Porter, Mr. Herzstein has lobbied and worked for Mexican winter growers and their distributors' association—the Union Nacional de Productores de Hortalizas and the West Mexico Vegetable Distributors Association. In that capacity, Robert E. Herzstein has urged the elimination of anti-dumping laws for agricultural commodities and has gone on record opposing the enactment of any legislation which limits or restricts vegetable imports from Mexico.

I do not honestly believe the Mr. Herzstein, who until recently vigorously represented one side of an ongoing issue, can be objective on the same issue. Any appointment to such a sensitive position should not be so closely aligned to a party whose interests are adverse to those of a domestic industry—in this case, the Florida fruit and vegetable growers.

Even if Mr. Herzstein voluntarily rescues himself from any matters before the Department of Commerce directly related to this specific case, I still firmly believe that Mr. Herzstein's influence will impact on the outcome.

Additionally, I am concerned that Mr. Herzstein has demonstrated an orientation which does not appear to favor our American producers—a position crucial to the success of any domestic industry in international trade.

Senator BENTSEN. Mr. Chairman, let me say I have sympathy with what Senator Stone and Senator Chiles have said. On that particular question on tomatoes, it's kind of academic for us in Texas because they've already put us out of the business, and there is very little in the way of production of tomatoes in Texas because of Mexican imports.

I noted with great interest that we have lowered our average tariff for the Mexicans from about 12 percent to an average of 6 percent. At the same period of time I have noted they have continued to go very much on licensing agreements and quotas, and now in moving to tariffs their tariffs are far, far higher than ours; and also they have chosen not to join GATT. Those things concern me.

What Senator Ribicoff has said, we are talking about here a man of honesty, and integrity, and obviously of intellect; but I want to see some of those cases you're talking about, too, Mr. Herzstein, where you've been on the other side as an advocate. Because I can't help but believe in spite of all the integrity and everything else, if you're always on one side, finally you develop a mindset that with all that integrity, those biases sometimes show through, even though the man himself does not realize it. And I would like to see how good an advocate you have been on the other side.

The CHAIRMAN. On the other hand, I think those are the kinds of lawyers we're looking for—those who win.

Senator WALLOP. It depends on what they win.

The CHAIRMAN. I think everyone's view is amply clear. I haven't made up my mind how I want to vote on the matter. I just think for the moment we'd better get on to other matters, and then come back to this later.

Senator Byrd.

Senator BYRD. I have a few questions in another field I would like to ask the nominee. Could I do that at the hearing?

The CHAIRMAN. Yes, sir.

Thank you very much.

[Whereupon, at 11:45 a.m., the committee proceeded to other business.]

# NOMINATION OF ROBERT E. HERZSTEIN TO BE UNDERSECRETARY OF COMMERCE

MONDAY, MAY 12, 1980

U.S. SENATE,  
COMMITTEE ON FINANCE,  
SUBCOMMITTEE ON INTERNATIONAL FINANCE,  
*Washington, D.C.*

The subcommittee met at 10:05 a.m. in room 2221, Dirksen Senate Office Building, Senator Abraham Ribicoff presiding.

Present: Senators Ribicoff, Byrd, and Chafee.

Also present: Senators Chiles and Stone.

Senator RIBICOFF. The committee will be in order.

Senator Chiles has been invited to participate in these hearings. Senator Chiles.

Senator CHILES. Thank you, Mr. Chairman. I am happy to have an opportunity to participate in these hearings.

Mr. Herzstein, as you know, there was considerable interest in the Congress in the creation of the new Department of Trade previous to the approval of Reorganization Plan No. 3. I remember well that Senator Ribicoff was one of the strong proponents of saying if we were going to have a reorganization or if we were going to have a new treaty, a new bill, that it was going to be necessary that we create a new Department of Trade.

Senator Roth was a strong proponent of that, as was I and a number of others. I think without the administration's acknowledgment that there would be a new, strong Department of Trade, there perhaps would have been no trade bill because of the strong feeling that there was in the Congress and especially in the Senate on that proposition.

The principal motivation was to centralize all of our trade functions in one department that would have as its mandate the protection and promotion of the international trade and investment interest of the United States. Many of us felt that on many trade questions, the State Department put forth one view but was lacking a strong voice for our domestic interest.

What is your view of the responsibility of the Undersecretary of International Trade to be an advocate for domestic producers in trade questions?

## STATEMENT OF ROBERT E. HERZSTEIN

Mr. HERZSTEIN. Senator, I think that the responsibility of the Commerce Department and the Undersecretary for Trade is to do their very best to advance the position of the United States in the world economy. This includes trade and investment.

It certainly includes being sensitive to the needs and strengths of U.S. manufacturers and agricultural interests, and doing whatever is in the Commerce Department's power and in the Government's power to advance those interests.

It includes, of course, both export promotion and implementation of the rules of the game, both the international rules and the domestic statutes. It also includes an ongoing input into the policy processes of the Government, which means taking a look at what is happening in global markets, figuring out whether the position of the United States in those markets can be improved, and then taking a look at what domestic policies or laws and programs can help that improvement.

That is my picture of the job, and that is certainly what I hope to be engaged in.

Senator CHILES. One of the reasons I was persuaded to support the Reorganization Plan No. 3 was on the basis of assurances by the administration that the newly organized Department of Commerce would have the institutional resources and the intestinal fortitude to vigorously pursue enforcement action to protect domestic interests from trade violations.

Would you agree that the post to which you have been nominated will be a vital position from the standpoint of preventing unfair imports competition?

Mr. HERZSTEIN. I certainly would, Senator.

Senator CHILES. The administration has admitted that the most criticized import function has been the administration of countervailing duty and antidumping cases in which foreign producers are accused of receiving subsidies or selling at less than fair value to U.S. markets.

Beyond criticism aimed at delays or lack of coordination, there has been considerable criticism of the results, that is, the failure to order relief in individual cases.

As an attorney who has specialized in problems of foreign trade and international business and who has been particularly interested in this import function, what is your view of the criticism that too often there has been too little relief afforded domestic interests in deciding these cases?

Mr. HERZSTEIN. I think it has been a valid criticism. When the two statutes you referred to were adopted—one of them, the countervailing duty law, was around the turn of the century, and the antidumping law was in the 1920's—no tight legal procedures were set up for enforcing them, and no statutory deadlines existed.

So for many years, even though both statutes read in mandatory terms, the actual enforcement of them was treated by the executive branch as a fairly discretionary matter. I know from my personal experience in law practice during the sixties that it was not unusual for the executive branch to let a case sit if it didn't seem convenient to press it forward. So I think that certainly was one problem.

Another was that by the time Congress got around to mandating time limits, which I believe was in 1974, in order to ensure that these cases were processed in a timely fashion, some cases had already foundered so long it was very difficult to get them moving again.

Another problem has been, I think, a simple lack of resources and a lack of seriousness within the Government toward these statutes. I think we are past that stage now with the work that Congress did in 1974 and in the 1979 act with the reorganization and with the new resources that we have available to us.

Senator CHILES. It is my understanding that now the Department of Commerce will be the administering authority for countervailing and antidumping duty cases; that it will lead delegations in such cases; that it will have the final legal say in such cases and cannot be reversed by the U.S. Trade Representative or the Trade Policy Committee.

Is that a correct description of the way the process will work?

Mr. HERZSTEIN. Yes. I think the statute puts the legal authority to make the determinations in those cases in the Commerce Department. It does leave some room, and the President's reorganization contemplates that the Trade Representative with the advice of the Trade Policy Committee will have a policy role to the extent that the statute authorizes in the antidumping and countervailing duty matters.

Senator CHILES. If any role, that would only be one of advice, though. He would not be able to reverse any policy or to veto any policy, or amend.

Mr. HERZSTEIN. There are a few situations where, under the statute, negotiations with foreign governments are called for, for instance in negotiating a settlement of an antidumping case. In those situations, I believe it is contemplated by the reorganization plan that the Trade Representative would handle those negotiations.

Senator CHILES. It has been maintained by advocates of the trade reorganizational plan that with the advent of the MTN subsidy countervailing and amending antidumping codes, countervailing duties and dumping assessments will become more important tools for limiting trade distortion practices and thereby provide relief to domestic producers.

Would you agree with that statement?

Mr. HERZSTEIN. Yes. I think the antidumping and countervailing duty codes represent an effort to bring foreign governments under an international regime of rules so that we are all playing by the same rules; so that industry and government can play by the same rules; and so that the U.S. statutes constitute an important part of our tools for seeing that other countries abide by their obligations under those statutes.

There are, though, some other tools. There are, for example, Section 301 proceedings that the U.S. Trade Representative conducts which are dispute proceedings under the international code. That is the primary method by which the U.S. will be enforcing its rights under the antidumping and countervailing duty codes.

Senator CHILES. You have argued in a recent Law Review article that executive branch action in international trade decisionmaking should be considerably less discretionary and removed as completely as possible from the pressures of politics and domestic interests.

You pointed out the need for a firm set of rules governing executive branch decisions in international trade. Do you regard your efforts with respect to the Florida antidumping petition as



falling within your concept of international trade decisionmaking being in a strictly insulated and legalistic framework?

Mr. HERZSTEIN. I think, Senator, it is important to separate our ideas so we know clearly what we are talking about. In my Law Review article I was talking prescriptively. I was saying what we ought to try to do to establish a more effective system of rules. I was not describing the situation that existed at that time or that exists now.

I certainly hope in my new position to move us toward a more effective system of rules. That is the first point I want to make.

The second is that my efforts in connection with my client, the importers of fresh vegetables from Mexico, were aimed principally at persuading the Treasury Department, which was then the administering authority under the statute, to adopt an interpretation of the statute that was in the interest of my clients.

I was giving them the legal reasons why that was the proper interpretation of the rules. And, in fact, both the Treasury Department and the Commerce Department agreed. Now it is up to the courts whether they were right or not.

Senator CHILES. I hear a little bit that your Law Review article is more of a "do what I say, don't do what I do" proposition.

Mr. HERZSTEIN. My role as lawyer was to defend the interests of my client in the system that existed. Now, when the Florida people brought an antidumping proceeding a year or two ago, we initially started out defending that proceeding in the Treasury Department, which is, of course, the place where the administrative proceeding took place.

We then discovered that there were a number of interventions coming into the Treasury Department from Congress on behalf of the Florida industry. We felt that it was our appropriate role on behalf of our clients to secure some communications that showed the other side of the picture.

I must say there is hardly a controversial antidumping case that has taken place in the past where that wasn't the normal procedure on both sides. I am not saying there was anything improper on the part of the people who supported the Florida interests or on our part in responding. That kind of political sort of background music has accompanied antidumping cases for sometime.

Senator CHILES. I think if there was background music from the standpoint of this Senator's action, it was simply to ask them to follow the law and to not follow a policy that they had followed so many times in the past which you have described here today, which has been a policy of just deciding this is controversial and we won't touch it.

Simply the thing that I sought for them to do was to follow the law and make a fair determination based on what the law said and nothing more than that.

Mr. HERZSTEIN. I think that is what we were all doing, sir. It happens that we had different views of the law. I think probably it would be better if these proceedings were conducted without any background music, in other words, if it were done more like a court proceeding where all the views get submitted in briefs to the administering authority. Congressmen don't write to judges when a controversial case is before them. If we are trying to make these

proceedings more adjudicative, it probably would be better to do that.

Whether that will happen or not, I don't know. There are a lot of administrative proceedings that take place in Washington where congressional intervention is common and entirely proper. Very often, it takes the form of urging a viewpoint on the law or the facts to the agency, and both sides engage in it.

Senator CHILES. Would you outline what efforts you undertook in congressional committees or other forums to eliminate perishable produce from application of the Antidumping Act?

Mr. HERZSTEIN. Yes. I submitted an answer to question No. 2 that Senator Stone handed us last time, and it is covered in there. If you would like, I could read that, or we can put it in the record.

[The responses of Mr. Herzstein to the questions submitted by Senator Stone follow:]

Responses of Robert E. Herzstein  
to the  
Questions Submitted by Senator Stone  
to the  
Senate Finance Committee on April 29, 1980

1. Do you support the fair and equitable application of the U.S. Antidumping Law?

Yes

2. Why did you support efforts to amend the Antidumping Act in April and May 1979 before a closed session of the House Ways and Means Committee, in order to eliminate perishable commodities from the jurisdiction of the Antidumping Law?

This question makes several erroneous assumptions which should be corrected.

First, I was not personally involved in the proposal to amend the Antidumping Act in 1979; this proposal was made by my former partner, Patrick Macrory.

Second, neither Mr. Macrory nor any other member of his firm participated in a closed session of the House Ways and Means Committee. Mr. Macrory testified during open hearings of the Committee on April 27, 1979. Copies of his written statement were made available to the Committee prior to the hearing, and the testimony appears in the printed record of those hearings.

Third, Mr. Macrory did not propose that perishable commodities be eliminated from the jurisdiction of the antidumping law, as the question suggests. Instead, he recommended that Congress pass a clarifying amendment that would make it clear that in administering the Act the Treasury Department would have the necessary flexibility to deal with "fair value" determinations concerning highly perishable products in accord with the peculiar economics of these products. Mr. Macrory provided language for two possible amendments, each of which would have made it clear that the Antidumping Act does not require each individual sale of highly perishable produce to be made at or above full cost of production, while at the same time maintaining discipline over unfair pricing practices on the part of foreign producers. Mr. Macrory concluded his statement by saying:

"I am not proposing blanket immunity for foreign producers to engage in predatory conduct that may adversely affect U.S. interests. I am asking Congress to ensure that a legislative provision which was designed to require foreign suppliers to compete in the U.S. marketplace on an equal footing with their U.S. competition, does not become a means of imposing a grossly unequal burden on the foreign suppliers, with its attendant costs for U.S. consumers."

3. Are you opposed to any restrictions being placed on vegetable imports from Mexico? If so, what steps would you take to ensure that U.S. exports into Mexico are similarly unrestricted?

I am not opposed to restrictions on imports if they are called for by U.S. law. As you may know, there are several U.S. statutes besides the Antidumping Act which permit restraints to be placed on imports if certain findings are made. Examples include the countervailing duty statute, 19 U.S.C. Section 1671 et seq.; the "escape clause" statute, 19 U.S.C. Section 2251 et seq.; and the "unfair trade practices" statute, 19 U.S.C. Section 1337.

I do not know precisely what restraints exist on exports to Mexico, but I certainly favor dismantling trade barriers erected by trading partners of the United States. I am prepared to work vigorously for the improvement of U.S. exports to Mexico.

4. Do you agree with the current policy of the Government of Mexico that does not permit certain winter vegetables to be imported into Mexico while it is in production of those vegetables?

What steps would you take to assure U.S. growers access to the Mexican Markets?

I do not know the details of the Mexican Government's policy with regard to the importation of winter vegetables into Mexico, but in general I would favor the reduction or elimination of Mexican barriers to imports from the U.S. -- including imports of winter vegetables.

Removal or reduction of exporting restrictions would probably best be pursued through bilateral negotiations with Mexico. This, of course, would be primarily the responsibility of the United States Trade Representative and the Department of Agriculture, but I am sure the Department of Commerce would be prepared to assist in any appropriate way.

5. What efforts would you make to get Mexico to join the GATT?

This project also is within the primary responsibility of the USTR, who has been negotiating on this issue with Mexico for a considerable period of time. As you know, USTR thought last year that Mexico would decide to join GATT, but the Mexican negotiators recommendations were ultimately not accepted by their government. Thus this issue may not be a live one until a new administration comes into office in Mexico. I would be prepared to assist in any appropriate fashion in urging Mexican entry into GATT. I do not believe there is any inconsistency between my previous legal work concerning fresh vegetable imports and efforts on behalf of the U.S. to persuade Mexico to enter GATT. I have written articles and given speeches strongly supporting the GATT system and the value of rules for regularizing the conduct of nations affecting international trade. My personal views on GATT, and the value of Mexican membership in GATT, have been expressed to Mexican officials on a number of occasions.

6. Do you intend to recuse yourself from any issues that would affect Florida agricultural interests or Mexican agricultural interests? If not, why not? If yes, explain how.

I have stated previously that I intend to disqualify myself from any issue affecting, favorably or unfavorably, the interests of my former clients. This would include any issues affecting competition in perishable products between Mexican and Florida growers. I have informed the Secretary of Commerce and other senior Commerce Department officials of this commitment and have instructed the International Trade Administration staff that no matters involving these interests which call for the attention of my office should be referred to me. I shall not decide, participate in, or consult about any such matter.

7. What efforts would you make to arrange for a bilateral agreement between the U.S. and Mexico on vegetables?

Because of my prior attorney-client relationship with the importers of Mexican vegetables, I do not think it would be appropriate for me to play any role in arranging a bilateral agreement between the U.S. and Mexico on vegetables. As previously noted, this task would in any event be within the primary responsibility of the USTR and the Department of Agriculture.



8. Did you take any part, either directly or indirectly, in the Department of Commerce final finding against the Florida growers' antidumping petition?

What office reviewed that decision? What office has ultimate responsibility for that decision? What, if different, did the office you were in have to do with this petition?

I took no part, directly or indirectly, in the Department of Commerce's final determination with respect to the Florida growers' antidumping petition. As soon as the President's intention to nominate me was communicated to me, the law firm and I immediately instituted elaborate procedures to screen me from any knowledge of, or participation in, not only the vegetables case but also any matter at the firm which was before the Department of Commerce. I informed the Secretary of Commerce, the General Counsel, and the pertinent officials in the International Trade Administration that I was disqualified from participating in the vegetables case and the other matters noted. I do not know which offices or officials participated in the decision.

9. What are the problems you see facing the Florida winter vegetable growers with regard to import? What do you see as solutions to these problems and how do you believe the Department of Commerce can take an active role in solving these problems?

I do not believe it would be appropriate for me to attempt to give an independent or scientific appraisal of whether there are such problems and what they might be. My involvement with the situation has always been as a professional counsellor and advocate. In the course of my work on the matter, I often noted facts such as the following: Mexican imports have accounted for a sizeable share of the U.S. winter vegetable market for well over a decade, yet by the usual criteria the Florida winter vegetable industry is in a healthy condition. Florida sales of tomatoes last season (1978-79) reached an all-time record, more than twice the volume in 1969-70, at which point the Florida growers were complaining that they would be driven out of business unless Mexican imports were restrained. Almost as many acres are being planted with winter vegetables today as ten years ago, and there have been large increases in yield per acre. Florida's average annual share of the U.S. market has remained stable, or increased, over the past ten seasons, and was dramatically higher in the latest season. The available

data indicate that most winter vegetable farmers in Florida are making healthy profits. The Dade County tomato farmers, for example, made a 21 percent return on cost in the 1977-78 season and a 15.6 percent return last season.

It would not be appropriate for me to comment on solutions to such problems as the Florida growers may have, nor would I be qualified to do so. To the extent the government has a role in such problems, the principal responsibility would be in the Department of Agriculture. If negotiations with Mexico are involved, responsibility would focus in the USTR and the Department of Agriculture. If the Florida growers wish to seek involvement of the Department of Commerce, or such involvement is called for otherwise, I am sure the Department would be responsive to the extent its mandate and resources permit.

10. How best can we proceed to obtain an orderly marketing of fresh winter vegetables so that the American consumer can best benefit by a choice of both Mexican and U.S. winter vegetables?

Since I advised the Mexican parties in connection with the negotiations that took place last year between the two governments with respect to a possible orderly marketing agreement, it would not be appropriate to comment on this question.

Senator CHILES. I haven't seen that answer.

Mr. HERZSTEIN. Essentially the question asked whether I supported efforts to amend the Antidumping Act in April and May 1979 before a closed session of the House Ways and Means Committee in order to eliminate perishable commodities from the jurisdiction of the antidumping law.

As I note in my answer, there are several points to be made in response. First, that proposal was submitted by my then partner, Mr. Patrick Macrory, who had the primary responsibility for that aspect of the case. He came and talked before a meeting of the Ways and Means Committee.

The second point that should be made is that it was not a closed session. Neither he nor any other member of the firm participated in a closed session of the committee. He testified during open hearings on April 27, 1979. Copies of his written statement were made available to the committee prior to the hearing in accordance with the normal practice, and his testimony appears in the printed record of the hearings.

The third point that I think should be made is that Mr. Macrory did not propose that perishable commodities be eliminated from the jurisdiction of the antidumping law, as the question suggests. Instead, he recommended that Congress pass a clarifying amendment that would make it clear that in administering the act, the Treasury Department would have the flexibility to deal with fair value determinations in cases involving highly perishable products in accordance with the peculiar economics that apply to those products.

He provided language for two possible amendments, each of which would have made it clear that the Antidumping Act does not require each individual sale of highly perishable produce to be made at or above the full cost of production, which was the contention of the Florida growers in that case.

But at the same time, I think the amendments that he submitted made clear that there would be a discipline maintained over unfair pricing practices on the part of foreign producers. He concluded his statement by saying:

I am not proposing blanket immunity for foreign producers to engage in predatory conduct that may adversely affect U.S. interests.

I am asking Congress to insure that a legislative provision which was designed to require foreign suppliers to compete in the U.S. marketplace on an equal footing with their U.S. competition does not become a means of imposing a grossly unequal burden on the foreign suppliers, with its attendant costs for U.S. consumers.

So I think that gives the story on what was done there. In fact, the committee decided not to adopt an amendment at that time, but as you know, the Treasury Department and later the Commerce Department did adopt that interpretation of the existing law.

Senator CHILES. They adopted that interpretation without an amendment to the law.

Mr. HERZSTEIN. That is right.

Senator CHILES. Do you play a role in that adoption by the Commerce Department?

Mr. HERZSTEIN. Yes. I am sorry. Did I get your question?

Senator CHILES. By the two departments.

Mr. HERZSTEIN. Oh, no; certainly not the Commerce Department.

Senator CHILES. But you were starting to say something.

Mr. HERZSTEIN. I signed the briefs and submitted arguments to the Treasury Department. I was one of the counsel in the case; Mr. Macrory and I were working very closely together. Other lawyers were involved and that was our legal position in the case.

Senator CHILES. Did you play a role in the public relations campaign against the Florida tomato growers' position, including common carriers, in the New York Times?

Mr. HERZSTEIN. I don't think I would go along with the notion that there was a public relations campaign, Senator. I think from time to time we, just as Mr. Feldman, the counsel for the Florida growers, were contacted by various journalists and we would give them our views. We would give them copies of the briefs. In many cases they had been around already to the Treasury Department and had picked up the relevant papers or they had been given them by people on the Hill, and they were asking our views.

Senator CHILES. Would you say in those instances that was always when the columnist or writer sought your views as opposed to seeking to see that those views got a proper airing?

Mr. HERZSTEIN. No. I think, again, as is a very common practice and was certainly part of the practice in this case on both sides, when either party felt that something was happening which they thought a journalist should know about, that would be a part of it too.

That is another part of the background music, which I think it would be nice if we could get away from. Let me stress that in saying that I would like to get away from it, I am talking about my views as a "rule-of-law" man in what I would like to do in the future, and not in terms of what has been common practice in the past.

As I say, every controversial antidumping case—and most of them are controversial—or countervailing duty case or section 201 case or various other cases affecting trade decisions has been accompanied by a considerable amount of journalistic activity.

Senator CHILES. Did you work with Mr. Alfred Kahn and his staff in the development of his pronouncements on the Mexican part of the winter vegetable dispute?

Mr. HERZSTEIN. As I recall it, my office submitted some papers to them.

Senator CHILES. What is your personal opinion now as to the merits of eliminating perishable produce from coverage of the Anti-dumping Act?

Mr. HERZSTEIN. Let me say that it is delicate for me to give personal views on anything where I have represented a client, for the reasons I indicated in the last hearing. There are very severe ethical limitations on a lawyer giving his personal views about a situation in which he has been representing—

Senator CHILES. But you are not representing a client now. I assume you have severed or you will be severing those.

Mr. HERZSTEIN. Yes, I already severed them.

Senator CHILES. Then I would like to know your opinion now as you go into this job that you are being proposed for.

Mr. HERZSTEIN. I have also, Senator, of course, disqualified myself from participating in a case involving these perishable prod-

ucts in the future, so I hope my views will be irrelevant. But let me say that nowhere in the course of the case did we urge that perishable products should be eliminated as such from the anti-dumping laws.

The other side kept characterizing our views that way because that made a convenient target for them. We would repeatedly come back in our briefs and say that was not what we were urging. We were urging an interpretation of the fair value rule that would recognize their particular economics in perishable produce which are different from those that might apply on a manufactured product.

Senator CHILES. I still don't think you have given me your personal views today or how you feel on this question today.

Mr. HERZSTEIN. I really haven't allowed myself the luxury of having personal views on that, Senator, because it hasn't been my task, either as advocate for these clients or as a Government official. As I say, I never made that argument.

Senator CHILES. I just find that a little difficult, having been a lawyer myself. There were often times that I represented clients and I argued the clients' view when that view differed from what would be my personal opinion. Generally speaking, in any area of the law in which I devoted any kind of time or effort at all in practice, I generally had some opinion.

Maybe I am an opinionated person, but I generally had some opinion as to what the law should be or what I thought it should be, and I find it strange that this would be an area of your practice in which you specialized and have been very good and very successful and provided excellent representation for your clients, that you wouldn't have some opinion, especially in an area like we are now dealing with which is pretty central to our trade.

Mr. HERZSTEIN. I think it is safe to say that I personally have never felt that it was necessary or desirable to remove perishable products from the coverage of the antidumping laws. I don't see why that should happen. If I had felt that that did make sense, I probably would have suggested it to my clients as a position for them to take in the course of the legislative efforts that we were talking about earlier. It just doesn't seem to make much sense to me to remove perishable products.

Senator CHILES. It is my understanding that you have on a number of occasions appeared at congressional committees to argue for free trade for imports into the United States. Have you ever argued the other side of the coin for free trade of U.S. imports into other nations? How do you feel about the position taken by the Mexican Government which restricts U.S. winter vegetable imports while pressing for unfettered access for its own produce?

Mr. HERZSTEIN. I think you asked me two questions. I will answer each.

Senator CHILES. Yes, sir.

Mr. HERZSTEIN. I have indeed pressed for access for U.S. products into foreign markets, and I have also talked in many situations about the desirability of moving toward a reciprocally more liberal trading system. Usually one doesn't put it in terms of free trade because that is such an ideal that it is hard and most people realize we are not going to reach it.

What I have argued for in individual cases is that a given line of products should be afforded access to a foreign market. Let me say that an American lawyer doesn't often have occasion to argue for improved access into a foreign market. Normally you would turn that over to a lawyer in the foreign country involved, depending on how their decisionmaking system works.

I have worked with clients where that was a problem, and I have done the best I could to help them gain access to the foreign market. Does that answer the first question?

On the second one, I also submitted something on that in response to Senator Stone's question No. 4 in which I was asked if I agree with the current policy of the Government of Mexico that does not permit certain winter vegetables to be imported into Mexico while it is in production of those vegetables, and what steps I would take to assure U.S. growers access to the Mexican markets.

Although I don't know the details of the Mexican Government's policy with regard to import of winter vegetables in Mexico, I would certainly favor the reduction or elimination of Mexican barriers to imports from the United States, imports of all kinds, including imports of winter vegetables.

Removal or reduction of exporting restrictions would probably best be pursued through bilateral negotiations with Mexico. That would, of course, primarily be the responsibility of the U.S. Trade Representative and the Department of Agriculture, but I am sure the Commerce Department would be prepared to assist in any appropriate way.

Senator CHILES. I have been advised that you plan to recuse yourself from any decisionmaking within the Department affecting the Mexican vegetable case. Will that apply only to winter vegetables, or to all matters affecting Mexican trade?

Mr. HERZSTEIN. Certainly it would apply to all matters on winter vegetables. I don't think it is necessary for me to recuse myself on all matters affecting Mexican trade. I think I can do an effective job pressing for improved U.S. exports into Mexico. Obviously, if there is a problem that is closely intertwined with the vegetable situation, I would probably have to stay out of it.

But there are innumerable problems that come up where vegetables would not be involved, and I would hope to play a constructive role along with the Trade Representative, along with any other departments of the Government and officials of the Commerce Department in doing the best we can.

During the course of my representation of my clients in the vegetable case, I very occasionally had the opportunity to talk with Mexican Government officials. I normally went out of my way to tell them that I thought the restrictions that Mexico maintains on U.S. imports were very undesirable, and were certainly not helpful to their position in the vegetable case or in any other situation where they are seeking better access to the U.S. market.

I feel that the question of promoting better access into Mexico is not one that I was in any way involved in except in a way that would be consistent with my new position.

Senator CHILES. Mr. Chairman, those are all my questions. Thank you for the opportunity to ask them.

Senator RIBICOFF. Senator Stone.

Senator STONE. Thank you, Mr. Chairman.

Mr. Herzstein, your firm asked that amendments be adopted to the dumping statute in effect so as to allow some sales of imports of perishables to take place below full cost. Is that right?

Mr. HERZSTEIN. That is right, individual sales.

Senator STONE. You supported that and you support that still.

Mr. HERZSTEIN. I don't support it still. I don't have any role in it at this time.

Senator STONE. If that was the position of your firm and you at that time—well, let me ask you this. Have you read the Commerce Department's determination on the winter vegetable case?

Mr. HERZSTEIN. No, I haven't.

Senator STONE. Does it serve as a precedent to other dumping cases?

Mr. HERZSTEIN. I suppose it would serve as a precedent to dumping cases involving perishable products in that kind of situation.

Senator STONE. Do you plan to recuse yourself on all cases regarding perishables, or just Mexican winter vegetables?

Mr. HERZSTEIN. Well, I think that was the first case involving perishables that ever came along. There may have been one or two others which got settled out before they reached—

Senator STONE. That is an interesting historical point, but my question is, Do you plan to recuse yourself in the future?

Mr. HERZSTEIN. I was just going to get around to answer the question.

Senator STONE. That is good.

Mr. HERZSTEIN. I wanted to get that point in because I think it is an indication that it is not too likely that many of these cases will come up in the future if—

Senator STONE. I completely disagree with that, and particularly with regard to Mexico. I will get to that in a minute. So my question is do you plan if confirmed to recuse yourself with regard to other perishable dumping cases?

Mr. HERZSTEIN. I heard the question, Senator, and I hope you will let me get enough background in so my answer can properly be interpreted. My answer is that I probably will have to recuse myself if they involve fresh produce from Mexico or if they involve a precedent which might affect closely fresh produce from Mexico, or if they obviously involve the Florida growers' interests.

Senator STONE. All right. Now, suppose you get a petition protesting the sales below full cost or fair value of citrus from Brazil. What would be your position then? Do you plan to recuse yourself from that determination?

Mr. HERZSTEIN. I haven't thought all of these through. I certainly will make my best and most conscientious effort in every case to ascertain whether there is a likely rub off on Mexico or Florida, and whether my judgment in the individual case coming along might be questioned by virtue of my previous involvement. If so, I will recuse myself.

Senator STONE. Well, Mr. Herzstein, it isn't a hypothetical that I am discussing with you. Now, suppose, for example, California or Arizona or Texas, all of whom are citrus States, file an antidumping petition in the coming year or two on sales in this country below fair value or full cost by Brazilian citrus. That directly



relates to the mechanism by which the Florida winter vegetable determination was evolved and decided by the Commerce Department.

It is not hypothetical. The precedent is quite clear. I am going to get into the mechanics of that precedent in a minute. But now my question to you is do you recuse yourself?

Mr. HERZSTEIN. I think I probably would.

Senator STONE. And what about sales of other products—avocados, fruits of all kinds from Caribbean countries, from Brazil, from other countries, from Asian countries coming into California? Do you recuse yourself in those?

Mr. HERZSTEIN. Again, I am somewhat more skeptical than you are, Senator, as to how many of those there are going to be; but again, I think I probably would. I simply have to tell you that in my mind it sounds like a hypothetical. I would want to look at how closely they relate to the precedent of the tomato case. If they do, then I think I should stay out.

Senator STONE. Now, what about a dumping case on sugar. That is not too hypothetical. One already was filed this last year. As long as the European Common Market continues to subsidize its sugar far greater than we subsidize ours, then the comparative subsidy marketing makes it quite likely they come in here. What about that? Do you recuse yourself on that?

Mr. HERZSTEIN. No, I don't think so. I never viewed the position we were arguing in the Mexican case as applying to anything other than products which are immediately perishable, and I don't understand sugar to be that perishable. The position we repeatedly said was that the rule that each individual shipment should come in at or about full cost of production plus 8 percent allowance for profit was unrealistic when it was being applied to a foreign supplier who had invested in his crop some months earlier and who had no control over the timing or the quantity of his production or the market price at the time it comes on, who simply had to sell it because that is the way agricultural economics works.

We often made clear that in the case of less perishable products like apples, which are storable, at least we weren't arguing that case. Now, someone else coming along might try to extend the argument, but we were arguing only for what we thought was a hardcore case where the only choice of someone is either ship it within the next 2 or 3 days or throw the crop away.

Senator STONE. So that you would not recuse yourself in sugar cases, is that it?

Mr. HERZSTEIN. Senator, I am not going to try to rule on each conceivable case. What I am telling you is that is my intellectual viewpoint at the present time. I would want to look at it and see whether it does involve elements of the sort that I was personally involved in as an advocate.

Senator STONE. Well, you see—go ahead and finish.

Mr. HERZSTEIN. If it does, I would certainly stay out, and I would certainly allow a reasonable margin for error, as I think lawyers have to do.

Senator STONE. Now, one of the key points decided in the Commerce Department determination was that it would find that there was no dumping, based on a comparison of pricing during the test

period between export sales to the United States and export sales to Canada. Do you support that approach?

Mr. HERZSTEIN. I think we made arguments along those lines among our other arguments. Those are arguments we made as advocates.

Senator STONE. Well, now I am asking you as an applicant for a position in the Federal Government with jurisdiction to decide this very point, and I am asking you: do you support that approach?

Mr. HERZSTEIN. Senator, whether that approach was the proper one in the tomatoes case was something for the government and the courts to decide. If that question comes up in the future and I am called on to work on it, I will use my very best judgment at that time. There are any number of questions that parties to potential antidumping cases who might be coming before the Department in the future would love to have me commit myself on at this point. I don't think it would be a service to anyone for me to try to do so.

Senator STONE. Mr. Herzstein, I think that that approach is so shocking, so ridiculous, so irrelevant, so wrong that it will mess up the dumping interpretations for months or years to come unless it is set aside. Let me just give you an example.

Mr. HERZSTEIN. You mean the approach that was taken in the—

Senator STONE. Yes. I am asking you not about the approach in that case. I am asking you about your feeling about that approach in future cases. I will give you an example. Here comes the steel dumping case, and it is right before us now. It is no hypothetical case. U.S. Steel has filed one.

Now, how would it be if Japan says, listen, all right, we sold our steel in the United States of America below what it cost us. All right, we sold our steel in the United States for less than what we sold it in Japan. But we sold it in the United States for the same amount during this test period as we sold it in Canada.

Now, does that make sense?

Mr. HERZSTEIN. The tomato case was certainly not the first time that question came up. It has been discussed in bar association meetings, in learned articles and in other Treasury Department decisions. It is a tough question. It is a question of antidumping law interpretation that clearly has to be sorted out imminently in the future by the Department and the courts.

Senator STONE. You are applying for one of the major decision-making posts in that and you have been nominated for one of the major decisionmaking posts on that very point, and I am asking you what you think about it. You write Law Review articles. This has been a specialty of yours. You have had cases on both sides, importers and exporters, according to your background. What do you think about this?

I frankly volunteer to you I think it is crazy. I mean that is not dumping of which I have ever heard. If you dump in two or three or four places, that doesn't mean you didn't dump in one of the two or three or four places, does it? Or does it?

Mr. HERZSTEIN. Yes, sir.

Senator STONE. Yes. How are we ever going to protect ourselves if that is a proper approach. And that is what happened to the

Florida growers in this case. That is why I happen to know about it. But I am just as concerned about that kind of thing happening in any of the other cases that come up here.

Would you give us your opinions on that?

Mr. HERZSTEIN. Congress has passed a law, Senator, which says that the administering authority is first to look to the home market as a basis for determining what is fair value, and then using that home market price as a test for whether the sales in the United States were at fair value.

Now, obviously, in some situations looking at home market is not fair to one party or the other. Sometimes the supplier doesn't have substantial enough sales in his home market to give a fair test. It is a product that is made primarily for export. The famous Polish golf carts case is perhaps the best example of that.

In other situations it could be unfair to the U.S. petitioner to look at the home market. That would have been the case in the Mexican vegetable case because the home market in Mexico was always at a very low price. There was a substantial home market but the product was being produced primarily for export and the home market was a sort of residual one. We did not even argue, as I recall it, that the home market should be used there, even though it would have certainly been a marvelous test from our point of view.

So what the statute says when you don't find an adequate home market it tries to find some alternatives. And this is a very tough business to judge what is a "fair" price in a complicated world market.

Senator STONE. Well, you still haven't told me what your opinion is.

Mr. HERZSTEIN. What the statute does is it directs the administering authority then to look at a third market. The third market has to be, as I recall it, substantial enough to be a fair test. If the Japanese sold one ton of steel in Canada and 10,000 tons in the United States, it would be too easy for them to sell that 1 ton in Canada at a low price in order to get around dumping problems and justify that price in the United States.

On the other hand, if there is a substantial market in third countries so that you can say that there is a proper internal check on the conduct of the foreign supplier, that it wouldn't be in his interest to sell at a low price in that third market just in order to justify a low price in the United States, then I think the general feeling is that that is what Congress expects of the administering authorities—to use the third country price.

There is a final test, as you know, which is constructed value, which involves attempting to get at the fair value by looking at costs. That also has lots of intangibles and highly judgmental questions involved in it, questions of cost accounting which get quite theological when you come down to them. But sometimes one has to go into that.

Now, those are the factors that go into these decisions. That is the very stuff that gets argued about in each case as it comes along, and it is very hard for any of the Senators that participated in enacting those statutes or any of the people in the executive

branch or the bar to give definitive answers on a question of the sort you asked.

Senator STONE. What is your opinion?

Mr. HERZSTEIN. My opinion is that if there are substantial sales in the third market, then that is what Congress expects. If there is an inadequate home market, then it is the third market that Congress expects the——

Senator STONE. As compared with going to the cost of production and marketing.

Mr. HERZSTEIN. Under the new statute I think the two tests are more or less parallel. Under the previous statute, you had to go to the home market first, third country market second, and constructed value only last. Under the new statute those latter two tests are more or less equal alternatives for the administering authority to go to.

I am afraid the guidance isn't too clear in the statute which one is to be sought out first.

Senator STONE. Which would you prefer?

Mr. HERZSTEIN. I think that is something I will be having to go into. I think they both have severe difficulties.

Senator STONE. That is not too reassuring, at least not to this Senator's view. I would prefer cost. Cost. Dumping is sales below cost. That is really what it is, for the purpose of running your competitor out of the market. Then once he is out of the market, you can sell and not only recover your cost but get along very well.

Particularly in cases where costs are advanced by the complaining parties, they somehow found out about those costs, that is not theological. That is the gut of the whole issue.

Mr. HERZSTEIN. Senator, could I respond to that?

Senator STONE. Yes, I wish you would.

Mr. HERZSTEIN. I think the simple fact is Congress didn't say cost is the test. If it did, that would be clearly what everyone has to do. But also I should say that selling below cost for the purpose of driving your competitor out is clearly the deplorable practice that one could proceed against under the antitrust laws or under the criminal provisions of the antidumping laws.

Senator STONE. It is very difficult to proceed in the antitrust field against foreign producers. It is not as easy as proceeding against domestic producers under the antitrust. Dumping is a much more practical way to go. I am not saying that it can't be done, but it is much more practical, and that is what our Florida people have been trying to do.

Mr. HERZSTEIN. I think the reason Congress refrained from mandating antidumping cases any time sales were below cost is that there are many situations in the normal operation of the market where sales do take place below cost. But separating the proper ones from the improper ones is a tough job and that is basically why Congress didn't try to set it out in one rule but left it to case-by-case decision.

Senator STONE. Now, how are we going to solve this problem, Mr. Herzstein? How are we going to solve this problem between the foreign perishable producers and domestic perishable producers? What is your best advice on how to get this thing solved?

Mr. HERZSTEIN. Again, Senator, I think that it is not my proper role to try to prescribe that. I had some views when I was an advocate, and if I gave you views now it would have to be the views I expressed as an advocate. If I gave you any other views, I think I would be going back on my obligation to my client.

Senator STONE. You are going to recuse yourself from this problem?

Mr. HERZSTEIN. On attempting to negotiate a settlement of the vegetable case?

Senator STONE. Yes.

Mr. HERZSTEIN. Oh, yes.

Senator STONE. And not just the vegetable case, but anything, as you put it, closely intertwined?

Mr. HERZSTEIN. Yes.

Senator STONE. Do you think that selling in a consistent way below cost if you are an exporter to this country is predatory conduct?

Mr. HERZSTEIN. Yes. The question is what is in a consistent way below cost. Well, let me backtrack. The term "predatory conduct" has a special meaning in the law. It means intentional, and intent can be evidenced in a variety of ways. Again, it has to be judged in individual cases.

The statute does, however, make sales over a protracted period of time at less than cost of production to be, in effect, sales at less than fair value. The question is whether this means individual sales or whether it means that the foreign seller can sell individually or for a while below cost so long as over a reasonable period of time he recovers all his costs plus a profit.

Senator STONE. How long is for a while?

Mr. HERZSTEIN. I think that would vary with the realities of the industry. You have to look at the way competition is conducted in any given industry, the way the competitors make their decisions, and judge what is normal conduct.

Senator STONE. I never did get your answer on whether you were going to recuse yourself on citrus dumping complaints. Was it yes?

Mr. HERZSTEIN. I think I probably would, yes.

Senator STONE. And sugar?

Mr. HERZSTEIN. Sugar, as I indicated, I think is probably a different case; but I am going to have to look at those as they come along and see if it involves the same principles that I was arguing in the tomato case or not.

Senator RIBICOFF. If the Senator would yield, I noted here that you did represent the Great Western Sugar Co. in an antidumping case against sugar imports from the European community. So, if you refresh your recollection, if you follow your answers to Senator Stone on vegetables, you might have to recuse yourself on sugar, too.

Mr. HERZSTEIN. Senator Ribicoff, it was not sugar involved in that case. It was a product called monosodium glutamate, a salt seasoning substance.

Senator RIBICOFF. I see.

Senator STONE. Accent.

Mr. HERZSTEIN. That is right.

Senator STONE. Sugar has about a 2- to 3-year storage life. Is that perishable enough for you to recuse yourself?

Mr. HERZSTEIN. No, I would not view that as being within the same category as the perishables we were talking about.

Senator STONE. Well, see, that troubles me. I will tell you why it troubles me. If I had a cost man sitting in front of me as opposed to a third country marketing man, or if your answer had been a little clearer on that, I might feel a little more sanguine.

But it is very real to us in Florida because our main customer of many of our producers is the Savannah refinery, which for a considerable period of time, the last several years, has been receiving dumped sugar from the European Community, dumped by an any cost yardstick.

But the European Community is dumping in Canada, too, plenty, because of the structure of the way they are subsidized. You are knowledgeable in this area and I see you nodding your head, so you know I am describing it accurately.

If you don't recuse yourself, would you consider the cost factor a little bit more highly as compared to the third country dumping? In the sugar case, that is a classic case of where it is in the politico-economic benefits to that peculiar structure to dump in many places as opposed to just storing it in Europe.

If you don't use cost in a case like that, we are out of court, considering that you are the court. If you don't recuse yourself and you don't go to cost ahead of third country marketing, look what it does to the Florida sugar industry. I am anticipating now what is going to happen to us then. Do you see?

Mr. HERZSTEIN. Yes. Let me say first, you characterized me as a third country man rather than a cost man. I don't agree with that.

Senator STONE. I am glad.

Mr. HERZSTEIN. I think I will look at the statute and try to get the best guidance I can as to how to handle individual cases. The administering authority is going to have to figure out something Congress, unfortunately, didn't figure out for it, and that is in which case to apply one of those rules and in which cases to apply the other.

I certainly have no predispositions on that other than to try to figure out what is most sensible.

Now, on the sugar thing, that is an extremely serious problem. It has been around a long time. It is a very different problem from the perishable vegetables, as far as I can see. For one thing, it involves a concerted agricultural support system in one country or set of countries which maintains high prices in order to encourage domestic production, and then puts the surplus products out onto world markets at whatever can be gotten for them.

It does, as you say, result in sales in a variety of countries at low prices. I haven't studied it, but I think that the situation you describe is one which one should try to go after under the subsidies code, and I think that would be the more effective remedy.

But if dumping has to be used, it is certainly not a situation where one would have to be stuck with sales in third countries.

Senator STONE. Thank you, Mr. Herzstein.

Thank you, Mr. Chairman.

Senator RIBICOFF. Thank you very much.

Just a few statements before Senator Byrd.  
 Without objection, I will submit a statement by Senator John Chafee.  
 [The statement referred to follows:]

PREPARED STATEMENT OF SENATOR JOHN M. CHAFFE

Mr. Chairman, I was extremely disappointed that Mr. Herzstein did not seem to be a more vigorous proponent of expanding U.S. exports when he appeared before the Committee on April 29. I was disappointed because the office to which he has been nominated, Under Secretary of Commerce for International Trade, has the potential to exert positive influence on U.S. export policy.

Despite numerous past pronouncements by the Administration about a new export policy, we have seen little visible progress in this area over the last three years. We are still running a strong trade deficit in 1980, just as we have for the past five years.

In fact, the Administration is often the first to balk at changes in the current law that will increase exports. Proposed changes always seem to have to carry the burden of "beyond a reasonable doubt" that they are necessary to enable American firms to compete in international trade. Too often the preponderance of evidence is ignored in developing rational and effective export incentives.

Perhaps Mr. Herzstein can help me understand just what it takes to persuade this Administration that positive action is warranted on tax and other trade issues that would help strengthen U.S. exporters, and how he would propose to use this new office to further the U.S. export effort.

Senator RIBICOFF. I just want to call your attention to the last paragraph, Mr. Herzstein.

Perhaps Mr. Herzstein can help me understand just what it takes to persuade this administration that positive action is warranted on tax and other trade issues that would help strengthen U.S. exporters, and how we would propose to use this new office to further the U.S. export effort.

I will have the staff give you a copy of this statement. I think for the record you ought to answer the question asked.

Mr. HERZSTEIN. I will be happy to do so.

Senator RIBICOFF. Without objection, I have a number of letters that will go in the record from various companies and attorneys concerning Mr. Herzstein's qualifications.

I had asked the staff to submit some information concerning Mr. Herzstein and the issues involved. Without objection, the statements submitted to me by the Finance Committee Trade Staff will go into the record.

[The items referred to follow:]

[Memorandum]  
 MAY 9, 1980.

Re Herzstein Nomination Hearing.

To: Senator Ribicoff.

From: Finance Committee trade staff.

The following is some information relating to Monday's hearing on Robert Herzstein's nomination as Under Secretary of Commerce for International Trade.

(1) Before Mr. Herzstein was being considered for Under Secretary, he wrote an article in 1979 for the Georgia Journal of International and Comparative Law which reviewed the MTN results and needed changes in U.S. Law. He noted in the article that disciplined administrative proceedings had not developed under the antidumping and countervailing duty laws, that factual conclusions in cases under such laws were not adequately documented, and that legal interpretations were not supported by careful reasoning based on the law and previous decisions. He called for increased access by parties to information, better analytical support in opinions for the results of cases, and increased judicial review, all to insure that the law is faithfully executed and administrative discretion properly bounded.

(2) The following is information on U.S.-Mexico trade:

## UNITED STATES-MEXICO TRADE

|           | U.S. exports to Mexico | U.S. imports from Mexico | U.S. trade surplus |
|-----------|------------------------|--------------------------|--------------------|
| 1975..... | \$5,078,634,000        | \$3,066,664,000          | \$2,011,970,000    |
| 1976..... | 4,915,635              | 3,800,846                | 1,114,789          |
| 1977..... | 4,738,973,000          | 4,693,661                | 114,789,000        |
| 1978..... | 6,542,238,000          | 6,092,783,000            | 449,455,000        |
| 1979..... | 9,666,803,000          | 8,813,378,000            | 853,425,000        |

*Leading nonagricultural trade products for 1979**Amount*

## U.S. imports from Mexico:

|   |                 |
|---|-----------------|
| 1. Crude petroleum .....                                    | \$3,040,752,858 |
| 2. Telecommunications and sound reproducing equipment ..... | 386,737,398     |
| 3. Fish (fresh or frozen) .....                             | 302,076,775     |
| 4. Silver unwrought or semimanufactured) .....              | 243,375,458     |
| 5. Television receivers and combinations .....              | 210,739,872     |
| 6. Parts of motor vehicles and handling equipment.....      | 174,449,297     |

## U.S. exports to Mexico:

|  |             |
|--|-------------|
| 1. Parts of road vehicles and tractors.....                          | 760,238,422 |
| 2. Nonmonetary gold except ores .....                                | 217,681,725 |
| 3. Airplanes .....   | 198,294,988 |
| 4. Parts of construction and mining machinery.....                   | 180,665,727 |
| 5. Parts of piston pipe engines (except A/C).....                    | 174,698,817 |
| 6. Parts of television, radio, and sound reproduction equipment..... | 173,815,463 |

## UNITED STATES-MEXICO AGRICULTURAL TRADE FOR 1979

1. Total U.S. agricultural imports from Mexico were \$1,623,000,000 out of which tomatoes were \$153,858,000 and vegetables other than tomatoes were \$162,525,000.
2. Total U.S. agricultural exports to Mexico were \$1,071,927,000.
3. Leading U.S. agricultural exports to Mexico for 1979 which compare with U.S. imports of tomatoes from Mexico: (a) Wheat, \$197,083,000; (b) Soybeans and soybean oilcake, \$161,444,000; (c) Grain sorghum, \$154,017,000; (d) Corn, \$112,242,000; and (e) Cattle hides, \$93,538,000.
- (3) Examples of U.S. firms represented by Mr. Herzstein in trade matters include:
  - (a) Ford Motor Co.—Countervailing duty case.
  - (b) Phillip Morris—Variety of matters.
  - (c) Sperry Corp.—Variety of matters.
  - (d) Coal Exports Association—Export barrier elimination cases.
  - (e) Great Western Sugar—Antidumping case against imports from the European Communities.
  - (f) Fiarchild Camera & Instrument—Variety of matters.
  - (g) Amcord Corp.—Antidumping case against Japanese imports of above-ground swimming pools.
  - (h) Tamper Corp.—Antidumping case against imports of railroad track maintenance equipment from Austria.



STATEMENT OF RICHARD O. CUNNINGHAM  
IN SUPPORT OF THE NOMINATION OF ROBERT HERZSTEIN

My name is Richard O. Cunningham. I am a member of the law firm of Steptoe & Johnson, where I have practiced predominantly in the field of international trade law for the past ten years. In the course of that practice, I and my firm have represented both U.S. industries and foreign exporters. Based upon this history of balanced representation, I have developed a very strong view that the administration of the antidumping and countervailing duty laws should be objective and judicial, influenced as little as possible by political pressures (either domestic or international) and not influenced at all by preconceived notions of theoretical economics or other matters extraneous to the statutes themselves. It is for this reason that I view Bob Herzstein as an excellent selection for the position of Undersecretary of Commerce -- indeed, Mr. Herzstein is in my opinion by far the best choice that could have been made for that post.

I have known Bob Herzstein for most of the ten years in which I have been practicing in this area of the law. We have worked together on cases and opposed each other on other cases. I have also participated with Bob in advisory groups, bar association activities and government-sponsored trade law panels (in all of which he has taken a leadership role). I have developed the highest regard for his abilities as a lawyer, his sound judgment, and especially his objectivity in analyzing complex and politically-charged issues.

It is this last point, I think, that deserves particular emphasis in connection with Mr. Herzstein's nomination to be Undersecretary of Commerce.

What that post needs, in my judgment, is someone who does not bring to the job a bias or an ideological prejudice of the issues, whether that bias be in favor of U.S. petitioners or foreign respondents. If a lawyer is to serve in this office -- which I strongly favor, in view of the intense and somewhat esoteric legal complexities inherent in the cases which the Undersecretary will preside over -- that lawyer should not be one who has represented exclusively importers or exclusively U.S. industries. Rather, his experience in private practice should have encompassed "both sides of the street". That is certainly the case with Bob Herzstein. In cases in which I have participated with or against him, I have seen him defend foreign exporters or advocate the interests of U.S. industries, each with the same vigor and high quality of legal work. This background, coupled with his high degree of objectivity and sound judgment, will serve him well in administering the trade laws.

It might be worth noting, in this regard, that there are not many attorneys in the trade law field who would bring such an objective background to the Department. The great majority of practitioners are "one sided" (without meaning to attach any derogatory implications to this term). By this I mean that they either exclusively represent the importer's side of trade cases or exclusively represent the U.S. industry side. An attorney with that sort of one-sided background should not, in my view, be appointed to administer these laws. In Bob Herzstein, the Administration has found an eminently qualified, universally respected attorney who meets the essential criterion of objectivity. I strongly urge that he be confirmed as Undersecretary of Commerce.

Collier, Shannon, Rill, Edwards & Scott  
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Susan B. Nealon  
Robert E. Sylvester  
Thomas L. Anderson  
John B. Williams  
David W. Buring  
Daniel O'Connell

9 May 1980

\*Admitted to PA. Bar only.

Mr. David Foster  
Senate Finance Committee  
G-204 Dirksen Senate Office Building  
Washington, D.C. 20510

Dear Dave:

I understand Bob Herzstein has been critically questioned by the Committee regarding his alleged "conflict of interest" for having formerly represented foreign clients in legal proceedings.

Aside from the fact that an attorney has an obligation to represent clients irrespective of his personal views, I can state from my own experience that Bob is one of the most fair-minded individuals I have met during my 10 years of practice in this field.

As you know, I have generally represented the domestic industry viewpoint in trade issues, and have publicly advocated strict enforcement of our dumping laws. From time to time I have had differences of opinion with Bob on policy matters, but have never questioned his integrity, competence or willingness to perform his obligations in a fair and equitable manner.

I am quite frankly disturbed Bob should be accused of some sort of "conflict". These suggestions ignore the proper function of counsel, and imply that Bob would be other than the diligent and fair-minded person I know him to be.

I hope you will express my endorsement of Bob to appropriate people.

Best personal regards,



DONALD E. deKIEFFER

kmp

**Survival Technology Inc.**

April 22, 1980

**STANLEY J. SARNOFF, M.D.**  
*Chairman of the Board*

The Honorable William Proxmire  
Chairman  
Senate Banking, Housing & Urban  
Affairs Committee  
Suite 5300  
Dirksen Senate Office Building  
United States Senate  
Washington, DC 20510

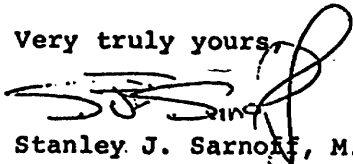
Dear Senator Proxmire:

I am the Chairman of the Board and Chief Executive Officer of Survival Technology, Inc., headquartered in Bethesda, Maryland. I understand that your Committee is holding hearings next week on the nomination of Robert E. Herzstein as Under Secretary of Commerce for International Trade. I am writing to urge your Committee to recommend confirmation of Mr. Herzstein's nomination.

Mr. Herzstein has been counsel to our company for more than ten years. There can be no question that he is a highly intelligent man of outstanding abilities. What is perhaps more important, however, is that I believe that he will bring to his position a balanced view toward international trade affairs. He has represented our company with respect to a number of transactions involving the export of our products to other countries, and he has also represented us in connection with foreign licensing and distribution agreements relating to our products. I believe that Mr. Herzstein has a good sense of the needs of American companies in connection with international trade and that confirmation of his nomination would be in our country's best interest.

I therefore urge your Committee to recommend Mr. Herzstein's confirmation.

Very truly yours,



Stanley J. Sarnoff, M.D.

SJS/nhm

LEONARD J. THEBERGE 5801 HUNTINGTON PARKWAY/BETHESDA, MD. 20014/301 652-3990

April 24, 1980

Senator Russell B. Long  
Chairman, Senate Finance Committee  
United States Senate  
Russell Office Building - Room 215  
Washington, D.C.

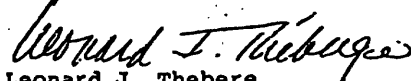
Dear Senator Long:

I understand that your Committee plans to deliberate on the nomination of Robert E. Herzstein, Esq. as Under Secretary of Commerce for International Trade. As chairman of the American Bar Association's Section of International Law this year and active in the Section for many years, I have had an opportunity to observe Mr. Herzstein's work in international trade. In addition to his many professional activities, Mr. Herzstein chaired our Section's Committee on International Trade and is a member of our Council.

Mr. Herzstein combines in a very high degree qualities of professional ability, knowledge of international trade, clear sightedness and a sense of public duty which are essential to the proper administration of government. His balance, judgment and perspective have been of great service not only to the American Bar Association but to the public.

It is with great satisfaction that I recommend his confirmation by your Committee.

Sincerely,

  
Leonard J. Theberge

cc: Michael Stern, Staff Director of  
the Senate Finance Committee

bcc: Robert E. Herzstein, Esq.

## MICHAEL, BEST &amp; FRIEDRICH

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JEFFREY L. ABRAHAM  
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TED H. LINDBRATH  
GORDON H. MILLER  
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JOHN A. BURSCH  
RICHARD E. JOHNSON  
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—  
DWAYNE L. STE  
NEWMAN E. FREDERICK  
JAMES T. HARRINGTON  
BERRY L. FOSTER  
NEWMAN A. JONKHOLOED  
OF COUNSEL  
JOHN W. MICHAEL  
1601-1070

April 22, 1980

Senator Russell Long  
Chairman, Senate Finance Committee  
Room 2227  
Dirksen Office Building  
Washington, D.C. 20510

Dear Senator Long:

It has come to my attention that Robert E. Herzstein has been nominated for Undersecretary of Commerce for International Trade.

I feel that Bob Herzstein is highly qualified for this position. He has been most helpful to me in regard to representation of a domestic manufacturer in a dumping proceeding involving a foreign manufacturer. Notwithstanding various difficulties, favorable decisions were obtained from the Treasury Department and the International Trade Commission. His conduct was very professional and indicated a very high level of expertise in the International Trade area and a sympathetic understanding of the problems which domestic manufacturers face in connection with dumping activities of foreign competitors. I strongly recommend that his nomination be confirmed.

Very truly yours,

Robert E. Clemency

REC:cag

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William B. Long  
Vice President and  
General Counsel

**DRUMMOND  
COAL  
COMPANY**

April 22, 1980

Senator Russell B. Long  
Chairman of the Senate Finance Committee  
Room 227 Dirksen Office Building  
Washington, D.C. 20510

Re: Robert E. Herzstein

Dear Senator Long:

It has been brought to my attention that Robert Herzstein has been nominated for the Under Secretary for International Trade of the Department of Commerce. We strongly support Mr. Herzstein's nomination for the position. Mr. Herzstein has represented our company for several years concerning a variety of export issues, and particularly his assistance has helped us greatly to compete more strongly with foreign coal producers. We urge that his nomination be approved.

Yours very truly,

William B. Long

WBL/mls

BY COLUMBIA  
(212) 879-1000

C. HONEY  
JAKE LUNDO, ST  
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JAMES J. O'NEILL  
RUFUS J. JARMAN, JR.  
DAVID O. ELLIOTT  
SUNTER W. CONRAD  
ROBERT E. CURRAN  
LEONARD LEHMAN

— — — — —

DONALD J. UNGER  
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April 24, 1980

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— — — — —  
COUNSEL  
EDWIN F. BAINE  
MICHAEL STRAMIELLO, JR.  
THOMAS E. O'NEILL  
\* NOT ADMITTED D.C.

Honorable Russell B. Long  
Chairman, Committee on Finance  
United States Senate  
217 Russell Senate Office Building  
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to express my personal enthusiastic support for and endorsement of the nomination of Robert E. Herzstein, Esq. to be Undersecretary of Commerce for International Trade.

I have known Bob Herzstein professionally for almost ten years. I had the privilege of serving with him on the Standing Committee on Customs Law of the American Bar Association during his tenure as Chairman of that Committee from 1976 through 1979, and I succeeded him as Chairman of that Committee last year. In addition, during my tenure as Assistant Commissioner of the United States Customs Service for Regulations and Rulings from 1972 through 1979, I met on several occasions with Mr. Herzstein when he appeared before me to represent clients with regard to problems that they experienced in meeting Customs requirements.

In all of my dealings with Mr. Herzstein, he clearly demonstrated an outstanding grasp of the technical complexities of international trade law, as well as a finely developed sensitivity to the policy implications of specific positions, whether they were taken by his client or by the government agency with which he was dealing. At all times, he has also manifested an absolute level of personal integrity that would serve as an outstanding model for his fellow attorneys to emulate.

I strongly believe that the qualities of intellect, sensitivity and character possessed by Bob Herzstein make him an outstandingly qualified candidate for the position of Undersecretary of Commerce for International Trade. I urge you to approve his confirmation as quickly as possible, so that the newly reorganized functions within the Department of Commerce may be given guidance and direction as quickly as possible.



If appropriate, please include this letter as a part of the record in any hearings that may be held on Mr. Herzstein's nomination.

Thank you very much for your consideration in this matter.

Sincerely yours,

  
Leonard Lehman

LL/md

cc: Michael Stern, Staff Director

**Senator RIBICOFF.** Now, I have no further questions of Mr. Herzstein. Senator Byrd has a number. I would thank Senator Byrd if he will excuse me and he will chair the balance of the hearing. When he is through, the committee would stand adjourned.

Thank you, Senator Byrd.

**Senator BYRD.** Thank you, Senator Ribicoff.

First let me say I think you have impressive credentials, Mr. Herzstein.

**Mr. HERZSTEIN.** Thank you.

**Senator BYRD.** The Department of Commerce on May 8—that was last week—telephoned my office to advise that Ingersoll Rand will not be permitted to ship the automated truck assembly line to the Kama River truck plant in Russia. Now, will you confirm that for the record?

**Mr. HERZSTEIN.** That is correct. I believe a regulation has been signed putting that ruling into effect, and certainly the company was informed last week before their shipment was scheduled to go.

**Senator BYRD.** My second question is, If there is any change in the future from that policy, would you advise my office and this subcommittee of which I am a member?

**Mr. HERZSTEIN.** I would undertake to do so, yes, sir.

**Senator BYRD.** I am taking what I am going to say next from memory, and I would hope you would correct me if I am in error in any detail. As I recall, the President on January 3 or early in January embargoed the transfer of any technology, or I suppose also any material going to the Soviet Union. Is that correct?

**Mr. HERZSTEIN.** I think what happened is all issued export licenses were suspended for review, and new standards were set limiting export of high technology items; and all the outstanding licenses that had been suspended were then reviewed, and still are under review, I should say, with a view to seeing whether they can be granted under the stricter criteria.

This applies particularly to such products as computers and any technology relating to them, but also to a number of other things.

**Senator BYRD.** Is the embargo on export trade with Russia still in effect?

**Mr. HERZSTEIN.** Yes, sir.

**Senator BYRD.** It is in effect?

**Mr. HERZSTEIN.** Yes. I don't know if you would call it an embargo. Products under general license, that is, products which could be shipped without the exporter having to come in and apply for a

specific license on each shipment, were not stopped by the President.

Senator BYRD. So the inference was that there was an embargo, but actually there was not an embargo.

Mr. HERZSTEIN. What happened is that all products requiring specific licenses were suspended, and those are being reviewed. That includes most of the higher technology or strategically sensitive items. Now, the Kama River assembly line, which was banned last week, and I may be mistaken but as I recall it, was a product that could go under a general license.

In other words, the President's original order of early January did not in itself require that the Kama River project be stopped; however, the Commerce Department, in conjunction with the Defense Department, the National Security Council and others, did undertake to review major projects of the sort involved at Kama River, which are making a very substantial contribution to the Soviet Union's infrastructure.

I think the Kama River decision represents an extension of the President's decision to other products, at least certain products that are on a general license but that still are viewed as being so substantial that their shipments should be stopped consistent with the President's policy.

Senator BYRD. It is your judgment that the Kama River plant has made a substantial contribution to Russia's war-making potential.

Mr. HERZSTEIN. Let me say, Senator, that I obviously wasn't in the Government at the time those policy decisions were made in the early seventies.

Senator BYRD. I assume that is why you now will not permit it to be.

Mr. HERZSTEIN. The decision was based on a number of factors, one of which was the contributions that the truck plant does make. A certain of those trucks are purchased by the Soviet military, according to the information that I have seen. It is a small portion, but nonetheless, some of them are purchased for troop support behind the lines. They are obviously used for military purpose, and I believe the newspapers reported that some of them were seen carrying troops into Afghanistan.

Another reason for the decision was simply consistency with the President's very emphatic views as announced in his earlier decisions on high technology and on the Olympics, that the Soviet Union's adventurism in Afghanistan should not be without costs, and that the collaboration being built up with the West should not just proceed as though nothing had happened.

So, quite apart from the specific military contribution that may be made by Kama River, I think there was this additional justification for the decision.

Senator BYRD. But trade is continuing with Russia.

Mr. HERZSTEIN. Some trade in general-licensed items of a non-strategic sort, yes.

Senator BYRD. That has not been eliminated.

Mr. HERZSTEIN. That is right. For example, if one wanted to send ordinary clothing or beverages or normal consumer products, those could go without interruption, and I assume they are going.

Senator BYRD. I received a letter dated May 7. I just got it just this morning, perhaps my office sooner, but I got it this morning, from the Secretary of Commerce. One sentence says, "As the result of the review, we will apply for restrictive criteria to applications for exports of high technology to the Soviet Union."

Now, to interpret that, it doesn't mean more restrictive than is in existence at the present time, does it?

Mr. HERZSTEIN. What was meant was more restrictive than had existed prior to the suspension of these—

Senator BYRD. That is what I am getting at. It is more restrictive than what had existed prior to the suspension, but not more restrictive than what exists at the present time, because it is totally embargoed now.

Mr. HERZSTEIN. That is right.

Senator BYRD. Isn't that right.

Mr. HERZSTEIN. That is right.

Senator BYRD. So another way of phrasing it is you are planning to relax the total embargo.

Mr. HERZSTEIN. Well, yes. The embargo was put as a suspension. In other words, pending review, all licensed shipments were suspended. The idea was there would be a review, new standards would be set, and then the licenses would be reviewed one upon one.

So I think under that program, Senator Byrd, the administration's plan was to allow some shipments after careful review to be sure they were consistent with the new more restrictive criteria.

Senator BYRD. But you plan to relax what is now in effect.

Mr. HERZSTEIN. Relax the across-the-board suspension of licenses.

Senator BYRD. Yes. You plan to relax that.

Mr. HERZSTEIN. The administration does plan—

Senator BYRD. Why does the administration plan to relax it? President Carter has told the American people a couple of hundred times that the invasion of Afghanistan is the most dangerous thing that has happened to world peace since World War II, and that Russia must pay a penalty.

Now, why do you want to relax the standards and relax the restrictions on the sale of high technology to Russia?

Mr. HERZSTEIN. Let me say that there would be no relaxation on exports that are banned for strategic reasons—that is, national security reasons—or foreign policy reasons. The relaxation would be on products where it is felt these criteria do not require shipments to be withheld.

The administration has gone through and is still going through a good deal of discussion on just how far one should go in stopping trade with the Soviet Union. Those who would argue that a total embargo is not appropriate, Senator, would point out that trade is an important part of our U.S. policy. There are many American businesses and many American workers who are supported by it, including trade of nonstrategic goods, export of nonstrategic goods to the Soviet Union.

They also point out that there is only so much cooperation we can get from other countries, and if we prohibit trade from the United States, we are to some extent only diverting—

Senator BYRD. You haven't gotten any cooperation from other countries, have you?

Mr. HERZSTEIN. I believe discussions are going on in COCOM now on the question of going along with these new stricter standards on high technology exports, and we are certainly hopeful that they will go along with those. I think there is some reason to believe they will.

Senator BYRD. But the invasion occurred a good many months ago. As of now, no other country has cooperated with us in that regard, has it?

Mr. HERZSTEIN. I am not an expert on the intelligence reports about what they are doing, but I think there have been some signs of a slowing down by the European countries and the Japanese, considerable cooperation of an informal sort pending these COCOM reviews.

The Japanese and the British, for example, in situations that I am aware of, have been quite cooperative.

Senator BYRD. Has either one of those countries embargoed trade with Russia?

Mr. HERZSTEIN. No, they have not.

Senator BYRD. I didn't think so.

Mr. HERZSTEIN. But you see, if you start talking about embargoing shipments from the United States of ordinary consumer goods, let's say, the chances of getting cooperation from other countries are—

Senator BYRD. Has any other country cooperated to the extent of embargoing high technology transfer?

Mr. HERZSTEIN. Yes.

Senator BYRD. What country?

Mr. HERZSTEIN. As I mentioned, Japan and the United Kingdom, to my knowledge. Now, others may well have, also. I can't purport to be too close to that situation.

Senator BYRD. Would you support a change in procedure to permit the Department of Defense to review all applications for validated licenses for export to the Soviet Union?

Mr. HERZSTEIN. Under the statute, the Commerce Department has to consult with them any time a national security question arises. That has been a procedure that has been carefully hacked out by Congress over the years. Just how far a final decision is placed in—

Senator BYRD. But that is an interpretation that the Department of Commerce makes.

Mr. HERZSTEIN. Yes, but I don't believe there have been any significant situations where Defense felt that they weren't consulted. There are sometimes disputes once they are consulted. There are sometimes disputes about whether the product should be banned or not, and when that happens those go to the White House, National Security Council, or—

Senator BYRD. Would you have any objection to letting the Department of Defense review on its own motion any particular license application that it was disposed to look into?

Mr. HERZSTEIN. I don't think I would. I have the feeling I am treading on ground that I am not too familiar with there. I am not sure what the administrative procedures and what congressional

mandates have been on. But certainly I would favor the closest kind of cooperation with the Defense Department on any matters which it feels are critical from a national security viewpoint.

Senator BYRD. Let me ask you about the Warsaw Pact countries of the Russian satellites. You are not now embargoing the transfer of high technology to Russian satellites, are you?

Mr. HERZSTEIN. Those are being looked at very closely with a view to judging the danger of diversion to the Soviet Union. That is a question that is getting very close attention at this time.

Senator BYRD. But is the answer to my question no, that you are not—

Mr. HERZSTEIN. Not across the board. If the Commerce Department is satisfied that the product will come to rest in another East European country and will not be diverted to the Soviet Union, or the benefits of the high technology will not be diverted, then it is not an export which is suspended or embargoed under present policy.

Senator BYRD. Do you believe that a different standard should be used in the case of the Soviet Union as opposed to, for example, East Germany; and if so, why?

Mr. HERZSTEIN. I think a different standard should be used for the Soviet Union and some of the East European countries, but I think each East European country must be looked at individually to see how reliably one could assume the product would stop there and not be diverted.

As far as East Germany specifically is concerned, I would not like to comment, Senator, because I simply haven't become familiar with that county in the course of my work at the Department so far.

Senator BYRD. I want to read a part of an editorial from the Lynchburg News and Daily Advance, published in Lynchburg, Virginia. Then I want to ask you a question in regard to it.

The President of the United States may be adamant in refusing to send American athletes to the Moscow Olympics to show his displeasure at the Soviet invasion of Afghanistan and the slaughter of many thousands of his people. But he is going ahead with plans to allow the Soviets to sell compact model cars in the United States at a time when thousands of auto workers have been laid off because of the competition of imports.

Not only is the present administration preparing to allow this competition from Soviet slave labor; its Environmental Protection Agency has been working with the Soviets to enable the imports to meet environmental and fuel standards. It has approved a tuneup plant for last-minute adjustments, which will be located in—surprise—Savannah, Georgia.

End of quote from the Lynchburg News and Daily Advance.

Now, my question to you is, are the facts accurate? Is there a plan to permit the importation of Russian automobiles?

Mr. HERZSTEIN. I have seen similar newspaper reports, Senator. I haven't seen anything else on it so I can't vouch for the facts. I think it is probably not quite fair to say that there is a plan to allow the imports. I think the imports would be allowed under normal U.S. law and policy unless someone intervened.

Senator BYRD. I understood from the President that he regards the Soviet Union as being somewhat different because of its aggressiveness. Is that correct?

Mr. HERZSTEIN. Yes. But his actions so far have not been addressed to imports from the Soviet Union. He could, under the International Emergency Powers Act, stop imports of all kind if that were considered necessary.

Senator BYRD. But it is correct, is it not, that the Soviets are going ahead with plans to sell compact model cars in the United States?

Mr. HERZSTEIN. According to the newspaper reports, it is correct, yes, sir.

Senator BYRD. You should be well aware of that, I would think, the Commerce Department.

Mr. HERZSTEIN. Well, it is a very minor amount of trade, from what I am told, in terms of the general imports coming into the country. I could quite readily check it with the Customs Service and find out what is coming in. I would be glad to supply that information to you.

So far, the importers would not have to apply for any permission from the Commerce Department. We operate basically a free market, and when someone wants to bring goods into the country, he files his Customs declaration, pays his duty and comes in. Then he has to comply with any regulatory requirements. In the case of automobiles, he has to comply with the EPA and the auto safety requirements. On those he would have his lawyers deal with the pertinent regulatory agencies.

But, there is never a situation of having to actually ask permission and get it granted unless a licensing system were to be set up specifically for—

Senator BYRD. Then that would be done through what office, your office in the Department of Commerce?

Mr. HERZSTEIN. It would either be Commerce or the Treasury Department, most likely. The President under the International Emergency Powers Act, can impose any kind of restrictions he wants on these transactions, and he can assign the responsibility to the department that he wishes. He recently did this in the case of transactions with Iran, as you know.

I assume if he did this in the case of imports from the Soviet Union, it would be likely that he would ask our department to police them in order to see that the restrictions were complied with. Or, he might ask the Treasury Department, which operates the Customs Service, to do it since they see the goods at the port.

Senator BYRD. Well, how do you view this situation? The President has denounced Russian aggression and said that Russia must pay the price. Up to this point we are embargoing high technology transfers to Russia. Should we permit the importation of Russian cars, bearing in mind that of all the American sales, 28 percent are now foreign-built vehicles, including trucks? Now Russia is getting into the act.

How do you view that?

Mr. HERZSTEIN. I think it is the sort of thing that bears close review as the strategic situation vis-a-vis Russia evolves. This has to be an administration position, and it has to involve weighing of military considerations as well as economic ones.

Senator BYRD. I thought the President had already weighed that.

**Mr. HERZSTEIN.** He did, and he decided on certain measures that were short of a total embargo. They were designed to impose a high cost on the Soviet Union and to keep them from getting certain materials that might be helpful to them in their strategic use.

In addition, as you know, the ban on materials for the Olympics was not a strategic one at all, but simply designed to impose a cost on them in terms of their image around the world.

**Senator BYRD.** What about imposing a cost on them to the degree of denying the importation?

**Mr. HERZSTEIN.** That is certainly an additional step that would be available. I think one would have to weigh the benefits and the costs of that step. It would certainly make clear to the Russians that we wanted to impose an additional cost on them.

It is conceivable that it could disrupt other trading relations. For instance, there are, as I mentioned, consumer exports to the Soviet Union going on now. It may be that if we stopped consumer imports, they would want to retaliate. Those are the kinds of factors that have to be borne in mind.

**Senator BYRD.** The editorial has another paragraph. It says, "The EPA has been helping the Soviets for 3 years, testing the car, working with Soviet technicians to improve it to meet EPA standards at American taxpayer expense." What would be your comment on that?

**Mr. HERZSTEIN.** It has been U.S. policy since 1971 to open trading relations with the Soviet Union. It was the duty of the regulatory agency to help anyone who wanted to sell their product here. And, I think that that is consistent with the policy as far as the administration has taken it.

The big question, Senator, is whether the President, in consultation with Mr. Brzezinski, the Secretary of Defense, the Secretary of Commerce and others, feels that he wants, as a matter of national security or foreign policy, to tighten up further on trade both ways.

So far, as you know, he has not done so, but I think these questions are certainly under continuing review.

**Senator BYRD.** Let me ask you, and I am asking more for information, how are we going to tackle this question of a very high percentage of automobile sales going to foreign manufacturers? I met last week with the chief executive officer of each of the four big automobile companies—General Motors, Ford, Chrysler and American Motors—and with Mr. Douglas Frazier, the president of the United Automobile Workers.

They point out the very dangerous position that the U.S. motor industry is getting into, with some 28 percent of all the sales being for foreign cars. Mr. Frazier made a very important point, I thought, when he said that the industry is being permanently damaged because automobile owners tend to have a loyalty to a product that they are satisfied with. Once the market is taken away from the American manufacturer, it will be very, very difficult to get it back.

Now, how can we tackle that problem?

**Mr. HERZSTEIN.** It is a terrible problem, Senator. I think it is probably the most important one in American economic policy at the present time. It is both an international trade policy problem

and a problem of our own domestic economic policy. I think we have to consider a number of tools.

One of them is, of course, to look at the import situation and see if there is anything we want to do there. Second, look at the condition of our domestic industry and see whether there is anything that can be done to help it get a more competitive posture.

Senator BYRD. If you would talk with those four chief executive officers, chairmen or presidents, they would tell you that one of their great problems is the severe Government regulations; that Washington, D.C. is playing a major role in reducing the sale of American-made cars and thus increasing the sale of foreign-made cars.

Mr. HERZSTEIN. I think that the burdens that the regulatory programs have put on the auto industries have been enormous and undoubtedly do have some effect on the competitive situation now. After all, the Japanese were already making small cars for a long time because of their own domestic marketing interests.

The American companies were put to the need to make a massive transition that cost billions of dollars and isn't yet completed. The result is that they simply are not making enough of the small cars that have been mandated both by legislation and by the high cost of gasoline.

One of the functions that we hope to fill in the Commerce Department is that of looking at the problems affecting the health and vitality of major American industries and seeing what we can do to lighten the overall regulatory load on them.

We have already successfully done one project since I have been in office. This morning the President will be forwarding to the Senate Banking Committee an administration position on export trading companies that favors two substantial regulatory exemptions for American companies that want to participate in export markets.

This position, if it is adopted by the Congress, in certain respects would relax the antitrust laws and the banking laws in order to permit better competitiveness by American businesses. I think we have to do the same thing now with some provisions in the tax laws, with the techniques and the procedures used in connection with the Foreign Corrupt Practices Act, with the environmental—

Senator BYRD. What changes in the tax laws do you have in mind?

Mr. HERZSTEIN. I think the tax provisions affecting the taxation of income of workers for American companies abroad have been brought into question by the President's Export Council and a number of other American companies as constituting a burden on exports. That is something we are looking at carefully.

I think the Commerce Department has to play a role in looking at those things along with the Treasury Department and other agencies in order to size up what actual impact they are having. That is so-called sections 911 and 913 of the Internal Revenue Code.

We also, though, have to look at the possibility that more rapid depreciation rules would help certain industries such as the automobile industry to retool.

Senator BYRD. Would you favor a more rapid depreciation?



Mr. HERZSTEIN. I personally would. That can be an important tool to help the massive problems of industries like the automobile industry. I think helping them to get very substantial Government support for the enormous readjustment they have is much more important than possible import remedies or inducing the Japanese to invest in this country, or the various other things that are being discussed.

I think the main device ought to be not giving artificial protection against competition and not inviting the competitors into our country, but simply helping our own companies compete more effectively. I think there is quite a bit the Government can do there.

Senator BYRD. Do you feel that a ceiling should be put on the percentage of automobile sales that a foreign country could make?

Mr. HERZSTEIN. I shouldn't commit myself specifically on that for reasons of propriety because that is one of the questions that might be coming before me. I think it has to be looked at. Other countries, for instance in Europe, don't have nearly the degree of import penetration that we do here. As a result their domestic industries have fared somewhat better.

We have tried to avoid that kind of restriction, and in general it has an awful lot of costs to it, especially in this situation where domestic industry is able to sell all the small cars that it makes. The problem is that it is not making enough of them to satisfy the market, and one can question how useful it would be to restrict imports of small cars when they are simply filling a real consumer need.

But I think that if the percentage keeps climbing radically with the danger of permanent damage that you talked about, some kind of temporary measure at least should be looked at to see whether it makes sense.

Senator BYRD. The danger is there now, is it not?

Mr. HERZSTEIN. Yes, it is. I think what the automobile companies told you makes a lot of sense. You can't just turn market share around overnight in an industry like that. Once the customers become accustomed to using a certain kind of automobile, they may well stay with it.

So even though our problem is a temporary one in terms of the American companies not being able to produce these cars, there is a danger that in 1 or 2 or 3 years when they are tooled up to start producing them, they will find that they have a harder time selling them because the American customers have gotten used to the imports.

It is going to be a very big competitive challenge for them. I personally feel that it is hard to beat the manufacturing skill and talent of our large automobile companies. If they are given the time and the resources and the legal and policy framework in which to compete effectively, they will probably do a good job of battling their way back; but it won't be easy.

Senator BYRD. But if the market is taken over in the meantime?

Mr. HERZSTEIN. Then it would be tough. I would agree with you. As I say, it is one of the most severe and difficult questions that I have ever seen in trade policy because none of the answers really seems very adequate.

Inviting the foreigners in to make their cars here might create further employment for a while, but that has the risk of creating a lot of excess capacity in 2 or 3 years. We could have the Japanese companies here with big new plants just at the time that General Motors and Ford are ready to come out with their new cars in large numbers. We might then have a situation somewhat like we have in the steel industry where there is a lot of very expensive production capacity in place and not enough manufacturing and sales to support it.

Senator BYRD. I was told—and you undoubtedly know more about this than I do—that Japan now has a new auto plant to turn out 1300 cars a day, with 67 employees. It would be very difficult for this country to compete with that.

Mr. HERZSTEIN. That is right. There are some remarkable stories. I think there was an article in one of the newspapers over the weekend that pointed out their remarkable advances in the use of robots. But I don't see any reason why eventually our companies shouldn't be able to equip themselves the same way.

Senator BYRD. What percent of the Japanese market do American-made automobiles have?

Mr. HERZSTEIN. It is extremely small.

Senator BYRD. It is virtually nil, isn't it?

Mr. HERZSTEIN. Less than 1 percent, I am sure.

Senator BYRD. You might say it is just a shade above zero.

Mr. HERZSTEIN. Well, it is probably in the tens of thousands of cars per year, but it would be quite small in terms of their percentage.

Senator BYRD. Percentagewise it would be less than 1 percent.

Mr. HERZSTEIN. I would guess so.

Senator BYRD. What about the European countries?

Mr. HERZSTEIN. I think that is quite small, too. I haven't seen those figures. Most of the American companies have substantial manufacturing facilities in Europe, which they have had for some time. I don't believe the exports to Europe are very big.

Senator BYRD. I find myself in sort of an ambivalent position. I favor free trade. On the other hand, I think we are getting ourselves into a very difficult position with these tremendous imports. If we don't have some method of coping with that relatively soon, it seems to me it could be very, very serious for the working people of the United States, the loss of jobs would be so great.

Mr. HERZSTEIN. I agree with you, Senator. And it is particularly serious in an industry so vital to U.S. employment as the auto industry.

Senator BYRD. Now, the Japanese have tremendous restrictions on the sale of U.S. automobiles, do they not?

Mr. HERZSTEIN. Yes, they do have certain restrictions, both in connection with the safety and construction standards, and also in connection with the taxes that they impose. They have a tax that is based on the size of the engine, and it happens that almost all the American cars are just over the line and in the category where the higher tax applies.

They also have a number of minor requirements about the construction of the car, the positioning of the taillights and that kind of

thing, which have operated to make it expensive—not to prevent, but to make it expensive to bring American cars in.

They also have a complicated distribution system that pyramids the cost of an imported automobile, so that an imported American car would not be nearly at the low price you would expect to find it if you were buying it in this country.

Senator BYRD. Senator Levin of Michigan has a proposal that he calls an equalization tax. Do you happen to have any views one way or the other on that?

Mr. HERZSTEIN. I don't believe I have seen his proposal. I think we do have to go to work vigorously on those restrictions. I believe Ambassador Askew is over there this week with Mr. Lande from the Trade Representative's Office, working on the auto question. We in the Commerce Department have given our views to the Trade Representative on the tactics and objectives that they should pursue on that.

Certainly I favor an extremely vigorous line. I think that even when we get those restrictions out of the way, we are going to have trouble selling many automobiles in the Japanese market until we are able to export more small automobiles.

The Japanese customers are not too likely to be interested in our middle-size and larger cars, both because of fuel efficiency reasons and the size of the Japanese roads.

Senator BYRD. Thank you very much.

Senator Chafee.

Senator CHAFEE. Thank you, Mr. Chairman.

I apologize for being late. Some of this testimony may have been gone over. I was anxious to have this opportunity to chat with Mr. Herzstein because in his last appearance here, I must confess I was somewhat disappointed in what seemed to me to be your approach to this job which I think all of us on this committee take with extreme seriousness, I am sure you do.

We look on—at least I do, and I can't speak for everybody—but I certainly hope you would be a very, very vigorous spokesman and a salesman for exports. In our little dialog we had when you came here before, we were discussing 911. It seemed to me that your attitude was, well, it hasn't proven beyond a reasonable doubt, so therefore let's not move with it; that the burden of proof is on those who say that the change in 911 will help.

Somehow that certainly isn't my attitude, and I would like you to explain a little more. I think you have just got to come at this job with "if something might help, let's try it," because for goodness sakes, whatever we are doing is wrong now.

Could you give me your thoughts on that a little bit more?

Mr. HERZSTEIN. Yes, sir. I am afraid I created the wrong impression by trying to be as judicious as I could in the last hearing. I am sorry it left you with any sense that I was going to be less than fully enthusiastic about anything that is necessary to promote U.S. exports.

On 911 and 913 specifically, we are now engaged in a study mandated by section 1110 of the Trade Act to give a report to the Congress from the President by July 15 on various export disincentive problems. Those sections of the Internal Revenue Code are among the questions being studied.

The reason I approached the answer that way at the last hearing is that we are engaged in the study now, and we are really urging the business community to come forward with evidence because we feel that is the best way to sell this change, both within the administration and to the Congress.

Every change we want to make, whether it is in tax law or regulatory law, has someone on the other side. You need to have a good, strong case in order to get your change through. That is what I meant to indicate, you really need evidence of the causal connection in order to do the best job on this.

I personally am enthusiastic about going forward with that and getting that change made. I share your view that we have to make a presumption in favor of exports and giving the exporters what they need in the way of flexibility and support.

I have in the last few weeks been engaged personally in a very strong effort to do the same thing in connection with the Export Trading Company legislation. As I mentioned to Senator Byrd earlier, the Commerce Department, on behalf of the administration, is sending a letter this morning to the Banking Committee stating that it supports the Export Trading Company proposals of Senators Stevenson and Danforth.

Senator CHAFEE. Is that the Webb-Pomerene?

Mr. HERZSTEIN. That is right. It is the Webb-Pomerene broadening amendments and also certain exemptions from the bank holding company regulations in order to allow banks to participate in these trading companies and to give the trading companies certain antitrust exemptions connected with their export activities.

That was very much a situation where we had to take the case to the other agencies. We had long and intense discussions with the Justice Department's Antitrust Division, and with the banking regulators—the Comptroller of the Currency and the Federal Reserve, even though they are not part of the administration.

We were in the position of salesmen there. Our basic position was expressed both orally and in numerous letters and memos: that we have to offer the American businessman more flexibility, and we have to demonstrate to him that the Government is willing to let him operate in a variety of different ways if he feels it will help exports.

We have to be responsive where we can. And I hope to take that same attitude into some of these other regulatory areas.

Senator CHAFEE. Well, I certainly hope you will. Obviously, the Treasury Department is going to be against you every time.

Mr. HERZSTEIN. That is right.

Senator CHAFEE. The Treasury Department's only view is immediate revenue. They can't take the long view at all. I suppose they would deny that, but that is certainly the experience we have had here.

So that on a host of issues, disincentives, we just need a vigorous spokesman in the administration. For example, I think last time we might have discussed the Foreign Corrupt Practices Act. Now, I have been working with Senator Proxmire and we have some changes there that I think we can do. But again, we are not going to be able to do them all.

The administration is vital, I think. The administration has a lot more influence up here than you may think. If the administration is behind something, it really gives those of us who are pushing it a peg to hang our hat on. In the Foreign Corrupt Practices Act, we have different jurisdictions here; the SEC and we have the Justice Department, and they are each riding off in different directions.

All I can say is we look to you with great hope because we have constantly had the brakes applied up here in anything we are dealing with. I suppose not with the Webb-Pomerene thing, but the Treasury Department is here, sitting here constantly, and any immediate loss of revenue they are against.

So your help on these various measures can be tremendously effective, and it has got to be a very positive type of help. You have got to be as vigorous as you possibly can be. It isn't a case of betting on a sure thing. We cannot wait for every piece of legislation to be absolutely guaranteed that it is going to work. You have got to take some chances in favor of exports.

I know you nod to all that.

Mr. HERZSTEIN. I couldn't agree more, Senator. That is one of the parts about my new job that I am the most enthusiastic about. As one who has worked with the interaction of the multitude of legal regulatory programs in Washington over many years, I know how mindlessly each one of them can proceed forward pursuing its own individual objective and overlooking the rest of its impact.

Senator CHAFEE. And they have got entrenched proponents that are there constantly guarding their turf.

Mr. HERZSTEIN. They are single-issue lobbies, as it were.

Senator CHAFEE. No question about it.

Well, thank you, Mr. Herzstein. There is no question you have got the ability to do it. I just wish you well. Speaking for myself and, I know, Senator Danforth and others, and I think this whole subcommittee, we are extremely interested in this subject.

Mr. HERZSTEIN. I am delighted with the responsive of the committee to our rather complex problems, Senator, and I will look forward to working with you as we work on them.

Senator CHAFEE. Have you been testifying since 10 o'clock?

Mr. HERZSTEIN. Yes.

Senator CHAFEE. That must be somewhat of a record. Thank you very much. We will adjourn.

[Whereupon, at 11:50 a.m., the committee adjourned.]

# NOMINATIONS OF EDNA G. PARKER AND SHELDON V. EKMAN TO BE JUDGES TO THE U.S. TAX COURT AND NOMINATION OF ROBERT HERZSTEIN TO BE UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE

WEDNESDAY, MAY 14, 1980

U.S. SENATE,  
COMMITTEE ON FINANCE,  
*Washington, D.C.*

The committee met at 10:15 a.m., in room 2221, Dirksen Senate Office Building, Hon. Russell B. Long (chairman of the committee) presiding.

Present: Senators Long, Talmadge, Ribicoff, Byrd, Nelson, Gravel, Bentsen, Matsunaga, Baucus, Boren, Bradley, Dole, Packwood, Roth, Danforth, Chafee, Wallop, and Durenberger.

The CHAIRMAN. The committee will be in order.

Let me call judge-to-be Edna G. Parker to take the stand.

[The biographical data of Edna G. Parker follows:]

## BIOGRAPHICAL DATA—EDNA G. PARKER

September 1977 to present: special trial judge, United States Tax Court—appointed by the then Chief Judge Howard A. Dawson, Jr.

1969 to 1977: administrative judge, U.S. Department of Transportation—Contract Appeals Board; Board for Correction of Military Records for the Coast Guard.

1960 to 1969: U.S. Department of Justice—trial attorney, Tax Division (February 1964 to November 1969) trial attorney, Civil Division (April 1960 to February 1964).

1959 to 1960: Department of the Navy—attorney.

1957 to 1959: U.S. Court of Claims—law clerk.

Education: George Washington University Law School—LL.B. (1957); Order of the Coif; Law Review. University of Arizona—B.A. (1953) with Honors.

Personal background: Born October 30, 1930, North Carolina; residence, Arlington, Va., one son, Douglas B. Parker.

Memberships: American Bar Association, tax section; District of Columbia Bar; Women's Bar Association of the District of Columbia; National Association of Women Lawyers.

## STATEMENT OF EDNA G. PARKER

Ms. PARKER. Good morning, Senator.

The CHAIRMAN. Good morning, Ms. Parker. Tell us a little bit about your experience, would you please?

Ms. PARKER. For the last 3 years, I have been a special trial judge of the U.S. Tax Court. That is a position appointed by the chief judge of the court.

We serve as commissioners hearing principally the small tax cases under the special procedures that Congress created for that.

We also serve as commissioners on larger cases at the court's direction.

The job involves trials of most of what I call the H. & R. Block type tax questions. These are the questions that seem to affect most of the individual taxpayers throughout the country and the people who are the most concerned about taxes these days.

It has been a great opportunity to get out in the country and meet these people and to find out what their problems are, and to try to help administer this tax system as fairly and equitable as possible.

There is some great feeling, I find, that a lot of taxpayers are dissatisfied because they feel someone else is getting a better break than they are, and I think small tax procedures do give the court a method of trying to meet this problem and trying to assure each taxpayer that he or she is being treated fairly, the same as other taxpayers so situated.

Prior to coming to the Tax Court, I served for eight years as an administrative judge on a Contract Appeals Board with the Department of Transportation. I also served on the Board for Correction of Military Records for the Coast Guard.

The Contract Appeals Board was an adjudicatory job. The cases were appealed to the U.S. Court of Claims, normally. And prior to that, I had ten years experience as a trial attorney in the Tax Division of the Department of Justice and the Civil Division.

The CHAIRMAN. I ask that this information giving certain biographical data about you be printed in the record.

You have checked out all possible conflict of interest matters, I assume, and they have been resolved; is that right? Do you have any conflict of interest problems?

Ms. PARKER. Not that I am aware of, Senator Long.

The CHAIRMAN. Have you checked that with the authorities and with the committee staff?

Ms. PARKER. Yes, I have discussed it with Mr. Stern.

The CHAIRMAN. Are there any questions?

Senator Byrd.

Senator BYRD. Mr. Chairman, I just want to strongly endorse Mrs. Parker for this position. I have had an opportunity to talk with her and I am much impressed with her as an individual. I am impressed with her credentials, and I am delighted she has been appointed to this position of judge on this very important court.

My colleague from Virginia, Senator Warner, was here a few moments ago. He had to return to the Armed Services Committee, but he asked me to say to Mrs. Parker and to the committee that he, too, strongly endorses Mrs. Parker for this position. He was here himself to make his own comments, but was forced to return to the Armed Services Committee.

Mr. Chairman and gentlemen of the committee, I hope the committee will act favorably and expeditiously on this appointment.

Senator DOLE. Mr. Chairman?

The CHAIRMAN. Yes.

Senator DOLE. I second what Senator Byrd has said and I would add that our staff has advised us that she is certainly well qualified and that we are pleased to support the nomination.

The CHAIRMAN. Thank you both.

Are there further questions?

[No response.]

The CHAIRMAN. Thank you very much, Ms. Parker.

Next, let's call Mr. Sheldon V. Ekman. I believe we also have a résumé of Mr. Ekman's background before us.

[The biographical data of Sheldon V. Ekman follows:]

**SHELDON V. EKMAN**

July 1969 to present: partner, Reavis & McGrath, 345 Park Avenue, New York, N.Y. 10022. Senior tax partner of law firm with wide general practice.

February 1950 to January 1969: S. D. Leidesdorf & Co., New York, N.Y., tax principal of large certified public accounting firm (since merged with Ernst & Whinney).

December 1945 to December 1950: trial attorney, Office of Chief Counsel, Internal Revenue Service, at New York City.

June 1942 to December 1945: active duty, U.S. Navy, ensign to lieutenant, U.S. Naval Reserve.

1939-42: Harvard Law School, J.D. 1942.

1935-39: Harvard College, A.B. 1939.

Professional activities: chairman (1976- ), and member (1962-66, 1969- ), Advisory Committee, Institute on Federal Taxation, New York University; lecturer (since 1950).

Member, Committee on Lectures and Continuing Education (1976-79), Committee on Taxation (1970-73), Association of the Bar of the City of New York; Committee on Court Procedure, Section of Taxation, American Bar Association; Committee on Taxation, Federal Bar Association; Tax Section, New York State Bar Association.

Adjunct professor of law and taxation, New York University (1979- ).

Lecturer, New York University Institute on Federal Taxation (since 1950) and other tax institutes, including Ohio State University, Dickinson, Rutgers, University of Miami (Fla.) and New York Law Schools: Texas Tech.; Southern Federal Tax Institute (Atlanta); Mid-America Tax Conference (St. Louis); Association of the Bar of the City of New York (Trusts and Estates Section); New School for Social Research.

Publications: articles in 10th-15th, 17th-19th, 23d, 27th, 28th and 33d proceedings of the New York University Institute on Federal Taxation (1950-75); 22 Ohio State Law Journal No. 2 (1961); 2 New Hampshire Bar Journal, Jan. 1960; 15 Journal of Taxation 143 (1961); 19 Journal of Taxation 231 (1963); 5 Practical Lawyer 26 (1959); New York Law Journal, Aug. 17-19, 1959; Proceedings, Texas Tech. Tax Institute, 1963; Proceedings, 8th and 14th University of Miami Institute of Estate Planning (1974, 1980).

Personal background: married, two children, one grandchild.

The CHAIRMAN. Let me ask you, Mr. Ekman, have you cleared with the administration and the committee staff any possible conflicts of interest moving from private practice into the Tax Court?

**STATEMENT OF SHELDON V. EKMAN**

Mr. EKMAN. I have had a discussion with the staff of the committee, Mr. Chairman, but it has been suggested that because I will be coming from private practice, I state for the record the agreement I have reached with my law firm with regard to my withdrawal from that firm.

The agreement is a conventional type of withdrawal or termination agreement and provides for fixed payments to be made to me over a period of 4½ years and I just want to make that clear on the record.

Other than that, I am aware of no conflict of interest and I do not consider that that is one, sir.

Senator RIBICOFF. Mr. Chairman, Mr. Ekman, was a resident of Connecticut while he practiced in New York. He has outstanding experience in the entire tax field. His background is such that I think he is indubitably well qualified for this position.



The CHAIRMAN. Are there any further questions, gentlemen?

[No response.]

The CHAIRMAN. Then we will excuse you, Mr. Ekman.

Mr. EKMAN. Thank you, sir.

Senator RIBICOFF. Mr. Chairman, I wonder if I could bring up—

The CHAIRMAN. Why do we not vote on these confirmations, if you have no objection?

Senator RIBICOFF. I am sorry.

The CHAIRMAN. All in favor of confirming these two nominees, say aye.

[A chorus of ayes.]

The CHAIRMAN. Opposed, no?

[No response.]

The CHAIRMAN. The ayes have it.

Senator RIBICOFF. Mr. Chairman, as you know, the full committee held a hearing on the nomination of Robert Herzstein to be Under Secretary of Commerce for International Trade. Opposition developed from both Senators from Florida, Senators Stone and Chiles, and the chairman asked the International Trade Subcommittee to conduct further hearings, which we did.

We invited both Senator Stone and Senator Chiles to be at the hearing, and they questioned Mr. Herzstein extensively and I asked the staff to develop further information concerning Mr. Herzstein.

I would report to the committee that Mr. Herzstein has outstanding qualifications. He has an outstanding reputation and is one of the most knowledgeable individuals concerning international trade.

He has practiced international trade law for 20 years with the firm of Arnold & Porter. He has served as the American Bar Association chairman of the Standing Committee on Customs Law. He is presently chairman of the American Bar Association's International Trade Law Section.

Senators Stone and Chiles were the only known objectors. They were concerned that Mr. Herzstein represented importers of Mexican tomatoes in an antidumping procedure before the Commerce Department and Department of the Treasury. It started before his nomination.

Tomato growers in the State of Florida and importers of tomatoes from Mexico were antagonists and the Commerce Department ruled in favor of Mexico. Senators Stone and Chiles raised some questions of whether Mr. Herzstein properly recused himself. There was uncontroverted evidence and statements that he did.

Once his nomination was decided upon, he completely isolated himself from all activities on the tomato case in his law firm. He had nothing to do with the case in any stage of the proceedings before the Commerce Department after the President decided to nominate him.

Senators Stone and Chiles then questioned Mr. Herzstein's ability to be objective in the future because of his representing importers.

I would like to point out that Mr. Herzstein represented American companies in antidumping and countervailing actions and his clients include the following: Ford Motor Co., Philip Morris, Sperry Corp., Coal Exporters Association, Great Western Sugar Co.,

Fairchild Camera & Instrument; and his representation was balanced as a lawyer for American exporters as well as importers.

This morning I received a strong letter from Frank Cary, chairman of the board of IBM, pointing out how important this position was, pointing out that IBM exported in the last 5 years almost \$4 billion worth of merchandise from the United States, and he considered Mr. Herzstein one of the most knowledgeable persons in the entire field.

While he did represent Mexican interests in the tomato case as a lawyer, which was proper, I think I should point out to the committee that we are on a slippery slope if we try to disqualify people who acted as a lawyer in matters involving international trade, because they are exactly the type of people we want.

From an agricultural standpoint, the United States exports to Mexico for 1979 were \$187 million-plus of wheat, \$161 million-plus of soy bean and soy bean oil cake, \$150 million of grain sorghum, \$112 million-plus of corn and \$93 million of cattle hides. And our trade surplus with Mexico in 1979 of \$853,425,000

I think we would be in a pretty bad position if we disqualified a man because he represented the importers of Mexican products in a quarrel with growers in the State of Florida. Long before his nomination, Mr. Herzstein wrote an article for the Georgia Journal of International Comparative Law pointing out that we lacked disciplined administrative procedures under antidumping and countervailing duty laws, and strongly urging that we have stricter laws and procedures and rules in antidumping and countervailing duty cases, exactly in line with what this committee had sought to achieve in our MTN agreements.

My feeling is I would strongly recommend that this committee vote favorably on Mr. Herzstein's nomination. There is a lot of work to be done in the Commerce Department, and I think the failure to confirm Mr. Herzstein is holding up action that this committee has ordered the Commerce Department to undertake.

The CHAIRMAN. Your point is that while Mr. Herzstein did very effectively represent the Mexicans with regard to their tomatoes, he has represented a lot of Americans who have been on the other side of the fence seeking protection. As a lawyer, he has been on both sides, and most of his representation has been representing American interests and seeking to uphold their end of it rather than the foreign interests.

Senator RUBIOFF. That is right.

Senator BENTSEN. Mr. Chairman, that was a question of mine, as to his advocacy, whether he had had some diversification in that. Obviously, he has.

I am pleased to see that. I would certainly endorse him.

I would like to make one qualifying point about our trade with Mexico. I think it has been very beneficial for both countries. I think the figures that have been cited are figures normally cited. But they exclude what is obviously a very substantial return of American funds to Mexico by illegal aliens in this country and the trade, I am sure, is much more in balance, if not perhaps in favor of Mexico, and Mexico's trade with this country has increased from \$600 million to \$6 billion in 10 years and it has moved up to now where 47 percent of that trade is manufactured products.

They have done very well with us and again as I say, it is mutually beneficial. They have generally also excluded what we call border trade which usually works, again, to the benefit of Mexico.

So this thing is, I think, at least in balance in Mexico's favor.

The CHAIRMAN. Yes, Senator Chafee?

Senator CHAFEE. Mr. Chairman, I have no reservations along the lines discussed by Senator Ribicoff but I have reservations as to whether Mr. Herzstein was going to be a strong advocate for the trade for a whole series of measures which I believe, and I believe most of the members of the committee believe, have to be taken to aid in our exports.

It seemed to me in his testimony the first day that Mr. Herzstein was very, very cautious and I felt that, brilliant though he might be as a lawyer, I did not feel he was going to be a strong enough figure in standing up to Mr. Lubick and other brilliant representatives of the Treasury who are always here saying no against any proposal to remove some of the disincentives.

However, we had another day of testimony last Monday and Mr. Herzstein assured me that he would be a vigorous advocate and that everything did not have to be proved beyond a reasonable doubt before we were prepared to move ahead in helping exports.

So, based upon that, I will support Mr. Herzstein, but I certainly will be watching carefully what he does in hopes that he pitches in to help our exports.

The CHAIRMAN. Well, you may be entirely right with your reticences, Senator, but my impression about people coming before committees for confirmation is that they feel they just cannot be too timid, on the theory that the less you volunteer, the less likely you are to be voted down. [Laughter.]

I have seen people make statements before committees which got them in trouble in a hurry. So let's be charitable.

If a fellow can get himself noninated and get by these committees, however he does it, as long as he is honorable, I think we cannot kick too much.

Those in favor, say aye?

[A chorus of ayes.]

The CHAIRMAN. How about you, Senator Dole?

Senator DOLE. I share the views expressed by Senator Ribicoff. I understand the concerns expressed by Senator Chiles and Senator Stone. I believe, however, that Mr. Herzstein is eminently well qualified, and I think he ought to be confirmed.

The CHAIRMAN. All in favor, say aye.

[A chorus of ayes.]

The CHAIRMAN. Opposed, no?

[No response.]

The CHAIRMAN. The ayes have it.

All right, sir.

[Whereupon, at 11 a.m., the committee proceeded to other business.]