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FIRST SESSION

ON

THE NOMINATION OF STANLEY D. METZGER TO BE A MEMBER OF THE TARIFF COMMISSION

SEPTEMBER 28, 1967

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NOMINATION OF STANLEY D. METZGER TO BE A MEMBER OF THE TARIFF COMMISSION

THURSDAY, SEPTEMBER 28, 1967

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

The committee met, pursuant to recess, at 10 a.m., in room 2221, New Senate Office Building, Senator Russell B. Long (chairman) presiding.

Present: Senators Long, Anderson, Talmadge, Hartke, Metcalf, Williams, Carlson, and Morton.

Senator TALMADGE (presiding). The committee will come to order.

Mr. Metzger, we would like to welcome you today to the committee. You are eminently qualified as an international lawyer and specialist in international trade. Your nomination to the Tariff Commission reflects the importance the President attaches to this Commission and the work it does in trade matters. We, too, have a high regard for the Tariff Commission. It serves a most important function as an independent, nonpartisan body, whose primary responsibility is to ascertain facts needed by Congress and the President to enable us to properly perform our roles in fixing trade policies. We look on the Tariff Commission as an arm of the Congress. It was created 51 years ago to provide Congress with trade facts on which it could rely in writing its tariff policies. Congress wanted to be independent of the executive branch in this important and sensitive area; and it did not want its information colored by departmental biases.

We do not expect the Tariff Commission to make policies, but to provide facts—facts which are not to be slanted or adjusted to favor any special interest or purpose. As an impartial and objective body, the Commission can perform great service to the Congress and to the President. But if it should compromise its independence or sacrifice its objectivity, its reliability and usefulness would be jeopardized.

Now, Mr. Metzger, you have an excellent background for the position for which the President has nominated you. Your publications are too numerous to mention; and your experience over the past 20 to 25 years in the executive branch, as a lawyer and as a professor, makes you well prepared to lead the Tariff Commission. The President, in my judgment, has made a fine choice.

At this point, let me insert in the record a copy of your biographical sketch.

(The biographical sketch of Mr. Metzger follows:)

STANLEY D. METZGER—BIOGRAPHICAL DATA

Mr. Metzger, 51, was born July 10, 1916, in New York City and received his bachelor's degree from Cornell University in 1936. Following receipt of the LL.B. degree from the Cornell Law School in 1938, he became an attorney with the New York State Labor Relations Board, and then in 1939 an attorney with the National Labor Relations Board. From 1942 to 1943, he served with the U.S. Army Air Force.

He then became Associate Director of Field Operations for the President's Committee on Fair Employment Practices. In 1946, Mr. Metzger joined the Department of State as an attorney, becoming Deputy Assistant Legal Adviser for Economic Affairs in 1950, and Assistant Legal Adviser for Economic Affairs in 1952. He served with the Department of State in the latter capacity until 1960, when he joined the law faculty at Georgetown University, where he had previously served as an Adjunct Professor since 1955.

Since joining the law faculty at Georgetown, Mr. Metzger has served the government in various capacities. From 1961 to 1963, he was a consultant to the International Air Transport Study Group as well as Staff Director of the Claims Committee of the Administrative Conference of the United States. He was a consultant to the White House and State Department on the Trade Expansion Act of 1962. He served as an arbitrator for the United States on the Panel of Arbitrators of the International Civil Aviation Organization, and in 1965 he served as a consultant to the State Department, U.S. Maritime Commission and the Organization for Economic Cooperation and development.

Mr. Metzger is a member of the Board of Editors of the American Journal of International Law, and of the Executive Council of the American Society of International Law. He has also served as the American Editor of the Journal of World Trade Law published in the United Kingdom, and has authored such books as International Law, Trade and Finance, Trade Agreements and the Kennedy Round and Documents and Readings in the Law of International Trade.

Mr. Metzger is a member of the Bar of New York State and of the Bar of the Supreme Court of the United States.

Mr. Metzger resides with his wife at 3338 Volta Place, NW., Washington, D.C.

* * *

Senator TALMADGE. At the conclusion of your statement, if you care to make one, I would also like to include in the record a number of letters I have received, praising your nomination.

(Letters received by the committee appear at p. 59.)

Senator TALMADGE. If you do not have a prepared statement, perhaps some of the members of the committee, as I have, have some questions we would like to ask you.

STATEMENT OF STANLEY D. METZGER, NOMINEE TO BECOME A MEMBER OF THE TARIFF COMMISSION

Mr. METZGER. Thank you very much, Senator Talmadge. I do not have a prepared statement to make to this committee. I appreciate your very kind introduction and kind words. I do not think I will make a statement at this time. I would add simply that in terms of your description of what the Congress expects of the Tariff Commission, I subscribe to everything you have said.

Senator TALMADGE. One of the motivating forces of the Trade Expansion Act of 1962 mentioned in your book on "Trade Agreements and the Kennedy Round," was to insure access for American farm products to the European community. As you know, the group of six in Europe have a highly protectionist policy on agriculture. Do you feel that the negotiations achieved anything substantial in the way of

removing barriers to U.S. agricultural exports which enter the European Economic Community?

Mr. METZGER. Senator Talmadge, I think that the Kennedy round negotiations on agriculture did secure some benefits but I do not think that they were as successful as we hoped they would be. I think that the grains agreement, the wheat agreement that was negotiated, is going to be helpful and I think certain other benefits in terms of particular commodities will be helpful, but on the basic question of the variable levy system, I think there was less progress than had been hoped for.

Senator TALMADGE. Should not the Tariff Commission make a study of the effects of the variable levy system on U.S. agricultural exports?

Mr. METZGER. I would think it would be helpful if the Tariff Commission would make such a study and certainly would cooperate with the Congress, this committee, or the House Ways and Means Committee, if so desired.

Senator TALMADGE. As you know, we are not shipping any more chickens to the European Economic Community. They pretty well put us out of business during the chicken war as you are aware, and apparently many other areas of agricultural exports.

Based on your knowledge of trade matters, would you say that the average textile worker in Appalachia or the average glassworker in Corning, N.Y., or the average steelworker in Pittsburgh or Gary, Ind., could be retrained to fit another occupation if he were displaced by rising imports?

Mr. METZGER. I would have difficulty answering that question, Senator, simply from lack of knowledge of the possible skills and the ability to acquire skills in closely related lines. I just would have to say on that, Senator, that I just do not know the answer to that question, as to how much training or whether it would be feasible.

Senator TALMADGE. Section 332(b) of the Tariff Act of 1930 as amended, states that the Tariff Commission shall have the power to investigate the tariff relations between the United States and foreign countries, commercial treaties, preferential provisions, economic alliances, and the effect of export bounties and preferential transportation rates, the volume of importations compared with domestic production and consumption, and conditions of causes and effects relating to competition of foreign industries with those of the United States, including dumping and cost of production. Mr. Metzger, I believe you will agree that the Tariff Commission is a bit out of date in many of its studies. To my knowledge, the Commission has not made studies on the impact of all of the nontariff barriers that foreign countries have established which seriously affect U.S. commerce.

Among these I might mention; (1) Variable levies affecting U.S. agricultural exports; (2) border taxes and equalization fees; (3) exports cartels; (4) export subsidies; (5) discriminatory road taxes, and many others.

Do you not think it would be appropriate if the Tariff Commission would udate and modernize our studies to ascertain the effect of these nontariff barriers on the U.S. trade?

Mr. METZGER. Yes, I do, Senator. I think that the investigatory function could be substantially stepped up to cover subjects such as those you mentioned and others that you have not mentioned which are

facing us as trade policy questions over the next several years. I think there will be a question of getting money to carry on a substantial number of investigations at one time, but subject to that, I would certainly agree with you.

Senator TALMADGE. You mentioned in your book on "Trade Agreements and the Kennedy Round," that the balance-of-payments problem was one of the overriding considerations which the executive branch used in promoting the Trade Expansion Act of 1962. Do you feel that the agreements entered into at Geneva help our balance of payments, have a neutral effect, or deleterious effect?

Mr. METZGER. I think it is very difficult to tell at this stage, Senator, what the precise effects upon our balance of payments will be of these agreements. The reductions in U.S. tariffs on the one hand, and in foreign tariffs on the other, consequent upon the negotiations, will take place over a period of years, staged as the Congress directed in the Trade Expansion Act. This means that one will not see the impact in terms of the direct result of the tariff negotiations upon trade except gradually over a period of years, and since balance-of-payments considerations turn on a great many other things as well, general prosperity and the like, it may be difficult to trace the precise effect upon balance of payments.

To the extent that the agreement results in maintenance and expansion of American exports, to the extent that it results in the maintenance and expansion of imports so that the deal is truly reciprocal, the impact upon balance of payments certainly should not be adverse and it may be an improved balance-of-payments situation, but I would believe that it would be difficult to tell at this stage with any degree of precision.

Senator TALMADGE. You stated in an article published in the American Society of International Law Proceedings in 1960 that countries outside a customs union or free trade area could retaliate if they were adversely affected by the policies of the union because "every customs union or free trade area created or planned departs from the stated GATT safeguards."

What is the purpose of having safeguards if they are not adhered to by the member countries of the GATT?

Mr. METZGER. I think the reference there, Senator, is to the safeguards set forth in article 24 of the GATT, which are designed to permit an exception from most-favored-nation treatment for customs unions and free trade areas measuring up to certain standards. The object of the paragraph in article 24 was to caution those who were forming, thinking of forming customs unions or free trade areas, to conform to those standards. I think that in the absence of such standards, the departures from the norms set forth by those in article 24 would have been greater than they are. It is nonetheless true that in international legal relationships, just as in domestic ones, one cannot count on complete performance in accordance with the legal requirements, and I think this is what we saw in this case. We saw partial performance, substantial performance, in the case of the Common Market but not complete performance.

Senator TALMADGE. Mr. Metzger, many foreign trade experts talk about the so-called nontariff barriers as being the major obstacles to freer trade. Foreign countries engage in these practices to a much

greater extent than we do. The Tariff Commission has the authority to investigate these practices.

How do you feel these nontariff barriers can best be dealt with, through bilateral negotiations or multilateral negotiations or perhaps by U.S. retaliation?

Mr. METZGER. My impression is that it would probably be a mistake to say that they must be through bilateral negotiations or must be through multilateral negotiations or through retaliation. I would think what needs to be done would be to look at the barriers to decide from barrier to barrier what is the most sensible way of approaching it. In some, perhaps, the multilateral form. In others, perhaps, the bilateral form. In this way one can pick and choose one's method of getting at the problem from the nature of the problem.

For example, I am not sure when one looks at the procurement policies of the various countries, I am not sure that a multilateral form is necessarily the best form for tackling this problem. Our own procurement regulations as set forth in the Government procurement regulations, are set forth in our "Buy America" acts and are on the table for all to see. In many countries they have the same policy, in fact a policy which is much more exclusionary than ours ever has been, and yet it is not in the form of a law which all can see. It is in the form of deep-seated practices which are very difficult to find out about, and I am not sure that a multilateral form is the best way of finding out about them.

It may be in that case one deals directly with the Government of France or the Government of Germany or the Government of England. I think it depends, case to case.

Senator TALMADGE. In testimony before the House Foreign Economic Policy Subcommittee last February, you criticized the attempt being made to deal with the American selling price valuation in the context of the Kennedy round negotiations, pointing out that the ASP issue had been raised by the EEC in order to reduce the 50 percent tariff reduction figure to a much lower figure which would eliminate the political consequences and reduce the significance of the economic consequences of the Kennedy round.

Has not your analysis of this ASP issue been borne out by the fact that the Kennedy round deal as ultimately concluded provides for only a 20-percent reduction on chemicals by the EEC in return for a 50-percent reduction by the United States?

Mr. METZGER. Partly, sir. Partly. The other part of the package, the ASP package, however, would increase the reductions on the other side of the bargain if the Congress approves the ASP legislation that the administration, I understand, is going to come forward with. But, I think the answer to—the direct answer to your question, Senator, is that the result partly justifies what I was concerned about.

Senator TALMADGE. At the time you urged that the parties reexamine their position on chemicals and attempt to work out an acceptable deal within their Kennedy round authority, instead of entering into separate and vulnerable amendments outside the authority of our trade act, while subsequent events in this area appear to have justified your fears in that regard, will you please explain to us the basis of your concern for the use of this so-called separate package procedure and your criticism of congressional tariffmaking.

Mr. METZGER. Well, what I had in mind there, Senator, was the problem of a break with past practices ever since the Trade Agreement Act of 1934 was enacted, of the executive negotiating agreements under the authority of the trade agreements legislation, and then not needing to come back to the Congress with the results—the results being in accord with the authority delegated. I always thought this was a sensible practice and one of the reasons is the famous remark that Senator Vandenberg once made after the 1930 Tariff Act enactment saying that he would hope never to have to live to go through another process such as that. And this is what I had reference to.

I was concerned that negotiating a separate package outside the authority of the Kennedy round and then coming back to the Congress with it could cause difficulties, not only in respect of getting approval of the particular package, but also in respect of the future.

Senator TALMADGE. I share that view. I voted against the Canadian auto agreement because the executive branch of Government presented it to the Congress as a fait accompli. They were warned by Senate Resolution 100 not to exceed the authority in the Geneva negotiations under the Trade Expansion Act of 1962. The Finance Committee reported that resolution unanimously. The Senate approved it without a dissenting vote but now we are presented with the second fait accompli in just a few years' time where the executive has exceeded the authority delegated by the Congress and they bring us a package and say take it or leave it. Sometimes either alternative is difficult.

Senator Williams?

Senator WILLIAMS. No questions.

Senator TALMADGE. Senator Hartke?

Senator HARTKE. Has Mr. Metzger's biographical sketch been inserted?

Senator TALMADGE. Yes; it has been inserted in the record, along with a number of letters that the committee has received, praising his appointment.

Senator HARTKE. This is a complete biographical information? You are familiar with it? Did you prepare this, Mr. Metzger?

Mr. METZGER. I had something to do with it. I did not actually prepare it.

Senator HARTKE. Are there any omissions?

Mr. METZGER. There are some things in my life that are not included but it is pretty extensive. Not every jot and tittle is there, but practically.

Senator HARTKE. Has anything in your life been omitted that we should know about?

Mr. METZGER. I do not think so.

Senator HARTKE. But, it does contain complete information as to where you have ben employed, is that correct?

Mr. METZGER. I think there may be one or two omissions. As I recall it, it does not list the Office of Price Administration. I gave that information to the White House. This is based on a White House release.

Senator HARTKE. You were with the Office of Price Administration?

Mr. METZGER. I was there for a while and as I recall, it fails to point out that fact.

Senator HARTKE. Anything else?

Mr. METZGER. This is, I think, because of just a lack of space really.

Senator HARTKE. Anything else that is omitted?

Mr. METZGER. No. I do not think so.

Senator HARTKE. Did you ever work for any Member of Congress?

Mr. METZGER. I worked for a short time for a committee of the Congress. That, I do not think, is listed there. I worked for a very short time for a subcommittee of the House Education and Labor Committee.

Senator HARTKE. For which committee?

Mr. METZGER. A subcommittee of the House Education and Labor Committee.

Senator HARTKE. But, you did not put that on your biographical sketch?

Mr. METZGER. Well, you see, I gave a lot of information to the White House and the White House prepared this and released it and this sketch——

Senator HARTKE. Why did the White House omit that?

Mr. METZGER. I do not know why the——

Senator HARTKE. Is there any significance in the fact that it was omitted?

Mr. METZGER. Perhaps; but I do not know. The White House knew about it and I informed them of that. I think they omitted the OPA information as well.

Senator HARTKE. Why did they? Did they tell you they omitted it for any reason?

Mr. METZGER. No.

Senator HARTKE. Or did they talk to you about it?

Mr. METZGER. No.

Senator HARTKE. Who prepared it in the White House?

Mr. METZGER. I do not know who prepared it in the White House.

Senator HARTKE. You did not prepare your own biographical sketch? In other words, the White House is submitting this information, not you yourself; is that true?

Mr. METZGER. This is right. This is taken from the White House release that appeared in the weekly digest of Presidential Documents of August 7 of this year. They asked me questions over the telephone and they had data from past releases of various kinds, but I did not prepare it.

Senator HARTKE. Well, how long did you work for this committee of Congress?

Mr. METZGER. A short time. I believe it was about 4 or 5 months.

Senator HARTKE. Were you paid?

Mr. METZGER. Yes; I was.

Senator HARTKE. What did you do?

Mr. METZGER. I was counsel for a subcommittee. It was the subcommittee headed by chairman—the subcommittee chairman was John Dent. I had been asked to take on that job while I was teaching law at Georgetown.

Senator HARTKE. What was the nature of your duties with Congressman Dent?

Mr. METZGER. The nature of my duties was chief counsel of this subcommittee. The committee was to investigate the impact of im-

ports upon employment in the United States and my job was to attempt to set up hearings on various commodities. We were to conduct, as I understood it, an objective investigation of this impact of imports upon employment, and my job was to attempt to set up these hearings, to get witnesses, I thought, on both sides of these questions in various industries, in order to develop the facts in respect of this question.

Senator HARTKE. What was the period of this employment?

Mr. METZGER. Pardon?

Senator HARTKE. What was the period of this employment?

Mr. METZGER. This was in, as I recall it, 1961, I believe it was.

Senator HARTKE. 1961. What months?

Mr. METZGER. Summer of 1961.

Senator HARTKE. For a period of how long?

Mr. METZGER. A period of several months. I think I started on a part-time basis in the spring of either 1960 or 1961 and it continued until midsummer of that year. Mr. Dent and I, as it developed, did not see eye to eye with respect to the conduct of the investigation and we parted company.

Senator HARTKE. Was the fact that you had a little difficulty in seeing eye to eye with Congressman Dent and the circumstances surrounding that, was that the reason for the omission in this biographical information?

Mr. METZGER. No, sir, because the White House knew about this and they decided whether to include it or not, just as they decided whether to include the affiliation with the Office of Price Administration or not.

Senator HARTKE. Did they talk to you at that time about this employment with a committee of Congress? You are coming before Congress for approval. To omit this fact—that you had previously worked for a committee of Congress and had some difficulty there—should raise some questions. Did they talk to you about this at all?

Mr. METZGER. Did they what?

Senator HARTKE. Did they talk to you about it?

Mr. METZGER. No, they did not talk to me about it. It was widely known that this was the fact. They knew about it and they drew up the press release and I have no idea why they did not include this or the other information that they did not include. Perhaps because it was—the release was already over lengthy, in my judgment.

Senator HARTKE. Did you think it is more important for you to go back here several years and cover from 1961 to 1963, the fact that you were consultant to the International Air Transport Study Group, was that more important than the fact that you worked for a congressional committee? Is that what you are saying?

Mr. METZGER. I gave the information to which you are referring, to the White House along with all the other information there. They decided what to put in the release.

Senator HARTKE. Yes.

Mr. METZGER. In fact, I think the work I did with the Air Transport Study Group was more important because the work that I did with the committee tended to be abortive and nothing much happened in that time. I was there, with them, a very short time before we parted company, while for the International Air Transport Study Group, we came forth with quite a substantial report.

Senator HARTKE. You say this was widely known about your activities and your disagreement with Congressman Dent? Was there publicity on this fact?

Mr. METZGER. Yes, there was at the time.

Senator HARTKE. What was the nature of that publicity?

Mr. METZGER. There were newspaper stories in respect of the parting of company——

Senator HARTKE. And would you——

Mr. METZGER (continuing). With the reasons for it.

Senator HARTKE. Would you care to tell us—care to relate to the committee your own opinion concerning the circumstances of this disagreement you had with the chairman of a committee of the Congress and which led to your separation from employment there?

Mr. METZGER. I would have no hesitation about it. When I took the job on at the suggestion of Chairman Mills, I had understood it was to be an objective investigation.

Senator HARTKE. I can barely hear you.

Mr. METZGER. Sorry. When I took the job at the suggestion of Chairman Mills——

Senator HARTKE. Chairman Mills of the House Ways and Means Committee?

Mr. METZGER. Yes. I had understood it was to be an objective investigation. It turned out in the course of the time that I worked that I thought that Congressman Dent was more interested in—more interested in one side of the investigation than the other. I thought that he was more interested in an investigation which was perhaps in my terms less than objective. I think he probably felt the same way on the other side, and this is what led to the—what turned out to be the mutual desire to part company.

This turned on the basis of a difference in view. I think at the bottom of it this was the difficulty.

Senator METCALF. Will the witness speak up? I cannot hear.

Mr. METZGER. Sorry. This was the basis of the difference in view, Senator Hartke.

Senator HARTKE. Well, what was the nature of the proposals that you were making to which Congressman Dent objected? They dealt in the same field we are talking about, a question of imports and question of tariffs; is not that true?

Mr. METZGER. It dealt with the question of investigating the impact of imports upon employment.

Senator HARTKE. Well, that is a rather important factor in American society.

Mr. METZGER. Certainly.

Senator HARTKE. And, this is something about which as a member of the Tariff Commission, you would be concerned, is not that true?

Mr. METZGER. Quite right.

Senator HARTKE. Then, would you care to explain what it was that—what your position was that caused the difference with Congressman Dent which led to your mutual agreement to terminate this employment which was not listed on your biographical sketch?

Mr. METZGER. The circumstances were as follows. At the outset, we decided to have an investigation and hearings, that is to say, on the impact of employment in the coal industry. I secured witnesses on both

sides of the issue, that is to say, coal, labor, the residual oil industry. The New England people took a different view on the impact of imports—this was really an impact of imports of oil upon the coal industry—and we had hearings.

The next major thing that was scheduled was an investigation of the impact of imports on the aluminum industry. I busied myself with attempting to secure evenhandedly witnesses who might be expected to testify on different sides of this issue, those who would make the case that imports were hurting employment in the aluminum industry, witnesses who would say that is not so and who would demonstrate their respective points of view, document their respective points of view so that there would be a record made of all points of view on the issue. This, it seemed to me, was my task.

While this was happening, without knowledge to me, Chairman Dent, of the subcommittee, decided to schedule a hearing in respect of cheese in Wisconsin and I had nothing to do with that. He went out and held these hearings. I did not accompany him, although he did ask me, but I had not been forewarned of this at all and I knew nothing about the situation, had done no research at all and had had nothing to do with setting them up.

Upon his return, which was shortly before the aluminum hearings which I had been working on were scheduled to be heard, Chairman Dent cancelled the aluminum hearings.

Now, I believe he felt that I was loading the deck, as it were. I believe he felt—it later appeared from his public statement—that he felt that I was trying to present a one-sided view of the matter. I thought quite the reverse. I thought that I was trying to present an evenhanded, objective investigation, and these were the basic circumstances under which we parted company.

I still believe that what I was doing was the correct thing to do, to have an objective investigation. I am sure that Congressman Dent, for whom I have respect, sincerely believes the other way. And there have been no words between us since of any kind. That is the story.

Now, the administration, the White House, if you wish to call it that, has known about this. This was publicized. They knew about this when they asked me to be consultant to them in the preparation of the Trade Expansion Act of 1962 and it has been public information to all the departments, Government, and the White House, ever since. Their failure to include it in the biographical sketch which they prepared, as I say, I have no knowledge as to why they omitted this as well as omitted a few other things such as the other employment that I mentioned that I had which they did not include.

Senator HARTKE. Now, just to correct the record, then, the Office of Price Administration, how long did you work for them?

Mr. METZGER. I worked for them from August 1943 until—just a moment. From August of 1944 until January of 1946, 1 year and 5 months, I guess.

Senator HARTKE. Well, at the time when you were talked about for this position, was it discussed with you at all at that time about the difficulty you had had during your employment with a committee of Congress? Was this discussed at the White House? Was it talked about with anybody?

Mr. METZGER. No. To my knowledge it was not. The White House had no discussion with me about it. Whether they discussed it among themselves I do not know.

Senator HARTKE. You read this biographical information before it was submitted to us; is that correct?

Mr. METZGER. I did not read it before it was released. The first I saw of that biographic information was when I secured a copy of the press release after the public announcement.

Senator HARTKE. Are there any inaccuracies in this biographical sketch which you have made a part of the record here?

Mr. METZGER. I do not think there are inaccuracies. There are elisions as I indicated in these two respects.

Senator HARTKE. Are there any other deletions of employment?

Mr. METZGER. Elisions, I said sir.

Senator HARTKE. Deletions of employment is what I ask——

Mr. METZGER. Pardon?

Senator HARTKE. Are there any other deletions of employment?

Mr. METZGER. There are no other elisions of employment, Senator. There are certain consultancies that are not listed that I had. For example, as I recall that release, I do not believe it lists the fact that I was U.S. Arbitrator in the U.S.-Italian Aviation Arbitration of 1964 and 1965. That information had been given to the White House, but the White House, I assume, felt they had run out of space or at any rate——

Senator HARTKE. Is that what they told you, they had run out of space?

Mr. METZGER. No. They said nothing of the kind, Senator. I am just assuming since it was such a lengthy release and they omitted it.

Senator HARTKE. They have got three stars down here at the bottom. I guess maybe they felt they should go no further.

Mr. METZGER. They listed one aviation affair, two aviation affairs, but they failed to list the U.S. Arbitration with Italy of which I was the U.S. Arbitrator.

Senator HARTKE. It says here you were arbitrator for the United States on the Panel of Arbitrators of the International Civil Aviation Organization.

Mr. METZGER. That is right. One thing. But they omitted an additional piece of information that I was also in adddition to that, U.S. Arbitrator on a specific arbitration, the United States-Italian Aviation Arbitration of 1964–65.

Senator HARTKE. Let me ask you——

Mr. METZGER. There was no reason for them to omit that. It was a favorable circumstance.

Senator HARTKE. Unfavorable circumstance?

Mr. METZGER. It was a favorable circumstance and there was no reason for them to omit it except as I assume, a lack of space.

Senator HARTKE. But you feel that failure to remain in the employ of Congress was an unfavorable circumstance?

Mr. METZGER. It could be so interpreted. I do not view it as being unfavorable but some people might because it indicates that there was a controversy and some people think controversial matters are unfavorable matters.

Senator HARTKE. Now, do you know a Mr. Hendrick, of the Treasury Department?

Mr. METZGER. I have met him and I know his writings. I do not know him well.

Senator HARTKE. Who is he?

Mr. METZGER. He is special assistant to the Secretary, to the best of my knowledge, and for a long time has handled antidumping matters in the Treasury Department, and has written widely about such matters.

Senator HARTKE. And you consider him an authority?

Mr. METZGER. I think he is well known to be an able man and an authority in his field. I consider him to be one of the antidumping law authorities.

Senator HARTKE. But he was publicly referred to as "A mere employee" at one time. Is that what they called him? A mere employee of the Treasury Department?

Well, let us come on back.

You made a speech on April 24 to a luncheon sponsored by a committee of the Federal Bar Association on the Kennedy round. Do you recall that speech?

Mr. METZGER. Yes, sir.

Senator HARTKE. And you talked about the Antidumping Act at that time, the act now——

Mr. METZGER. I just mentioned briefly the antidumping agreement which had been negotiated, was in the proces of negotiation.

Senator HARTKE. Let us put it straight. Let us keep it—there is the Antidumping Act, which is a part of the Congress, acts of Congress.

Mr. METZGER. Right.

Senator HARTKE. Now, there is a code which was adopted at the last negotiations at Geneva.

Mr. METZGER. That is right, international agreement that the United States entered into.

Senator HARTKE. Called the Antidumping Code. That is right. So one is a code and the act of Congress is the act but you discussed the Antidumping Act, did you not, in——

Mr. METZGER. I think I mentioned both of them, sir.

Senator HARTKE. Yes. All right. And did you say at that time that this Mr. Hendick of the Treasury Department was the chief architect of the code?

Mr. METZGER. I do not know if I used the term chief architect but I know at the time he had been one of the negotiators, one of the principal negotiators.

Senator HARTKE. Did you consider him as the chief architect of the code?

Mr. METZGER. I certainly think he was one of the leading people involved in the negotiation. I would not want to be held to the particular words "chief architect" or "assistant chief."

Senator HARTKE. I do not want to put words in your mouth, but if you used the words chief architect in that speech, did you intend it to mean that?

Mr. METZGER. I intend to mean he had an important role to play. Yes, my understanding is he did.

Senator HARTKE. And drafted part of the code itself; is that true?

Mr. METZGER. I do not know for a fact he did that. I assume he did.

Senator HARTKE. Are you familiar with any of his actions in regard to the Tariff Commission?

Mr. METZGER. The Tariff Commission?

Senator HARTKE. Yes. With the Tariff Commission.

Mr. METZGER. No, sir.

Senator HARTKE. Are you familiar with his actions in regard to decisions of the Tariff Commission and interfering with decisions of the Tariff Commission?

Mr. METZGER. No, sir.

Senator HARTKE. Are you familiar with the fact that this same Mr. Hendrick of the Treasury, who you referred to as having a very important role in the development of the code, was reprimanded for submitting supplemental material to the Commission improperly?

Mr. METZGER. Oh, no, sir, I have no knowledge of this.

Senator HARTKE. You do not know of that?

Mr. METZGER. No.

Senator HARTKE. You do not know that he did or did not?

Mr. METZGER. I have no knowledge whatever about it, whether he did or did not.

Senator HARTKE. But you did have an opportunity to examine the provisions of the international antidumping code prior to your speech of April 24; is not that correct?

Mr. METZGER. No, I did not. I did not see it until after it had been published.

Senator HARTKE. You did not—but you knew its general contents?

Mr. METZGER. No, I did not. I had been told some of the principal things that were involved and I had been told that it would require no changes in American legislation. This had been informed to me but I had no knowledge of its detailed contents.

Senator HARTKE. Who told you this?

Mr. METZGER. I was informed of this by people in the U.S. Government, both here and in Geneva.

Senator HARTKE. By whom?

Mr. METZGER. People in the U.S. Government here and in Geneva, when I asked the question——

Senator HARTKE. Who in the U.S. Government told you that?

Mr. METZGER. People in the State Department and in the Commerce Department.

Senator HARTKE. What were their names?

Mr. METZGER. I do not really recall all the names. One of those who told me, whom I had a discussion of this matter with, and who informed me of this in the early stage, when I saw him in Geneva in January, was William Kelly, who was on our delegation in Geneva and closely connected——

Senator HARTKE. What was William Kelly's position with the delegation?

Mr. METZGER. He was a member of the delegation and he was in charge, I do not know if he was in the highest charge, but he was concerned with the negotiation of the antidumping agreement.

Senator HARTKE. And——

Mr. METZGER. He is, I believe, a Commerce Department employee and he was—at that stage in the discussions he said there was no intention of negotiating anything that was inconsistent with the statute and——

Senator HARTKE. I cannot hear you at times. You drift off.

Mr. METZGER. I am sorry. I was informed by him that there was no intention to negotiate anything inconsistent with the statute in the code. This was the information.

Senator HARTKE. I have not mentioned anything about any inconsistencies with the statute yet, but that is all right. I guess you anticipate where I am going but that is all right.

Who else did you talk to besides Mr. Kelly?

Mr. METZGER. He is the only one I talked with.

Senator HARTKE. He is the only one——

Mr. METZGER. He is the one I spoke with in Geneva and he is the one upon whose judgment I principally relied because he was directly connected with the negotiation there. I did not speak to Mr. Hendrick, if that is——

Senator HARTKE. Did you talk with anybody else in the United States, in the State Department—you said you talked to people in the State Department. Who did you talk to in the State Department?

Mr. METZGER. I talked to some people in the Economic Bureau of the State Department, very briefly, not in any detail, and that is about it.

Senator HARTKE. Well, do you consider the code to be a skilled job of legal drafting?

Mr. METZGER. I have read the code, Senator Hartke. I have not studied it. It is a rather lengthy document. I have not worked with it sufficiently closely to be able to come to a conclusion whether it is skilled or not.

Senator HARTKE. Well, you must have talked to somebody about this code and its provisions before that April 24 speech to have made the statements you made in that speech.

Mr. METZGER. I do not think so, sir. I did not speak to anyone in detail. I have never seen a draft of the document. When I made the statement, as I recall I made the statement that I was—that actually the negotiation on antidumping code was rather more than I had expected would ensue from the negotiations, and that I thought that the ability to do so and to stay within the framework of the Antidumping Act, which I was told was being done, was a noteworthy endeavor and a noteworthy accomplishment. As I say, since I did not know what was in the code, I had no further judgments to make on it at that time.

Senator HARTKE. Well, who told you that Mr. Hendrick had such a great part to play in this drafting of this code prior to your April 24 speech?

Mr. METZGER. I think Mr. Kelly told me this in Geneva. He was quite forthcoming. I had known that Mr. Hendrick had been involved.

Senator HARTKE. Do you know Mr. Kelly quite well?

Mr. METZGER. I know him. Not intimately, but I know him.

Senator HARTKE. Do you consider him an authority upon this subject?

Mr. METZGER. I think he is an extremely knowledgeable fellow.

Senator HARTKE. What did he tell you that Mr. Hendrick—what did he tell you Mr. Hendrick had to do with the drafting of this code at Geneva?

Mr. METZGER. He said Mr. Hendrick had been very instrumental in this and had come over to Geneva a number of times. I knew of Mr.

Hendrick's close knowledge of the antidumping problem because he had written an article on antidumping for the American Journal of International Law some years back, which I had gone over before it was published. I am on the board of editors of that publication and I knew of Mr. Hendrick's intimate knowledge of the area, assumed that he was active in the negotiations because he was one of the most knowledgeable people in the Treasury Department, and this was confirmed to me by Mr. Kelly. That is it.

Senator HARTKE. But you did not know Mr. Hendrick had been referred to publicly as a mere employee of the Treasury Department in an antidumping decision of the Tariff Commission, which also reprimanded him for submitting supplemental material to the Commission improperly.

Mr. METZGER. I have no knowledge of that, sir; no.

Senator HARTKE. All right. Now, this same Mr. Hendrick who was so reprimanded in this decision from the Tariff Commission, did you during the course of your speech April 25 this year, April 24 of this year, refer—did you during that speech refer to the masterly manner in which Mr. Hendrick had fended off demands from foreign governments to amend the act by openly and admittedly weakening its substantive provisions?

Mr. METZGER. I think I said something along that line as I recall it, because I knew from prior complaints that certain foreign governments wanted to see changes in American practices in the antidumping area which——

Senator HARTKE. How did you know that?

Mr. METZGER. Which——

Senator HARTKE. How did you know that?

Mr. METZGER. Oh, I had known that from prior years and from complaints.

Senator HARTKE. Did you know they were doing this at Geneva?

Mr. METZGER. No. I did not know it at Geneva but——

Senator HARTKE. But——

Mr. METZGER. If I may, Senator.

Senator HARTKE. Let us just get it straight now here. You have said in this speech on April 24, you referred to the masterly manner in which Mr. Hendrick had fended off demands from foreign governments to amend the act by openly and admittedly weakening its substantive provisions. Now——

Mr. METZGER. May I explain, sir, the basis for that statement?

Senator HARTKE. Certainly.

Mr. METZGER. Senator, the basis for that statement was twofold. One, I had been told by people on whom I relied that——

Senator HARTKE. Now, by whom?

Mr. METZGER. I mentioned earlier——

Senator HARTKE. Just Mr. Kelly?

Mr. METZGER. Mr. Kelly.

Senator HARTKE. And who else? This is the sole source of your information?

Mr. METZGER. This is the source of the information, that the antidumping agreement that the United States was in the process of negotiating would not require any changes in American law, that it was within the four walls of the domestic statute. Since, secondly, I had

known for many years that foreign governments were attempting to secure changes in American antidumping practices which would have required changes, very clearly, in American law, and putting those two factors together, it seemed to me to be a matter to congratulate a person who was—who obviously had been heavily involved in an important factor in the negotiations, upon his ability to make it plain to the foreign people that they could not secure those changes without an amendment in American law and that the U.S. Government was going to stay within the confines of American law in the negotiations.

These were the circumstances that led me to, as it were, give an accolade to the man who was able, assuming that he stayed within American law, of course, to accomplish this purpose.

Senator HARTKE. Who told you that Mr. Hendrick was doing all of this work, that he was the chief architect of the code?

Mr. METZGER. As I indicated a few moments ago, Senator, Mr. Kelly.

Senator HARTKE. Mr. Kelly told you that——

Mr. METZGER. Specifically.

Senator HARTKE (continuing). Hendrick was doing this?

Mr. METZGER. Mr. Kelly specifically informed me that Mr. Hendrick had played an important role in this.

Senator HARTKE. And this is the same Mr. Hendrick who was referred to publicly in a decision by the Tariff Commission as a mere employee of the Treasury Department and reprimanded publicly in this decision for submitting supplemental information to the Commission improperly?

Mr. METZGER. As I said, Senator, I have no knowledge whatsoever of that.

Senator HARTKE. All right. I am just coming back to this man.

A few moments ago you said no one had told you how much he had done about it. Now, let us come on back to your speech. You stated Mr. Hendrick had explained to foreign governments that if amendments were made, the code would have to be presented to Congress and in that event, that Congress would strengthen rather than weaken the Antidumping Act.

Now, who told you, if you did not talk to Mr. Hendrick, that he had explained to foreign governments that if amendments were made, the code would have to be presented to Congress and in that event that Congress would strengthen rather than weaken the Antidumping Act?

Mr. METZGER. Well, as I indicated earlier, the conversation I had at some length was with Mr. Kelly in Geneva. He told me.

Senator HARTKE. Did Mr. Kelly tell you that Mr. Hendirck had explained to foreign governments that if the amendments were made, that the code would have to be presented to Congress and in that event Congress would strengthen rather than weaken the Antidumping Act?

Mr. METZGER. He said Mr. Hendrick had explained that changes would be required in American law if all the foreigners' requests were met. I do not recall whether he said that the Congress would probably—I was told that he said the Congress would probably strengthen in one sense the Antidumping Act but that was my own opinion, formed over a period of years, that if the Antidumping Act were to be opened up in the Congress, the likely result would be that it would

be strengthened, that is to say, would be strengthened in a way which the foreign exporter would not like.

I believe when I was talking before the bar association, I believe that in the latter part of that I was expressing my own view of the matter which was and is that if the Antidumping Act were opened up, this is the likely result of this and I was basing that judgment, if I may just add one further word, on the fact that there have been introduced in the Congress for a number of years now, legislation with wide support which would have had that effect.

Senator HARTKE. Was it your own statement or was it Mr. Hendrick's statement, and if it was Mr. Hendrick's statement, who told you that it was Mr. Hendrick's statement, that he deliberately couched the language of the code so as to avoid giving the impression that the Antidumping Act was being amended substantively?

Mr. METZGER. No, As I said a moment ago, I believe that I was expressing my judgment in respect of the likely action if the Anti-Dumping Act were opened up.

Senator HARTKE. Wait a minute. We are talking about Mr. Hendrick had deliberately couched the language of the code. Now, how—was that you——

Mr. METZGER. I do not believe I used that language because I do not believe—I have no knowledge about any deliberate couching of the code in language of this kind, in language to avoid the impression, the other words you used in that regard. I do not recall saying anything of that kind.

Senator HARTKE. But you praised Mr. Hendrick also for his skill in the drafting of the code in this manner.

Mr. METZGER. I praised him; I was praising him for having accomplished an international agreement in this difficult area without—as had been told me then—without requiring any changes in American law, because this, I thought, was a favorable accomplishment. Now, I realize, Senator, that there are those who think that he did not or—not that he did not but the United States did not successfully accomplish this objective because I realize that there are those who think that the result is not consistent. But I had no knowledge of the contents of the agreement at the time and I was relying for my statement on the fact that I had been told that there would be no such changes required.

Senator HARTKE. Yes; but no one in the Senate was told, no one on this committee was told what was in that code prior to that time, in fact, there was public refusal to provide it even to this committee as late as June of this year. Is not that correct, in fact late June this year?

Mr. METZGER. I have no knowledge of that but I can tell you I did not see it.

Senator HARTKE. But you talked about it quite at length. Are you familiar now with the provisions of the International Antidumping Code?

Mr. METZGER. I have read it, sir. I am not intimately familiar with it. I have not studied it.

Senator HARTKE. If, in the abstract, the code amends the act in any respect, do you agree that the code could only become effective if it is approved by Congress?

Mr. METZGER. The code to be effective, if it is to be effective as internal law, would need to be translated into a law of Congress. I think that—if I understand your question correctly——

Senator HARTKE. You are familiar with the code. You have read it.

Mr. METZGER. In general terms; yes.

Senator HARTKE. And you are familiar with the act.

Mr. METZGER. Yes, sir.

Senator HARTKE. And this is a field in which you have done a lot of study.

Mr. METZGER. I have done some. I am not—I do not purport to be an expert in the antidumping law but I know something about it.

Senator HARTKE. According to this biographical information which omits the fact that you worked for a committee dealing with dumping——

Mr. METZGER. No, sir.

Senator HARTKE (continuing). That you state on here that—according to the White House it states on here, they did not give all the information again, they did not tell a lie; they just omited something.

Senator MORTON. Will the Senator yield?

Senator HARTKE. Yes, sir.

Senator MORTON. I merely want to comment that I had the privilege of serving with Mr. Metzger in the Department of State for a little more than 3 years. I consider him—I do not know whether he is a Democrat or Republican, whether he is free trade or protectionist, but I know he is a man of great judicial stature. The Legal Adviser of the State Department when I was there was one of the most distinguished lawyers on the west coast, Mr. Herman Phleger, who probably left Washington before you came. And he graciously sent me a copy of the letter which he wrote to our minority leader, the Senator from Illinois, Senator Dirksen, in which he points out that he considers Mr. Metzger as a very able and judicious man and he also points out that he thinks it is high time that the Tariff Commission be a bit more judicious and perhaps less of a policymaking organization.

I personally think that Stan Metzger represents that and when one talks about what Congress thinks, he went through the battles I went through. I remember once when we passed a bill in the House by one vote or at least the motion to recommit failed by one vote on the Trade Agreement Act. I think it was 1953 or 1954 or along in there. And I told Secretary Dulles that morning, I said, we are going to win by one vote and when you can call them that close in the House of Representatives you are calling them. And the gentleman before us was with me in that fight and I just—I do not know what you are getting at, frankly, Senator, but I do not see why you have to continue to castigate this witness with the questioning that you are developing.

Senator HARTKE. Mr. Chairman, I feel that this is a peculiar statement coming from a fellow Senator. I cast no aspersions.

Senator MORTON. Oh, yes, you have.

Senator HARTKE. That is not true. Certainly if I have. I had no intention. I have asked questions here on biographical information which has an omission of a man who is being asked to be confirmed by the Congress and as he states—there are two omissions and one of them—there is an omission as to the time he served as a member of a—as general counsel for a subcommittee of Congress which he left under cir-

cumstances in which he says there was publicity as to his disagreement with the chairman of that committee and I am——

Senator MORTON. That is no secret, Senator.

Senator HARTKE. It was not certainly in this biographical information.

Senator MORTON. I have seen biographical statements submitted by people that have come before this committee or other committees on which I serve. I do not think a biographical statement necessarily has to be a complete documentation. Those of us who have served in public life, those of us who have served as Mr. Metzger has, if you are going to write all that up in a biography, you are going to give us five pages which we probably will not read.

Senator ANDERSON. Will the Senator yield?

The CHAIRMAN (now presiding). I would hope that we could proceed on the basis as we have in the past that when a Senator is particularly concerned about a nominee, let him just ask his questions.

Senator MORTON. All right. I withdraw. I yield.

The CHAIRMAN. When you get down to it, on all these cases we all try to do what we think is right. Sometimes we are right, sometimes we are wrong. I guess if one of us were right all the time, there would not be any point in having the other 16 of us here anyway. I have unsuccessfully opposed nominees on occasion. Sometimes, I was in error. Sometimes I might have been right. I think it is more up to the conscience of an individual Senator what he wants to get into.

Senator MORTON. I apologize.

Senator ANDERSON. Will the Senator yield to me a moment? Did you submit a biographical sketch to the White House?

Mr. METZGER. No, sir; I did not, Senator Anderson. I was asked on the telephone to give certain information. They had a lot of information from past biographical sketches, from form 57's or whatever else they had, since I have been in the Government for 20 years, and I was not asked to submit a sketch to the White House and I never did. And the first time I saw what they had done, they had put together from a series of sources that were available to them, the first time I saw it was in the White House press release.

Senator ANDERSON. I was going to ask if he prepared it and sent it to them and they edited it, he should be blamed.

Mr. METZGER. I did not even do that, sir. I did not even prepare a draft of it.

Senator MORTON. Well, you had a top-secret clearance, as I remember.

Mr. METZGER. That is correct, sir.

Senator MORTON. And I think they have got a lot of information on you in the Government.

Mr. METZGER. I think so.

Senator HARTKE. Well, is it the contention of the Senator from Kentucky that this should not have been brought out in the hearings?

Senator MORTON. Go right ahead. I am sorry. I apologize.

Senator HARTKE. It is well known in this committee, I have been concerned about this agreement.

The CHAIRMAN. My I say, I think we would do better just to go ahead and stay with the interrogation. Whether I think that the Senator's question is relevant or do not think the Senator's question is

relevant to me is completely immaterial. As far as I am concerned, the Senator is entitled to everything he wants to know and he is not asking about anything that is out of bounds or personal.

Senator HARTKE. Let me say to the chairman I have taken quite a bit of time. Maybe these Senators would like to question. I would be glad to yield.

Senator CARLSON. Mr. Chairman, on that very point, I do think the statement the Senator from Indiana should keep in mind there are other members of this committee—

Senator HARTKE. I am going to yield right now. I do want to ask some more questions but I will be glad to yield at this time.

The CHAIRMAN. If the Senator would be so kind, I would like to explore one particular matter. May I say that with all due deference to the witness and everyone else, when I served as a junior member of committees, if I wanted to explore something and I was having difficulty finding out what I wanted to know, on occasion the other members have over a period of time just left me in charge and I asked all the questions I wanted to ask. Sometimes I came nearer finding out what I wanted to know that way than other ways. But there are one or two matters that particularly concern me and they really do not have much to do with the witness' qualifications. They have to do with policy matters. I do not know that it would change my vote one way or the other but I would like to get them on record.

Now, we have this section 337 of the Tariff Act, and I am sure you are familiar with that. The title is "Unfair Practices in Import Trade." You are familiar with that, I believe, Mr. Metzger.

Mr. METZGER. Yes, I am aware of it. I do not have the text in front of me.

The CHAIRMAN. Some people say that the tariff barriers have been lowered to the degree that these tariff barriers are not going to keep commodities out in the future. Foreign countries which want to keep U.S. commodities out of their market are going to resort to unfair trade practices more and more. They say also that those who want to get into the United States or a third-country market, whether it is the Europeans and Japanese seeking to get into the South American market or get into our own, whether they are trying to invade a market we are selling into or invade our own markets will use unfair methods more and more. This unfair competition provision is going to be more and more a weapon that we will have to use.

Now, in the light of your broad experience in the area of international trade, what is your opinion of the Tariff Commission's role in maintaining channels of international trade free from anticompetitive practices?

Mr. METZGER. Well, as I recall, Senator, the anticompetitive practice aspect of unfair trade practices is specifically mentioned in section 337 and the Tariff Commission certainly then has statutory jurisdiction to consider these matters when they are brought before it.

The CHAIRMAN. Well, now, do you believe that the Tariff Commission should actively utilize section 337 or that it should continue to remain passive and indifferent and thereby discourage the application of section 337?

Mr. METZGER. I think the Tariff Commission has a duty to apply section 337 just as it has a duty to apply all other statutory provisions committed to its care.

The CHAIRMAN. Do you regard the jurisdiction of the Tariff Commission under section 337 as duplicative of the jurisdiction of the Department of Justice or do you believe that the in rem jurisdiction conferred by section 337 constitutes an additional remedy in the field of unfair competition which goes beyond the in personam jurisdiction of the Department of Justice?

Mr. METZGER. Well, the Latin phraseology of in rem and in personam, I am not at all sure how I would handle that at this stage. On the basic question that you ask, Senator, while the authority of 337 may be cumulative in one sense - - -

The CHAIRMAN. Let me clarify that for you. The Tariff Commission acts against the offending commodities. It keeps them out. The Justice Department goes against the person who is moving those goods. So, you have two different ways of going at them. The Tariff Commission can go at them by keeping the goods out. The Department of Justice can put them in jail, prosecute them, fine them.

Mr. METZGER. In the sense that both have jurisdiction to go after the same kind of offending conduct, as it were, I suppose one could say that they are cumulative or even duplicative, but I am not at all sure that has anything to do with the problem. If the Tariff Commission has got the duty under 337, whether the Congress in its wisdom provided for duplicative remedies is something apart from its own duty. Its duty is to apply 337, even though that may mean that there may be duplication, I would think.

The CHAIRMAN. Well, what I have in mind is this: Here is one of our industries being hurt and there are two potential remedies available to it. Now, does one have to be applied before he resorts to the other?

Mr. METZGER. This depends on the language of the statute and not on any other notion so far as I——

The CHAIRMAN. I do not think it does depend on the langauge. I think it depends on the interpretation you put to it. In other words, you have two remedies here. When someone is engaging in unfair competition against us, against our producer, you can see that he cannot ship his goods in here. You can stop it. I just want to know if you think you ought to go ahead and do that rather than waiting for the Justice Department to prosecute him. When you hold your hearings—this thing provides for hearings and review and when you conclude, as I understand it, it says that—

> The final finding of the Commission shall be transmitted with a record to the President and then whenever the existence of such record shall be established to the satisfaction of the President, he shall direct that the articles concerned in such unfair methods or acts imported by any person violating the provisions of this Act shall be excluded from entry into the United States and upon information of such action by the President, the Secretary of the Treasury shall, through the proper offices, refuse such entry.

What I want to know is, Do you think that these people who are being hurt, these American producers, should be told no, we are just not going to do that, we are going to wait and see what the Justice Department does?

Mr. METZGER. I think the Tariff Commission's duty is plain, to follow 337.

The CHAIRMAN. It is sort of like the jurisdiction as I see it, of the Finance Committee and the Judiciary Committee. We do not have

the power to pass a law to make it unlawful for somebody to do something wrong but we do have the right to tax him and my reaction is, if we put a tax on somebody that we think is engaged in conduct of which we disapprove, they owe the tax, whether the Justice Department puts them in jail or not. I understand your saying for the record here that you think the Tariff Commission ought to proceed to protect American industries as this section intends without waiting to see whether the Justice Department can successfully prosecute the people involved in this.

Mr. METZGER. Yes. I think the Commission must follow the law.

The CHAIRMAN. Fine. Now, do you favor the use by foreign industries in trade with the United States of cartel type organizations which are outlawed for domestic producers by the Sherman Act or by other provisions of U.S. law?

Mr. METZGER. I am not quite clear I got the import of that, Senator.

The CHAIRMAN. Well, how do you feel about foreign industries in trade with us using the type of cartel organizations which are outlawed for American producers by the Sherman Act or by other provisions of the law such as the Clayton Act or Federal Trade Commission Act?

Mr. METZGER. My feeling on the question of restrictive business practices of the cartel type as you just mentioned is that I think that they are on the whole, harmful to international trade. I have so written in the past and this is my general view of the matter.

The CHAIRMAN. Well, you oppose this thing where these international cartels get together to share a market, for example.

Mr. METZGER. Yes. I think that is contrary to American law as I understand it.

The CHAIRMAN. Yes. Now, in this connection, would you view the section 337 of the Tariff Act as a viable and useful mechanism either actually or potentially for insuring free and open competition in the foreign commerce of the United States?

Mr. METZGER. I do not know the answer to that, Senator, as to how practical or how viable it is. I have not had sufficient experience with its workings. I think that is really a judgment on the basis of knowledge, and I do not have sufficient knowledge at this point to answer how useful and how viable it is.

The CHAIRMAN. Now, if you are confirmed as a member of the Tariff Commission, what are your plans with respect to the university? Section 330(c) of the Tariff Act provides that "No Commissioner shall actively engage in any other business, vocation or employment than that of serving as a Commissioner"?

Mr. METZGER. Mr. Chairman, my plans are to teach one course in the evening, 1 night a week, for 2 hours on an unpaid basis. This is a course called the law of international trade, which I taught when I was in the Government before, taught it in the 1950's when I was in the State Department, and my plans would be to continue to teach that one course, not to teach any more than one course, and to do that for two semesters a year, 2 hours in the evening, 1 night a week.

Because of the sentence in the statute to which you have adverted, I asked the Justice Department for an opinion on the question whether or not my action, teaching one course, would be compatible or incompatible with the statutory provision, and I have received from them a reply stating that while they are not at this point going to reexamine

the question as to whether or not I could do so on a paid basis, that they are satisfied that I can do so on an unpaid basis. And this is the basis upon which I propose to do so.

If you would like, Senator, I could introduce into the record for your purposes a copy of my letter to the Justice Department and a copy of their reply to me.

The CHAIRMAN. Would you, please?

(The letters referred to follow:)

AUGUST 7, 1967.

Hon. FRANK M. WOZENCRAFT,
Assistant Attorney General,
Office of Legal Counsel,
Department of Justice,
Washington, D.C.

DEAR MR. WOZENCRAFT: I am writing at the suggestion of Sol Lindenbaum, Executive Assistant to the Attorney General, with whom I talked this morning.

On August 4, 1967, the White House announced that President Johnson intended to nominate me to be Chairman, United States Tariff Commission.

I am presently Professor of Law, Georgetown University Law Center, and following confirmation would go on leave of absence.

Prior to 1960, when I came to Georgetown as a full-time law teacher, I had been teaching, as Adjunct Professor, one course, the Law of International Trade, one evening a week from 5:45 P.M. to 7:35 P.M., and was paid $600 per semester, two semesters a year. This activity took place from 1954 to 1960, when I was Assistant Legal Advisor for Economic Affairs, Department of State.

The Law School has informed me that they would very much like me to continue to teach that course on the same arrangement as prevailed in the 1954–1960 period. I have told them I should like to do so, if it is permissible—if it is not inconsistent with any legal requirements. I have reference to the last sentence of Title 19, U.S. Code, Section 1330(c), which reads: "No commissioner shall actively engage in any other business, vocation, or employment than that of serving as a commissioner." I know of no publishing Attorney General's opinion on the matter, but a book entitled "Public Ownership of Government—Collected Papers of Edward P. Costigan" (New York: Vanguard Press, 1940) at pages 264–265, indicates that there was an informal opinion relating to paid lectures in 1924.

I should greatly appreciate your opinion as to whether it would be lawful (a) to teach my course on the Law of International Trade while being paid on the same basis as from 1954–1960, or (b) to do so on an unpaid basis; or whether it would be unlawful on any basis. I should add that I have informed the Law School that I would teach the course if it were lawful on any basis, paid or unpaid, although naturally I would prefer (a) over (b).

If there is any further information which you will need, please do not hesitate to call me, either at the Law School (NA 8–7061, Ext. 253) or at home (337–9122).

Thank you for your consideration.

Sincerely,

STANLEY D. METZGER.

DEPARTMENT OF JUSTICE,
Washington, August 31, 1967.

Mr. STANLEY D. METZGER,
Professor of Law,
Georgetown University Law Center,
Washington, D.C.

DEAR MR. METZGER: This is in reply to your letter of August 7, 1967, in which you ask to be advised whether you may teach one course, the Law of International Trade, at Georgetown University Law School, one evening a week, either on a paid basis or an unpaid basis, after becoming Chairman of the United States Tariff Commission. Your letter points out that you understand that there was an informal opinion of the Attorney General relating to paid lectures in 1924.

As you know, the Attorney General is authorized by law to render opinions only to the President and the heads of executive departments. Within this limitation we will try to be as helpful as possible.

The opinion to which you refer is an unpublished opinion of Attorney General Stone to the President dated July 24, 1924, and concerned the right of Mr. Culbertson, as a member of the Tariff Commission, to teach on a part-time basis at Georgetown University School of Foreign Service. The opinion is printed in the transcript of the "Hearings before the Select Committee on Investigation of the Tariff Commission, United States Senate," May 10, 1926, beginning at page 547.

Attorney General Stone's opinion related to the application of the provision of the Tariff Act prohibiting a member of the Commission from engaging in certain outside activities. As your letter points out, this provision remains in the Tariff Act and is codified as the last sentence of 19 U.S.C. 1330(c). The sentence reads: "No commissioner shall actively engage in any other business, vocation or employment than that of serving as a commissioner." (The word "function" appeared in this sentence instead of "vocation" at the time of the 1924 opinion. However, the subsequent modification of the provision in this respect does not appear to be significant.)

The following excerpts from Attorney General Stone's opinion is pertinent to your inquiry:

"* * * [T]here can, in my opinion, be no reasonable doubt but what the commissioner, by the activities in which he is stated to have been engaged, has violated the literal meaning of the statutory prohibition. To deny that a member of the Tariff Commission who is engaged in delivering lectures in a university twice a week during an academic year of eight months, at a fixed annual salary, is engaged in an employment and that he is actively so engaged, is to deny the plain and unambiguous meaning of the terms employed. One who renders service at regular intervals for a definite time and for compensation, is actively engaged in an employment, and such employment is expressly prohibited to members of the Tariff Commission by the terms of the statute."

Attorney General Stone's opinion appears to characterize teaching activity which is both compensated and performed on a regular basis as inconsistent with the prohibition set forth in the last sentence of 19 U.S.C. 1330(c). The opinion seems to require, however, that both the elements of regularity of service and compensation be present before a question arises as to the possible application of the statute.

As we understand it, your interest primarily lies in being able to continue to make an academic contribution through teaching the single course, rather than in earning supplementary compensation for employment in addition to your Government post. In these circumstances, we do not think it appropriate at this time to reconsider the position taken by Attorney General Stone in his opinion. However, we see no reason to extend the effect of the opinion to teaching situations in which both elements to which he referred are not present. Accordingly, we do not believe the opinion would apply to your situation if you teach the single course on an unpaid basis.

Enclosed for your information is a xerox copy of the opinion as printed in the 1926 Senate hearings. We return herewith the book *Public Ownership of Government*, which you kindly let us borrow in connection with the background of the unpublished Attorney General's opinion.

Sincerely yours,

FRANK M. WOZENCRAFT,
Assistant Attorney General,
Office of Legal Counsel.

JULY 24, 1924.

MY DEAR MR. PRESIDENT: Receipt is acknowledged of the letter addressed to you, under date of the 8th instant, by Rudolph J. Silverman, attorney in fact for the Great Northern Chair Co., Room 723, Southern Building, Washington, D.C., alleging that Commissioner William S. Culbertson of the United States Tariff Commission has engaged actively in other employment in violation of section 700 of the act of September 8, 1916, entitled "An act to increase the revenue and for other appropriate purposes" and should be removed from office, which letter you have referred to me for my opinion upon the subject.

It is stated by Mr. Silverman that Commissioner Culbertson is at the present time engaged "as a teacher in the school of foreign service of the Georgetown University," and lectures twice a week during the scholastic year of eight months upon the subject of commercial policies and treaties, and is also an administrative officer and a member of the executive faculty of the school and receives a salary of $800 a year for his services as such lecturer; and that in addition, the com-

missioner is employed by the Institute of Politics, which meets annually, "as a teacher and lecturer on various economic subjects," and "now under contract to so act during the month of August of the current year, his subject being 'Public and Private Finance in the Policies of the Nation,'" and receives in that connection an annual compensation of $500.

It is charged that these activities of Commissioner Culbertson "are in violation of both the spirit and letter of the law," and to the material prejudice of the interests of the Great Northern Chair Co. which is said to be engaged in the manufacture of bentwood furniture and to have made application to the Tariff Commission in connection with an effort to have its products reclassified and the duty thereon increased under the provisions of Schedule 4 of paragraph 410 of the tariff act of 1922.

It is also charged that Commissioner Culbertson is guilty of "malfeasance" in office within the meaning of the law by reason of his employment by Georgetown University and the Institute of Politics as aforesaid.

The Tariff Commission was created under the authority of section 700, chapter 63, of the act of September 8, 1916 (39 Stat. 795), entitled "An act to increase the revenues, and for other purposes," which declares, among other things:

"No member shall engage actively in any other business, function, or employment. Any member may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."

It will be observed that the language quoted, by its terms, makes two separate and distinct provisions. First, it prohibits members of the commission from engaging "actively in any other business, function, or employment," and second, it, in terms, authorizes the removal of a member of the commission from his office by the President for "inefficiency, neglect of duty, or malfeasance in office."

The letter of Mr. Silverman and your request for an opinion in respect to the questions raised therein thus presents two questions for consideration. First, whether the activities of Commissioner Culbertson complained of, to which reference has already been made, constitute a violation of the prohibition against engaging "actively in any other business, function, or employment" and second, if the answer to the first question be in the affirmative, whether a state of facts is presented authorizing the President to exercise his power to remove the commissioner from office on either the grounds of his ineligibility to office or on the grounds of his violation of the express prohibition of the statute.

With reference to the first question, there can, in my opinion, be no reasonable doubt but what the commissioner, by the activities in which he is stated to have been engaged, has violated the literal meaning of the statutory prohibition. To deny that a member of the Tariff Commission who is engaged in delivering lectures in a university twice a week during an academic year of eight months, at a fixed annual salary, is engaged in an employment and that he is actively so engaged, is to deny the plain and unambiguous meaning of the terms employed. One who renders service at regular intervals for a definite term and for compensation, is actively engaged in an employment, and such employment is expressly prohibited to members of the Tariff Commission by the terms of the statute.

I am, of course, aware that in the interpretation of a statute courts may, and sometimes do, disregard the precise and literal meaning of the language used in the statute when it is apparent that the adoption of such literal meaning would defeat the obvious intent and purpose of the statute. Such was the case of Holy Trinity Church *v.* United States (143 U.S. 457), in which the Supreme Court held that a contract between the church corporation and an alien minister of the gospel by which the latter agreed to come to the United States and accept employment as the pastor of the former, did not transgress the provisions of the statute prohibiting contracts with aliens outside the country "to perform labor or service of any kind in the United States." The court, however, rested its opinion squarely on the ground that the literal meaning of the language quoted was not consistent with the legislative purpose and intent as disclosed by the title of the act and by all the facts and circumstances surrounding its enactment, of which the court took judicial cognizance, the purpose of the statute being, as the court declared, "simply to stay the influx of this cheap, unskilled labor."

Moreover, the court pointed out that the result reached by the literal interpretation of the language in the statute led to a result which was so manifestly absurd and unreasonable as to require the court to adopt an interpreta-

tion which would give to the statute a reasonable application. There are many other similar cases, all however referable to the principle that the literal meaning of the language in a statute may be disregarded when the application of such literal meaning would result only in thwarting the obvious purpose and intent of the statute or lead to a result obviously absurd or unreasonable.

In the present case it can not be said, either as a result of an inspection of the statute or an examination of the circumstances attending its enactment, that there are any such grounds for assuming that there was a legislative intent different or varied from the plain meaning of the language of the statute. Indeed, reference to the debates upon the bill creating the Tariff Commission, in both the Senate and the House, show that the literal meaning of the language was urged without dissent as grounds for the passage of the bill. In the Senate Mr. Simmons, referring to this provision of the bill said:

"This work will be of such importance and of such volume that it is necessary that the men who are appointed on its board shall eschew absolutely while they are serving upon it all other occupations and give their whole time, attention, and abilities to the working out of the matters which are referred to them in this bill."

"* * * But I wanted more especially, Mr. President, to make it clear that the Democratic Party not only wanted a permanent institution but that it wanted men who were able to efficiently perform the duties of the position; and to that end they have provided that the men who are appointed on that board shall, for the time being, and as long as they remain members of it, give up all other avocations in life and confine themselves solely and exclusively to the performance of the duties and functions of their office." (53 Cong. Rec., p. 13803.)

And in the House, Mr. Rainey, speaking of this provision of the statute, said:

"The bill excludes those who are actively engaged in some other business or employment and that provision has been approved by the great commercial organizations of the country."

And again:

"The man who serves on this commission and who is paid the salary provided for in this bill ought to give his entire time to the discharge of the duties of his office." (53 Con. Rec. 10589.)

I do not refer to these expressions in the debates in Congress for the purpose of ascertaining the meaning and purposes of the legislative body or for the purpose of resolving doubts as to the true meaning of an ambiguous provision of the statute (see Duplex Co. v. Deering, 254 U. S. 446, 474), but for the purpose of showing that the literal meaning of the unambiguous language used is not unreasonable or inconsistent with the general intent and purposes of the statute.

Had it been the purpose of Congress to prohibit only such other employment as would interfere with or be inconsistent with the performance of the duties of the commission, it would have been easy to say so in the appropriate language, but it is more reasonable to suppose, especially in view of the language adopted that Congress, in pursuance of the sound public policy, intended to remove the question of interference with public duty or other employment from the field of controversy and debate and to withdraw members of the commission from the exposure to the temptations and embarrassments which might result from the allegiance to divergent interests in occupations or employments other than those of the commission by prohibiting members of the commission from every other active employment.

That being a possible and not unreasonable interpretation of the intent and purpose of Congress in enacting this legislation, there exists, in my opinion, no reasonable basis for setting aside and disregarding the plain meaning of the language of the statute.

This has long been the commonly accepted interpretation of the statute (Judicial Code, sec. 258) prohibiting United States judges from practicing law. This statute has not been deemed to permit such practice as did not interfere with judicial duties, but it deemed to prohibit all practice by judicial officers regardless of its extent or its immediate effect on the performance of judicial duties.

I am therefore constrained to advise you that in my opinion the activities complained of violate the prohibition of the statute against a member of the commission engaging actively in any other business, function, or employment.

The remaining question is whether, by reason of such employment, a member of the Tariff Commission may be removed because ineligible or because of

neglect of duty or malfeasance in office. It will be observed that the statute itself enumerates only certain specified grounds for removal for cause, namely, "inefficiency, neglect of duty, or malfeasance in office." This language must be taken to indicate what, in the opinion of the legislative branch of the Government, would constitute grounds on which the President might and perhaps should remove a member of the commission from office; this language can not be said to limit the constitutional power of the President to remove an appointed officer, in the executive branch of the Government as is a member of the Tariff Commission, either for such cause as to the President may seem sufficient, or without cause. (Parsons *v.* United States, 167 U. S. 324). I am therefore of the opinion that full power and authority resides in the President to remove a member of the Tariff Commission from his office regardless of the grounds of removal specified in the statute, and that cause exists for the exercise of such power.

It is therefore not now necessary to decide whether the conduct of a member of the commission complained of is so serious as to be deemed a malfeasance in office within the meaning of the language of the act providing that any member of the commission may be removed for "malfeasance in office."

Malfeasance in office by a public official is such misconduct as affects the performance of his official duties or constitutes a breach of duty imposed upon him by rules of law applicable to him as an officer. It can not of course be urged that the acceptance of active employment as a University lecturer necessarily affected the performance of the commissioner's official duties, and it does not appear whether in fact those duties have been so interfered with. But, as already pointed out, the acceptance of such employment did constitute a breach of duty imposed upon the commissioner as an officer by the express provisions of the statute creating the office and defining its duties, namely, the duty not to engage actively in any other employment.

There is authority for the proposition that corrupt or malicious motive is not an essential ingredient to malfeasance in office, and that it is sufficient to constitute such malfeasance if the officer knowingly does an act which is a breach of official duty imposed by the express provisions of statute. (See Minkler *v.* The State, 14 Nebr., 181, and Meacham on Officers, paragraph 457.) In any event the exercise of Executive power of removal for the breach of duty here under consideration can not in my opinion be considered either arbitrary or unreasonable.

Respectfully submitted.

HARLAN F. STONE, *Attorney General.*

The CHAIRMAN. Do they say they approve of that?

Mr. METZGER. Yes, they did.

The CHAIRMAN. Here is some testimony of a former Commissioner on the same subject in 1928, Mr. Culbertson, speaking of his interview with the President:

The occasion of the interview was the opinion submitted yesterday by the Attorney General rendered as a result of the charges filed against me to the effect that I was violating that provision of the organic law establishing the Tariff Commission which reads that no member shall engage actively in any other business, function or employment. The charges were that I delivered one lecture a week in the evening in Georgetown University, that I participated during my vacation period in the Institute of Politics and, therefore, I was engaging in another employment.

The President said that the Attorney General felt that my lecturing in Georgetown University was a technical violation of the law. In view of this fact, the President asked me if I would discontinue by lecturing there and I told him that I would do so.

I called his attention to my journal entry of September 25, 1919, indicating that I had taken up full the question of the propriety of these lectures while I was a member of the Tariff Commission. I called his attention to President Harding's approval of my delivering these lectures and I told him that generally the matter had been a question of public information and had been generally approved.

The President said there is no moral question connected with the matter, that the opinion of the Attorney General was merely a personal opinion rendered to him and I need have no further concern over the matter. He said he wanted me to continue as a member of the Tariff Commission, but since the matter had been raised, he felt I should comply with the law.

I then told him that I thought the situation had been handled in a rather rough and ready way in the Attorney General's office. That I had been shown the charges before they were referred to the Attorney General and has acquiesced in the reference.

It goes on along that line.

Now, it seems to me, that is sort of a hiatus in the law. It is not clear just exactly whether that is a violation of the law or not. So far as I can determine, it never has been completely cleared up one way or the other.

Senator ANDERSON. Members of the Senate go out and address classes and——

The CHAIRMAN. There is no law that says a Senator cannot engage in some other business. A lot of them do, including me. But it does say that about a Tariff Commissioner.

Mr. METZGER. If you would like, Senator, I could read from the letter from the Justice Department the pertinent portion.

The CHAIRMAN. Would you, please?

Mr. METZGER. They were referring to—I was aware of this difficulty concerning Commissioner Culbertson. I had run across it in some readings, rather fortunately, and I found out that there was an opinion by Attorney General Stone on the matter.

The Justice Department, after quoting from Attorney General's opinion back in 1924—the Justice Department after referring to Attorney General Stone's opinion back in 1924, stated as follows:

Attorney General Stone's opinion appears to characterize teaching activity which is both compensated and performed on a regular basis as inconsistent with the prohibition set forth in the last sentence of 19 U.S.C. 1330(c). The opinion seems to require, however, that both the elements of regularity of service and compensation be present before a question arises as to the possible application of the statute.

As we understand it, your interest—

That is, mine—

primarily lies in being able to continue to make an academic contribution through teaching the single course, rather than in earning supplementary compensation for employment in addition to your Government post. In these circumstances we do not think it appropriate at this time to reconsider the position taken by Attorney General Stone in his opinion. However, we see no reason to extend the effect of the opinion to teaching situations in which both elements to which he referred are not present. Accordingly, we do not believe the opinion would apply to your situation if you teach the single course on an unpaid basis.

And this is what I intend to do, sir.

The CHAIRMAN. If you were advised in the judgment of the committee that that were a violation of the law, would you be interested in being Tariff Commissioner and not delivering these lectures to which you have referred?

Mr. METZGER. Well, if I were advised as you indicate, I would drop the course. In fact, I had so indicated in my letter to the Attorney General. In my letter to the Attorney General, I asked the question. I said, "The law school has informed me that they would very much like me to continue to teach the course. * * * I have told them I should like to do so if it is permissible—if it is not inconsistent with any legal requirements."

I then asked the question, "I should greatly appreciate your opinion as to whether it would be lawful (*a*) to teach my course * * * while being paid"—on the same basis I was when I was in the Government be-

fore—"or (*b*) to do so on an unpaid basis, or whether it would be unlawful on any basis." Because if it would be unlawful on any basis I would not teach the course.

The CHAIRMAN. If I might just cite you a parallel with which we are familiar here in Washington, Judge Skelly Wright went up to New York and made speeches to the effect that we had an interesting integration problem here in the District of Columbia, whether or not you could be permitted to bus children across the District lines into Virginia and Maryland and vice versa, and after he discussed the problem, he then proceeded to sit on the case here. The point was made he ought to excuse himself. He already discussed his subject, expressed his views on the issue, and had no business deciding it. And it does make a good argument that justices on the court should not be writing law review articles telling especially about something that has not happened yet. It does raise an interesting point, whether in delivering these lectures, you might find yourself in a position of explaining how cases would be decided or were likely to be decided on points that might come before the Tariff Commission. If you have taken a position on them in lectures you have delivered, it might pose a problem.

Now, what is your reaction to that?

Mr. METZGER. I do not think it is a real problem, Senator. I taught this course for 6 years while I was in the State Department working on matters of this kind and negotiations and I do not believe there was ever any indication that I had failed to exercise due discretion. I feel confident that I can exercise discretion in teaching a law course where the principal purpose is not to predict what particular things we can do but to teach what the law is.

The CHAIRMAN. Are there other questions?

Senator METCALF. I think, Mr. Chairman, I just wish to make a couple of comments to Mr. Metzger. I am impressed by the confidence in him that my friend from Kentucky has. I want to say I was one of the Members of the House that gave him that one vote majority.

Senator MORTON. I thank you.

Senator METCALF. I am somewhat surprised, however, at the responses that Mr. Metzger has given both to Senator Hartke and the chairman of the committee. I would hope in view of the confidence in your judicial attitude, Mr. Metzger, that when you are handling cases on the Tariff Commission, which is a quasi-judicial body, that you would certainly go into them a little more deeply than you said you went into your speech before the Federal Bar Association, when you talked about a subject and said you had not read the bill, you did not—you did not know the subject matter, and all you knew about it was some hearsay statement that you have identified from some man about the fine accomplishments of somebody else that you know very vaguely.

As I say, I hope when you come up to the real responsibilities of the quasi-judicial position you are about to assume you will not take into consideration such testimony or such evidence as you used as the basis of maybe an offhand speech to the Federal Bar Association.

The second thing that I was rather concerned about was your response to the chairman when he asked you about the application of the law and you said you think that the Commission would follow the law.

It would seem to me that you would make a categorical statement that as a member of the Commission, you would follow the law. You would not think about it at all. I should think that there would be a vehement response to the chairman of the committee, when he was trying to interrogate you on what your attitude would be, that whatever your own philosophy is, you would follow the law that is laid down by the Congress.

Mr. METZGER. I thought I had done that, sir. I am sorry I did not make it more emphatic. But I thought I had.

The CHAIRMAN. Senator Carlson?

Senator CARLSON. Mr. Metzger, you have been nominated to a place on the Tariff Commission at a time when there is great interest in the Nation and great interest and concern in Congress about some of our international trade problems. It seems to me that at the present time, and I have been in Congress some years, that there is more concern about some of the trade agreements and some of the trades that we are making as far as they affect our industry than any time in the past. I notice that in this committee at the present time we have bills affecting textiles, steel, dairy products, carpets, wool, electronics, chemicals, oil, just as a few of them that have been thrown in by Members of the Congress who are concerned about the industries that were affected in their communities.

I mention this because yesterday Senator Smith, of Maine, introduced a bill listed as S. 2476. I do not presume you have had a chance to even read her statements yesterday or do you know anything about the bill? Are you familiar with it?

Mr. METZGER. No, sir; I am not.

Senator CARLSON. This bill has about 30 cosponsors, both majority and minority sides of the aisle, so here again, we have another factor. This bill goes to a problem, I think concerns all of us on this committee and that is the application of the escape clause and I would say the results that many of us feel we have obtained when these provisions have been called to the attention of the President and the Commission. I am sure you are familiar with the escape clause features of this act.

Mr. METZGER. Yes, sir.

Senator CARLSON. Mrs. Smith in this bill, requires first, that—

The Tariff Commission define serious injury or threat thereof, to the domestic industry seeking escape clause relief or a firm seeking adjustment assistance when the Commission determines that the ratio of imports to domestic production exceeded ten per centum during the calendar year immediately preceding initiation of the Tariff Commission investigation.

Do you have any comments on that?

Mr. METZGER. Well, as a member of the Tariff Commission, once I assume those duties, I would, of course, apply whatever law Congress enacts in respect of the escape clause, the present law under existing circumstances. If the law were changed as Senator Smith proposed, of course, I would apply that law. With respect to the wisdom, the policy question as to whether or not that or some other amendments to the escape clause should be made, I really would like to hear the arguments and the like before expressing an opinion on that question, although I think as a Tariff Commissioner, we are not in the policy business as it were, and probably would not be involved in that kind of a policy question. But before expressing a judgment on any aspect of changes

in the escape clause, I would want to give serious study to it and see the arguments, pro and con.

Senator CARLSON. I appreciate your position on that. I think you made a sound statement on it. Here is a matter that is going to come before this committee. I have no doubt there will be hearings held in this committee on this bill because of, probably, 30 cosponsors and the interest in it and when you come to the escape clause provisions, you hear a great deal of complaints.

The second point in this bill is it would require the Tariff Commission to find unemployment or underemployment or a threat thereof with respect to workers seeking adjustment assistance when the Tariff Commission determines that increased imports have contributed or are contributing in any substantial degree to a decline amounting to 5 percent or more in man-hours or what is paid to direct labor employed by such firm or subdivision.

I will not ask you to comment upon it because it will be a matter of hearing. It will be a concern for us. But it is, I want to remind you, of real concern to at least one member of this committee and I think the Senate as a whole, when it comes to dealing with problems that we present and request the President to invoke the escape clause and I think you know, based on the past, that very seldom was escape clause action approved. They turn them down normally.

I do hope you look at that with some serious concern.

And then, I had just one other matter and I shall be very brief. On March 10, 1967, this committee held a hearing, "Trade Policies and the Kennedy Round." Ambassador William Roth was a witness and the distinguished Senator from Illinois, Mr. Dirksen, asked some questions which are a part of this hearing. I mention that because the Senator is unable to be here this morning and he asked me to submit for the record a statement.

(The statement referred to follows:)

STATEMENT OF SENATOR EVERETT MCKINLEY DIRKSEN

Mr. Chairman, I have no particular questions at this time, but I do want to reserve the right to submit some questions so that we can have the answers before the nomination is considered in executive session. I do have some observations about the Commission on which this nominee expects to serve.

As the members know, the U.S. Tariff Commission was created for a specific purpose. During the debate on the legislation that established the Commission one of the members referred to the difficulty they had in the previous session in drafting tariff schedules. He indicated that the Commission was to be staffed with skilled technicians and statisticians who would help the Congress in this work. Senator Smith of Georgia stated the case in this fashion:

> What is their work? Not to legislate. Not to pass finally upon the great problems of tariff taxation, but, as statisticians to make investigations for us.

The reason for establishing the Commission was given in another fashion by Senator Owen who said:

> Mr. President, This Tariff Commission which is being created is not a board whose members have any discretionary power of deciding anything of consequence. All that they do is make reports as to facts without being permitted to make recommendations.

We have come a long way since then when that debate took place in the closing days of the first session of the 64th Congress. The law has been amended many times in fact. But I think the principle, as stated by Senator Underwood remains the same. He referred to this statement of Professor Taussig:

> The first thing that needs to be borne in mind is that no Tariff Commission can settle policies. No administrative body of any kind can decide for the country whether it is to adopt protective or free trade, to apply more of protection or less, to enact "a tariff for revenue with incidental protection" or a system of purely fiscal duties. Such questions of principle must be settled by Congress—that is by voters—

And remarked that—

> Professor Taussig is eminently right in reaching this conclusion. In fact, he is so right that the Committee on Finance in preparing this bill has recognized that fact and do not authorize the Commission that it proposes to do any work except a finding of facts.

Even though we have amended the statute from time to time, I still believe that it is not the function of the Tariff Commission to formulate trade policy. This Commission is rather unique as agencies go, in that it was created as an arm of the Congress to develop facts for the Congress, and it should continue to do so.

It seems to me though that in recent years there has been some indication of a departure from this principle by the Commission. There has been some indication that the Commission was attempting to formulate trade policy. That simply is not their function. At other times the Commission has acted as if it were an agency of the executive branch which again is not the case.

I hope, Mr. Chairman, that when we begin the hearings on the administration and operation of our trade laws that you have just announced that we will have an opportunity to explore this area. Perhaps we can bring into better focus the duty of our Tariff Commission.

Senator CARLSON. That is the end of the statement. I just want to say personally that I agree fully with those last comments. As we have observed, and I have personally these many years, what seems to be a trend in the Tariff Commission not only to make policy but to operate as though they were a part of the executive branch of the Government, and I hope you will keep that comment in mind when you serve on this Commission. We in the Senate are going into that in some detail. Thank you very much.

The CHAIRMAN. Senator Bennett also has a statement he wished to be included in the record. Without objection we will print it at this point.

(The statement referred to follows:)

STATEMENT OF SENATOR WALLACE F. BENNETT

Like other members of the committee, I want to congratulate Mr. Metzger on his nomination to the Tariff Commission. The Tariff Commission serves a very useful purpose in advising Congress of the facts with respect to import and trade matters. Indeed, the original purpose for creating it more than 50 years ago was to provide Congress with an impartial group of experts who would produce the facts needed by Congress to enable it to properly consider the many difficult questions trade policy entails.

So long as it remains impartial, the Tariff Commission will continue to serve its useful function. But, if it should deviate from the role of a factfinder and enter into the realm of policymaking, then it will become difficult for us to rely on the Commission for the facts we need in our work. I am hopeful the nominee will keep these thoughts in mind as he assumes the chairmanship of the Tariff Commission and begins to exert an influence on its destiny.

He is well qualified to do a topflight job, and I wish him well in his new position.

The CHAIRMAN. Mr. Metzger, if Senator Hartke wants to ask you any great number of questions I am going to go about something else. But in any event, Senator Hartke.

Senator CARLSON. Mr. Chairman, before the Senator begins, I want him to understand fully I am going over to the floor and I do not want him to believe I am leaving him because he is asking questions. I believe any member of this committee should have the opportunity to ask any questions he wants.

The CHAIRMAN. I agree.

Senator HARTKE. I certainly appreciate your courtesy. I would like to call attention of the Senator from Kansas before he leaves, that I am a cosponsor with Mrs. Smith on the bill. I am very interested in its success.

We are back to the code and the act, and as I said, you said you had read the code. If the code amends the act in any respect, you agree the code could only become effective if it is approved by Congress. Is that your opinion?

Mr. METZGER. As domestic law; yes, sir.

Senator HARTKE. Well, how else could it? Do you mean it could be effective as international law without being effective as domestic law?

Mr. METZGER. The United States can enter into an international agreement as it has with the code and when it becomes effective by its terms, I would assume that is an obligation of the United States internationally. This would be my understanding even though it might not be effective as domestic law.

Senator HARTKE. I know that those people back there just cannot hear you.

Mr. METZGER. I am sorry.

Senator HARTKE. This is a unique thing. In other words, you are saying that if we enter into an international agreement which is in conflict with a law of Congress, that it could be effective as international law and binding on the United States, internationally, and still not be binding on anybody inside the United States domestically. That is what you are saying?

Mr. METZGER. Yes. Let me explain if I may, Senator, if I understand your question. The United States could make an international agreement and could become bound by this international agreement. It might not be able to carry it out domestically because the international agreement was not intended to be self-executing, and, therefore, did not by its terms, become effective as domestic law without an additional congressional act, and consequently, the United States might not be able to carry out an agreement internally, but still be bound by it internationally. This is possible.

Senator HARTKE. What you are saying——

Mr. METZGER. There are many examples of this.

Senator HARTKE. All right. Let us come on back here. Let us not get too far afield, but basically, as a matter of law, is not it true that the executive authority of the President to enter into international agreement is severely and strictly limited in that it cannot override existing law? Is not that an established principle of law in the United States?

Mr. METZGER. It cannot override existing law as internal law in the United States unless it is a self-executing international agreement or treaty. My understanding is that the present international dumping agreement is not intended to operate as a self-executing agreement.

Senator HARTKE. Let us come on back to this.

Mr. METZGER. Could I——

Senator HARTKE. Are you familiar—you are a lawyer.

Mr. METZGER. Yes, sir. Could I continue for a moment?

Senator HARTKE. Yes. Let us just wait. Let us just go over this point. You are familiar with *United States* v. *Belmont*, decision of 1936, 301 U.S. 324; *United States* v. *Pink*, 315 U.S. 203, 1942; *United States* v. *Guy W. Capps, Incorporated*, 204 F. 2d, 655, fourth circuit, 953, and affirmed on other grounds, 348 U.S. 296 in 1954. In all these cases it is well established as a principle of law that the executive authority of the President does not permit the President to enter into an executive agreement which overrides or amends an existing statute of Congress.

Now, do you disagree with that? Is that what you are telling us?

Mr. METZGER. Senator, I am acquainted with those cases and I think that the statement I made was that an executive agreement entered into on the President's sole authority cannot overturn an existing act of Congress. This is the dominant opinion, cannot overturn an existing act of Congress.

Senator HARTKE. Cannot amend or override.

Mr. METZGER. As domestic law of the United States. As domestic law of the United States. It is possible, on the other hand, for there to be a situation that can develop whereby the domestic law of the United States—I am not saying it does in this case, I do not know myself, I have not studied the question—but it is possible for there to exist a legal situation where the United States is bound by an international agreement and is unable to carry it out because domestic law is contrary to it. That leads to the situation where the United States is thrown into an inability to carry out its international commitment. If you want to call it a violation, call it that. There are many examples of this that exist, but I fully agree with the import of what I thought you were saying, that an international agreement which does not purport to change domestic law does not override existing domestic law as the internal law of the country.

Senator HARTKE. Well, are you familiar—what I am coming back to is this code and the Antidumping Act. Now, you made a speech upon this matter before the Federal Bar Association. You are an authority, according to your biographical information, submitted by the White House on your behalf. You say that you served as American editor of the Journal of World Trade Law published in the United Kingdom, and authored such books as "International Law," "Trade and Finance," "Trade Agreements and the Kennedy Round" and "Documents and Readings of the Law of International Trade."

Now, this is one of the most important parts of the Kennedy round; is not that true?

Mr. METZGER. I think it is an important part; yes, sir.

Senator HARTKE. And you say you have read it. Are you telling me you do not want to answer questions now upon this matter as to the effect of the code in relation to the act or do you feel that you are not in a position to answer them, because I have a long series of questions which I am going to ask, and I do think they should be answered and, I think before we proceed to confirm anybody to the Traffic Commission, at this time we should proceed to have an understanding as to where we are going in regard to international agreements on dumping.

Mr. METZGER. Senator Hartke, I think I have several problems in terms of answering questions relating to this basic question of the effect of the code upon the domestic act. These problems are of several types. First, the very questions may come up in cases before the Tariff Commission, and there would be a serious question as to whether or not if the very issue in litigation in these cases was the consistency of a given provision of the code with the domestic act, whether or not my testimony one way or the other on the matter, if I had such an offer, would disqualify me from participating. There is a serious question of practice.

Senator HARTKE. Do you mean to tell me that your testimony here in front of a Senate confirmation committee as to an interpretation would put you in a compromising position?

Mr. METZGER. It could very easily, sir.

Senator HARTKE. I can understand how it could, sure, that if you are going to make one statement here and then rule in another matter, but I sure cannot understand how you can say that you have fear of giving a truthful answer here would in any way interfere with your being judicious in a matter before the Tariff Commission.

Mr. METZGER. The point I am making in this respect, is if the particular issue was being litigated in an antidumping case——

Senator HARTKE. No question, this is exactly what you are going to be involved in. You are going to be involved in this issue. Nobody is going to take a nonissue before the Tariff Commission.

Mr. METZGER. My point is on this, and I do not want to labor it, if I express an opinion on a particular interpretation here and that question is litigated later in a case, where the case turns on that, I might well be subjected to a charge of having prejudged the matter, of not going into that case with an open mind. There have been many cases in recent years, I should add, in which precisely this problem has arisen, and in which great difficulties have been caused, time and expense, and the like, and disqualifications have been engaged in. Now, that is one problem I have.

Senator HARTKE. Disqualifications on the basis of prior statements?

Mr. METZGER. Yes. Of not having an open mind.

Senator HARTKE. All right.

Mr. METZGER. The party——

Senator HARTKE. Do you think if you expressed yourself in regard to whether or not the Congress of the United States should have its laws overridden by international agreement, by executive authority, without approval of the Congress, in other words, do you think that

that would be prejudicial in deciding these cases in the Tariff Commission?

Mr. METZGER. No. That sort of a question is an overall question and does not relate to whether a particular provision does——

Senator HARTKE. This is the question I am asking you right now.

Mr. METZGER. May I just add a few other things to the problems I have in answering a series of detailed questions, Senator? Another point is this: I would want the benefit of discussions with fellow Commissioners and with the staff of the Commission in terms of these problems.

Senator HARTKE. I am not interested in getting——

Mr. METZGER. I have not studied these questions in detail.

Senator HARTKE. Mr. Metzger, I find it very difficult for me to be convinced that you have not studied these matters when you are here giving all of this information. You have been involved in these questions since you are a member of the Board of Educators of the American Journal of International Law, of the Executive Council of the American Society of International Law?

Mr. METZGER. But I have just seen the code recently.

Senator HARTKE. And made a speech upon that matter in which you talked about a man who deliberately couched the language of the code so as to avoid giving the impression that the Antidumping Act was being amended substantively. You gave a speech here in which you said that Mr. Hendrick had explained to foreign governments that if the amendments were made, the code would have to be presented to Congress and in that event, Congress would strengthen rather than weaken, the Antidumping Act. Here you have expressed yourself on these matters publicly in front of other forums but you hesitate to give me any answer. What is your reason?

Mr. METZGER. Senator, I have already explained that I had not seen the code until very, very recently, that I had not seen the code at that time. I think I have explained that. I have read the code but I have not studied it in detail. And I have these very real problems if you are going to get into particularized questions of interpretation, of (*a*) not having studied it sufficiently, and (*b*) being in the position of prejudgment. In general terms that is all I can say. I will do the best I can to answer your questions.

Senator HARTKE. Mr. Chairman, may I suggest that maybe these hearings ought to be continued until such time as the nominee has an opportunity to study this code because this is at the very heart of these issues which are going to be decided by the Tariff Commission. Here is a question of whether or not we have an act which is effective, anymore, in the United States. If this nominee is of the opinion that we have repealed the Antidumping Act of Congress by executive authority without approval of the Congress, there may not be anything left for the Tariff Commission to do.

Mr. METZGER. I am not of that opinion, Senator, if I may say so. I believe that only the Congress can repeal an act of Congress.

Senator HARTKE. Is it your opinion, then, that the code will have to be approved by the Congress?

Mr. METZGER. I do not know whether the code is inconsistent or consistent with the statute. I know that as a member of the Tariff Commission, if I am confirmed for that job, I will interpret and apply the law of the United States on antidumping. Now, these facts——

Senator HARTKE. Mr. Chairman, I respectfully——

Mr. METZGER. These facts I know.

I can see that in particular cases issues will arise as to whether or not there is inconsistency in particular cases between the act and the code. I do not know the answer to these questions. I would like to discuss these in great detail and study them and it may well be that they can only be answered in particular factual context.

Senator HARTKE. Mr. Chairman, I respectfully suggest——

Mr. METZGER. But, I certainly would apply the law as it had been passed by the Congress.

Senator HARTKE. Mr. Chairman, I respectfully request that these hearings be continued, then, until such time as the nominee has a chance to examine the code and study it so these questions can be answered. I think they are very important.

The CHAIRMAN. Well——

Senator HARTKE. If he feels he is not prepared to answer them, and this is the very heart of the matter on which he is going to have to decide, I will be willing to come back here any time as soon as he is prepared to answer the questions. I will come back tomorrow or next week, on Sunday if necessary.

The CHAIRMAN. My impression about the matter is that the witness is seeking to give the best answer he can to the question. While I do not understand what the Senator is seeking to get at, although I am sure he does, my impression is the witness is trying to say that this code has not been enacted into law, that it has been drafted but not passed by the Congress? Is that correct?

Mr. METZGER. That is my understanding, sir.

The CHAIRMAN. It is further my understanding, based on what I heard here, that you are being asked the question, if there is a conflict between the code and the law: "Does the law prevail over the code—the code never having been enacted by Congress?"

Mr. METZGER. That is one question, I think.

The CHAIRMAN. Well now, if I understand your answer, you say that if there is any conflict, since the code does not have a statute to support it, then the code is not the law. Is that correct?

Mr. METZGER. That is correct. I would apply the law as passed by the Congress.

The CHAIRMAN. So that if you have a law here and then you have a code which seeks to apply the law, but the code had no law to support it, then the code would be a nullity at that point. But if it is in pursuance of a law that supports it, then that sector of the code might be effective; is that correct? Is that how you have answered the question? That is the impression I gained.

Mr. METZGER. I would interpret and apply the law as passed by the Congress and if this was consistent with the code, obviously, there would be no problem for the United States in being able to tell a foreign country that it was living up to its international agreement. If the statute as applied by the Treasury and the Tariff Commission resulted in a situation which was inconsistent with the international agreement, then that would put the United States in the position of not being able to carry out its agreement. But the Tariff Commission's job as I understand it, is to apply the law as passed by the Congress. And this is what I was attempting to say a moment ago in respect to this.

On the question as to whether or not the code is or is not consistent with the act of Congress, on that I was saying that I had great problems in deciding that question in the abstract and in advance of a case for several reasons, the first of which is the question of running the risk of prejudgment when that very question came up in litigation, the second of which is not having the benefit of discussion with the Tariff Commission and its staff, which has dealt with these matters and is seized of these questions right now. That is the upshot of it, Senator, as I see it. Within these limits I will do my best to answer any questions Senator Hartke has.

The CHAIRMAN. If I understood what you are saying, you are saying an act of Congress prevails over some agreement that does not have the status of a treaty, that an executive agreement cannot prevail over an act of Congress. If I understand it, that is what you said and that is the law, is that correct?

Mr. METZGER. Right. It cannot prevail over the act of Congress as the domestic law of the United States, and the job of the Tariff Commission, as I understand it, is to apply the law of the United States, the domestic law of the United States. And I would intend to do so if I were confirmed in the job.

The CHAIRMAN. Well, now, if I understand it further, you are saying that if you have an executive agreement on the one hand and an act of Congress on the other, the act of Congress prevails if there is a conflict between the two. That is clear, is it not?

Mr. METZGER. As the domestic law of the United States, absolutely right, where the executive agreement does not purport to change the act of Congress.

The CHAIRMAN. The question of whether something in an executive agreement is to prevail in this country would have to depend on the circumstances. It might or it might not. It all depends on what the law is. If it is in conflict with the law, it would not prevail: is that correct?

Mr. METZGER. That is correct.

The CHAIRMAN. That was my impression of it. And, I am frank to say that my impression is that the witness is trying to answer the question. Now——

Senator HARTKE. Mr. Chairman, I will proceed if you want me to. I think I can demonstrate this quite conclusively very simply here if you want me to, what the problem is. The problem very simply here is that you have a conflict. There is a direct conflict between the code and the law. There is not any question about it. The code was entered into by the executive authority without approval of the Congress and in direct opposition to Senate Resolution 100.

The CHAIRMAN. Now, let me say I am not familiar with the point of law and/or the facts to which that law would apply but there is no doubt whatever in my mind, Senator Hartke, that if that code which has not been passed by Congress—it is just an executive agreement—is in conflict with the law, then the law prevails. I believe that is what you think also, is not that right?

Senator HARTKE. That is right, but the very point about it is, I think, by prior statements it already has been indicated by the executive and confirmed to some extent by the nominee here, that they have ruled that the code does supersede the law and is not necessary

to be ratified by the Congress because they say it is procedural changes, and I think I can demonstrate very quickly that it is not procedural but substantive change involved here.

Mr. METZGER. May I just interject. I do not take this position, sir. I have never taken that position on this question. I do not know the answer to this question, whether there is conflict.

Senator HARTKE. You see, Mr. Chairman, what comes up immediately is that the question here as to whether or not he is going to follow the code or law, he says he is going to follow the law but he is going to follow the code and the code conflicts with the law.

Let me come back and discuss the *Cast Iron Soil Pipe from Poland* case decided September 5, 1967. Are you familiar with that?

Mr. METZGER. Not in detail. I read it recently once through but have not studied it, but I am familiar in a broad way with it.

Senator HARTKE. Well, this is one of the most important decisions of recent times.

Mr. METZGER. Yes, sir. I intend——

Senator HARTKE. It is considered an extremely important case, isn't it?

Mr. METZGER. I have no doubt that it is.

Senator HARTKE. In the field in which you are considered to be an expert.

Mr. METZGER. Yes, but, Senator, I said I have read the opinion, I have not studied it. It has just come out and undoubtedly I will be dealing with it once I am on the job, if I get there.

Senator HARTKE. It deals with the question of regional markets, doesn't it? You do not know that?

Mr. METZGER. It deals with a question of injury.

Senator HARTKE. Of injury and regional markets, isn't that correct?

Mr. METZGER. I don't recall that in detail. I have had no dealings with it.

Senator HARTKE. Mr. Chairman, we are presented with a rather difficult problem. I do think in all fairness to the witness, as well as this committee, that these matters here which are going to vitally affect practically every industry in the United States certainly ought to be reconciled. I know these tariff bills are here in front of Congress—what good are they if no one is going to follow them? I mean what difference does it make? If an act of Congress can be overriden by an international executive agreement without being submitted to the Congress——

The CHAIRMAN. Well, Senator, my impression is the witness says his judgment is that executive agreement does not supersede and override an act of Congress and that is what I think the law is.

Senator HARTKE. I understand that.

The CHAIRMAN. That is what you think the law is.

Senator HARTKE. That is right, but we have all agreed on the basic principle and the abstract, but when we come down to the specific code involved here, there is a serious question—I think the nominee will agree that there is not alone a serious question, but a debate going on in the field of international law at this moment as to whether or not the code adopted at Geneva is in conflict with the Antidumping Act of Congress. Isn't that true?

Mr. METZGER. There is a dispute on this question. The administration, I understand takes one view. I know, Senator, that you have said you take a different view.

Senator HARTKE. I delivered a speech on the floor of the Senate last night. I certainly do take another view.

Mr. METZGER. I am aware there is a dispute on this.

Senator HARTKE. And it is a major dispute, is it not, in industry today, between importers and domestic industry to a great extent. This is a major dispute, is it not?

Mr. METZGER. I think it is a major dispute.

Senator HARTKE. Probably the major item of contention at this moment is the question of international trade. Isn't that true?

Mr. METZGER. It certainly is one of the major items. The ASP question——

Senator HARTKE. The ASP question is another matter somewhat related to it as an unauthorized ad referendum agreement.

Mr. Chairman, perhaps I can do this. I believe I can avoid part of this if the chairman prefers not to continue the hearings. May I ask you this question: You say you have not formed an opinion as to whether or not this code has to be submitted to Congress or not before it becomes effective? Have you formed an opinion?

Mr. METZGER. I have formed no opinion, sir, on the question of the consistency of the code with the domestic Antidumping Act, and I haven't therefore formed any opinion on the question of submission of the code for translation into domestic law through act of Congress in the event there is an inconsistency because I agree with you, sir, that if there is an inconsistency, the United States would not be able to carry out its international commitment, domestically, without a change in the domestic law.

Senator HARTKE. Are you familiar——

Mr. METZGER. Therefore, the question comes to—the question at issues, as understand it, is the same one you framed: namely, is there an inconsistency between the code and domestic law? On that question I have not formulated an opinion, as I have indicated.

Senator HARTKE. You know that Canada reserved the right to take this agreement back and stated that it had to be ratified by their Parliament before becoming effective. Are you not familiar with that?

Mr. METZGER. I have been informed that Canada has got to seek additional legislation.

Senator HARTKE. They feel they needed to——

Mr. METZGER. That is correct.

Senator HARTKE (continuing). To deal with their Parliament.

Mr. METZGER. This is my understanding.

Senator HARTKE. Are you familiar, then, with the fact that under the code the Tariff Commission will be able to find injury only if it is demonstrably shown that dumped imports have been the principal cause of injury?

Mr. METZGER. I am familiar with that language as part of the code.

Senator HARTKE. According to the code——

Mr. METZGER. And I am familiar with the contention that domestic law, the contention that has been made that domestic law is not inconsistent with that provision, and also the contention——

Senator HARTKE. Now, just——

Mr. METZGER (continuing). The opposite contention that it is inconsistent. But as I said earlier, I think the Tariff Commission's job is to apply the domestic law.

Senator HARTKE. Now, under the Antidumping Act, which is the law, there is no need for the Tariff Commission to make such findings as demonstrably the principal cause in order to find injuries. Isn't that true? That is under the act as written.

Mr. METZGER. The language——

Senator HARTKE. Isn't that true?

Mr. METZGER. The language of the domestic statute——

Senator HARTKE. Does not make the necessary——

Mr. METZGER (continuing). Is different from the language in the code.

Senator HARTKE. Thank you, the language in the code says it has to be the principal cause of injury, isn't that correct? "Demonstrably" shown that the dumped imports have been the principal cause of injury. Now, that is different, isn't it? All that is required under the act today is that there has been injury beyond de minimis or trifles?

Mr. METZGER. By reason of the dumped imports.

Senator HARTKE. That is right, which is completely different, isn't it?

Mr. METZGER. It is different. Whether it is inconsistent is a question I would want to consider very carefully.

Senator HARTKE. Isn't that a different standard?

Mr. METZGER. It is a difference in the language, but as I said, whether——

Senator HARTKE. It is not a difference in the standards applied?

Mr. METZGER. Whether or not this makes the statute and the code inconsistent is a separate question from whether the language is different, sir. And it is this question which I think has got to be examined quite carefully. I am frankly, simply not prepared to give you my considered judgment as to whether this difference means an inconsistency.

Now, I know that there are some who are prepared, and have been prepared. The administration, I understand, has been prepared to say one thing on that, and you have been prepared to say the other. I am not prepared to say so, for reasons which I indicated earlier.

Senator HARTKE. Are you familiar with the adjustment assistance provisions of the Trade Expansion Act of 1962?

Mr. METZGER. Yes, I am.

Senator HARTKE. To qualify for adjustment assistance under these provisions it must be shown that tariff concessions were, and I am going to quote, "the major cause of increased imports"; isn't that correct?

Mr. METZGER. Yes, and that the increased imports are the major cause of injury.

Senator HARTKE. Right. Is it not a fact, too, that since the Trade Expansion Act went into effect, there has not been one single affirmative finding of injury under the adjustment assistance provisions?

Mr. METZGER. Yes, I believe that is the case.

Senator HARTKE. And yet there have been numerous applications for adjustment assistance under the act, isn't that true?

Mr. METZGER. Yes, there have been.

Senator HARTKE. Do you think it is pure coincidence that the Tariff Commission has never made an affirmative finding under these provisions.

Mr. METZGER. I think that is a consequence of their interpretation of the statute and I might add, Senator, that some years back I wrote that I thought that they were interpreting the statute in an overly rigid way. I have also testified before a committee of the Congress on the side of the Congress, early this year, that I thought that the statute, since it had been interpreted so rigidly, my policy judgment was that it should be modified so as to not make it that rigid.

Senator HARTKE. Would you feel obligated to follow the precedent of the Tariff Commission in this area?

Mr. METZGER. I would feel obligated to follow the law, Senator. On the question of following the particular way in which they applied it, I think that the Commission can change its views so long as it is applying the law. It has the job of interpreting the law, and to my knowledge, the principle of what we lawyers call stare decisis is not as binding in administrative agencies as it has sometimes proved to be in the courts.

Senator HARTKE. Are you familiar with Ambassador Roth's statements before the Subcommittee on Foreign Economic Policy of the Joint Economic Committee of Congress, July 11, in the course of which he stated:

> Unfortunately, however, the adjustment assistance provisions have not had the expected beneficial effect, because in practice the present test of eligibility to apply for the assistance has proved too strict. In fact, in no case brought under the act have any firms or workers been able to prove eligibility.
>
> The present test of eligibility requires (1) that tariff concessions be shown to be the major cause of increased imports and (2) that such increased imports be shown to be the major cause of injury to the petitioner.
>
> In the complex environment of our modern economy, a great variety of factors affect the productive capacity and competitiveness of American producers, making it virtually impossible to single out increased imports as the major cause of injury. In fact, it has usually been impossible to prove that tariff concessions were the major cause of increased imports.

Are you familiar with that statement?

Mr. METZGER. Yes, I have read it.

Senator HARTKE. If it is virtually impossible to single out increased imports as a major cause of injury under the adjustment assistance provisions of the Trade Expansion Act, would it not by the very same process of reasoning be virtually impossible to single out dumped imports as the principal major cause of injury as the code requires?

Mr. METZGER. I think it is always difficult, sir, to single out a given factor as a cause of injury. I think that under the present antidumping law it is difficult to say that by reason of dumped imports there has been injury. I think this causation factor is always a difficult factor. I think it is difficult in escape clause cases, adjustment assistance cases, antidumping cases, and I think no matter what words are used, it is going to be a problem. It is difficult.

Senator HARTKE. Article III(a) of the International Antidumping Code after stating the principal cause test makes it clear, does it not, that the principal cause test is certainly no less rigid than the major cause test in the adjustment assistance provisions of the Trade Expansion Act, to which Ambassador Roth was referring, isn't that true?

Mr. METZGER. I don't know, sir. When you use words such as the present statute, injury by reason of imports, when you use words "principal cause," the "major cause," you are dealing in imponderables in all these cases, and I am not at all clear which of those three is more rigid or more loose.

Senator HARTKE. Well, in fact, the principal cause test is even more rigid, isn't it, since article III(a) requires that dumped imports must be demonstrably shown to be the principal cause of injury? That is more rigid, isn't it?

Mr. METZGER. Than the existing statute?

Senator HARTKE. Yes.

Mr. METZGER. I am not certain of that, sir. I am not at all certain of that. I would—and I am speaking here with quite——

Senator HARTKE. Do you mean to say——

Mr. METZGER (continuing). With quite a degree of thought. I have understood some people to claim the opposite——

Senator HARTKE. You mean to say——

Mr. METZGER (continuing). That "by reason of" is more rigid than "principal." And I am not prepared to say—to give a horseback opinion, as it were, on this question. I think it is a serious question that needs to be looked at and studied. Whether in a practical situation it would make more difference again is something that would need to be looked at and studied. It is very difficult, in my judgment, to be categorical about these matters.

Senator HARTKE. Well——

Mr. METZGER. I find it so, anyway.

Senator HARTKE. And yet you praise Mr. Hendrick for his skill in the drafting of this code, and now you are telling me that——

Mr. METZGER. I praised—I was praising him.

Senator HARTKE. Did you——

Mr. METZGER. I had not seen the code. I was praising him for being able to come off with a negotiation which I had been informed stayed within the four walls of the U.S. statute, and I was praising him for that because of my understanding that foreign countries were wanting us to go outside the four walls. Now, if in fact——

Senator HARTKE. Did you tell them in a speech——

Mr. METZGER. If in fact you are right and the administration is wrong, if in fact it proves that we didn't stay within the four walls of the statute, then I would gladly go back and withdraw the praise.

Senator HARTKE. Well, I understand, but you made a speech here. In this speech did you tell them you had not read the code and implied that you had read the code?

Mr. METZGER. I didn't say one way or the other.

Senator HARTKE. I know you didn't say, but you said——

Mr. METZGER. It had not been made public, sir, and I was in no position to secure it. I assumed that this fact was known. Maybe it was——

Senator HARTKE. Well——

Mr. METZGER. Maybe it wasn't.

Senator HARTKE. You stated that Mr. Hendrick deliberately couched the language of the code so as to avoid giving the impression that the Anti-Dumping Act was being amended substantively.

Mr. METZGER. I don't know if I used precisely that language, but what I was saying was I understood he had participated actively in

the negotiation of an agreement which meant that the United States did not have to change its antidumping law. As I say, if in fact this is wrong——

Senator HARTKE. Did you not use those words?

Mr. METZGER. And I did not know what the code said.

Senator HARTKE. I am not saying what you know now, but I am asking you: Are you saying that you didn't use those words in your speech?

Mr. METZGER. I don't recall whether I used the precise words or not, but I am trying to give you—and I don't have the text of what I said before me—do you have a text of that as a part of this speech?

Senator HARTKE. If you want to say didn't say it, I can show you did.

Mr. METZGER. I am not saying that.

Senator HARTKE. If this is what you are getting at, these are your words, if you want to know your words.

Mr. METZGER. Are you reading from a text?

Senator HARTKE. I am reading from the words that you gave. Did you have a prepared text for that statement?

Mr. METZGER. I did have a prepared text, but I don't recall those words in the prepared text, sir. If you can show me those words in the prepared text, I will be glad to look at them.

Senator HARTKE. If you want to secure your prepared text and show me where you didn't say it in that speech, I think I can show you where you did. Whether you varied it——

Mr. METZGER. I extemporized.

Senator HARTKE. That is right. You extemporized.

Mr. METZGER. I had a prepared speech but what I did was talk extemporaneously. Now, whether I said those precise words extemporaneously—I am not trying to cavil, Senator, but what I am trying to do it explain the import and the import is I had not seen the code. I did not say I had seen the code. I saw the code only after it was made public.

Senator HARTKE. Let me ask you, are you familiar with the July 7 speech which Ambassador Roth made to the chamber of commerce where he said:

For our part, we agreed to certain useful refinements of the concepts we presently use in our anti-dumping investigation and to speedier completion of such investigations once preliminary measures are taken against allegedly dumped imports. I would emphasize—contrary to what you may have read in the newspapers lately—that all our obligations in the agreement are consistent with existing law and, in particular, that we have not agreed to a simultaneous consideration of price discrimination and injury.

Are you familiar with that speech?

Mr. METZGER. Not the speech, sir. No. I think I am familiar with the substance of what he said. I am not familiar with the speech but I think he testified similarly.

Senator HARTKE. You understand what I am talking about there, that it is not—that they have specifically said, "We have not agreed to a simultaneous consideration of price discrimination and injury."

Now, that is changed by the code, isn't it? And it was done in direct contradiction to what was stated in the speech, wasn't it?

Mr. METZGER. I know that that is the contention. I do not know that what has been done and what the Treasury Department plans to do

in this regard are contrary. I understand that it is believed that this can be done consistently with existing law. But beyond that I can't say because I do not know the answer to this question.

Senator HARTKE. Are you familiar with the fact whether article IV of the code defines domestic industry or not?

Mr. METZGER. I have read it but I am not——

Senator HARTKE. Are you familiar that the term "domestic industry" according to this definition shall include all producers in the United States of a product which is like the dumped product under consideration?

Mr. METZGER. I have read this, yes, sir; but my answer is basically the same as it has been before. I have not studied this provision and on the question of consistency with existing law, I am simply not prepared to give a definitive answer on this, sir.

Senator HARTKE. And are you familiar with the fact that article V requires the initiation of simultaneous investigations of injury and pricing?

Mr. METZGER. No; I am not acquainted in detail with this.

Senator HARTKE. Are you familiar with the history of this whole question and the fact that in 1954 Congress took away from Treasury power to determine injury and gave this power to the Tariff Commission?

Mr. METZGER. Yes; I am acquainted with that.

Senator HARTKE. And are you familiar with the fact that in 1954 the Congress made it quite clear it did not want Treasury to continue to exercise any authority in the area of injury under the Antidumping Act? Are you familiar with that?

Mr. METZGER. I am not familiar with that. I am not familiar——

Senator HARTKE. You are not?

Mr. METZGER (continuing). With the precise language or the import. I know the Congress changed the law to give the determination of injury to the Tariff Commission after 1954 whilst before it was not in the Tariff Commission.

Senator HARTKE. That is right, and it left with the Treasury the sole question of determining whether the dumped prices were being charged, isn't that right?

Mr. METZGER. That is right. They were to determine whether the sales were at less than fair value. The Tariff Commission was to determine whether there was injury by reason of such sales.

Senator HARTKE. Assistant Secretary of the Treasury Kendall in testifying before Congress in 1958 on further amendments to the act stated unequivocally that Treasury's sole function in determining prices was merely a matter of arithmetic. Are you familiar with that?

Mr. METZGER. No; not with the precise language.

Senator HARTKE. And Treasury had no discretion but merely applied arithmetic. Are you familar with that?

Mr. METZGER. Not that specific testimony.

Senator HARTKE. Is that your interpretation of what the effect of the action of Congress was in 1954?

Mr. METZGER. I am not prepared to say in a definitive way. I know in general terms the determination of injury was assigned to the Tariff Commission whilst the sales at less than fair value determination remained in Treasury, but with the specific aspects of this to which you

are now addressing yourself, I confess I have not looked into this in detail.

Senator HARTKE. In 1954 the Congress amended the Antidumping Act to specify that the Tariff Commission would make its investigation of injury only after Treasury made a determination of dumping prices. Are you familiar with that?

Mr. METZGER. The same answer. I am, in general, familiar with the division of function but I am not familiar with the precise language you are reading from.

Senator HARTKE. Not the precise language? Don't you understand this to be the law?

Mr. METZGER. I understand, Senator, what you are saying, and I understand the direction in which you are going, and I am saying to you——

Senator HARTKE. You are afraid to go ahead and follow. You are afraid——

Mr. METZGER. No, I am not.

Senator HARTKE. You are afraid to interpret the law today as it is and you have been teaching this course and writing books on it, and you have been an authority on this thing, and you are afraid to tell us what the law is, when it is spelled out in congressional hearings and Congress changed it specifically to take away the authority of the Treasury except in this one specific area of arithmetic, and yet you don't want to comment because you know what I am going to ask you at the end.

Mr. METZGER. I haven't been teaching the International Code and I have not been teaching or investigating the question of the consistency of the code with the domestic law, which is the obvious——

Senator HARTKE. Did I ask you anything about the code, now? I have been talking——

Mr. METZGER. Yes, you have.

Senator HARTKE. No. I have not, right now, asked you anything about the code. I am talking about the acts of Congress and going back to 1954. But because you anticipate, I shall ask you about those conflicts with the code you know I am going to ask about. I understand that, but you didn't answer that because you are fearful that this would put you in a position where you will have to answer a question one way or the other.

Mr. METZGER. I said I am acquainted in the broad sense with this divisional function, but I am not acquainted with the detailed legislative history to which you are addressing yourself.

Senator HARTKE. What is the function of the Treasury now?

Mr. METZGER. My understanding is that the Treasury's function is to investigate and determine whether a sale is at fair value.

Senator HARTKE. In other words, isn't it strictly a matter of arithmetic, then?

Mr. METZGER. My impression of their job of determining a question of sales at fair value is it involves more than arithmetic. My understanding is that they have to investigate a series of questions in connection with this and make adjustments of various kinds to determine whether or not there are special circumstances in connection with the sale, with the conditions of sale. My understanding is that these are somewhat more than arithmetical problems.

Senator HARTKE. But that has nothing to do with injury.

Mr. METZGER. No. My understanding is that they do not determine questions of injury.

Senator HARTKE. The fact of the matter is the question of the dumping has to be determined before the injury is to be considered by the Tariff Commission; isn't that true?

Mr. METZGER. This has been the practice under the law.

Senator HARTKE. Thank you. That is all I ask.

Mr. METZGER. If I understood that question, I would have answered.

Senator HARTKE. Of course, this is the problem and yet Mr. Hendrick of the Treasury Department, as one of the chief architects of the antidumping code, went well beyond this to the basic issues of policy in the area of unfair trade practices. He would have the code undo in this respect what Congress did. Isn't that right?

Mr. METZGER. I know there are provisions now which relate to this problem. The precise nature of them I am not certain of and whether or not this is consistent with the statute again is a question that I have not examined into personally.

Senator HARTKE. Mr. Chairman, under the circumstances, I find it very difficult to proceed with the questioning and I am willing to abide by the decision of the chairman, but officially I would like to request that these questions and others which I submit, that the designated appointee be required to answer them before we have a vote in the committee.

The CHAIRMAN. Has the witness declined to answer a question or——

Mr. METZGER. I haven't declined to answer any questions, sir. I have indicated a lack of personal knowledge sufficient to——

Senator HARTKE. He claims he doesn't have the knowledge but he can obtain this knowledge, study it and answer it after he obtains it. All I want to do is submit these questions to him and have him answer them for the record, before we take this matter up on a vote in the executive session.

The CHAIRMAN. Do you want to submit the questions in writing?

Senator HARTKE. In writing.

The CHAIRMAN. And let the witness submit written answers to them?

Senator HARTKE. That is right.

The CHAIRMAN. Fine. We will do that.

I have a number of questions here prepared by members of the staff, and I would like to ask that the witness, as soon as he can find time to it——

Mr. METZGER. Mr. Chairman, may I interject for a moment?

The CHAIRMAN. Yes.

Mr. METZGER. In connection with these questions, I have indicated in response to a number of questions by Senator Hartke that there were several bases for my problem in answering a number of his questions. One was a lack of study of these questions in detail at this stage, relative to consistency of particular provisions of the code and domestic antidumping legislation. Second was a plain desire to consult about this seriously with fellow members of the Commission and staff because these are detailed questions relating to the administration of the work of the Commission. And third, the serious problem of answering these detailed questions because of the problem of prejudice that could be caused in future participation by me in litigation before the Commission in which these precise questions are raised.

The CHAIRMAN. Well, in my judgment you have the right to decline to answer on any one of those bases.

Mr. METZGER. Fine. I just wanted to make it plain that these were persisting problems in connection with these questions.

The CHAIRMAN. I have a number of questions here—take your time to answer them—and I would appreciate if you would provide an answer to them. Most of them were prepared by the staff. I will have them provided to you. I am not going to ask you to answer them now. You can answer them at your leisure. And they generally simply seek to obtain your view with regard to matters of where you have responsibility. I don't seek to prejudice your decision on any matter that may come before you, but if you think that that is the case, you can so signify.

I don't feel that you have declined to answer any questions that I have asked and I fully understand the fact that with regard to the matters where you have responsibility, that you would have a right to withhold judgment until you hear the facts of the case. At the same time Senators have a right to ask you about your views on a great number of matters, and where you have a view, it is appropriate that you let us know your general reaction to those matters.

So if you will just provide us with these answers to Senator Hartke's questions and the ones I have provided, I will appreciate it.

Thank you very much.

Mr. METZGER. Did you wish me to return here, sir?

The CHAIRMAN. No. I am not planning any further hearing, but if someone asks for it, of course, it will be considered.

ADDITIONAL QUESTIONS SUBMITTED BY SENATOR LONG AND ANSWERS BY STANLEY METZGER

1. Mr. Metzger, Section 332 of the Tariff Act of 1930 gives the Tariff Commission authority to investigate the effect of "economic alliances" on United States trade. Why shouldn't the Commission do factual studies on the major trading blocs that have been created—the European Economic Community (EEC), the European Free Trade Association (EFTA), and the newly formed Latin American Common Market—to ascertain their effects on United States trade. Do you agree that this trend to preferential trade areas is of major importance in today's trading world? Can't the Tariff Commission analyze these blocs and let us know whether they hurt us or help us? Isn't it desirable to have this sort of information before we have to fix a new trade policy?

Answer. I believe that it would be very desirable for the Tariff Commission to make factual studies of the impact upon the foreign trade of the United States of regional trading arrangements such as the EEC, EFTA, and the Latin American arrangements, which are of major importance.

In my answer to Senator Talmadge's question on September 28, concerning Tariff Commission studies of variable levies affecting American agricultural exports, of border taxes, of export cartels, of export subsidies, and of discriminatory road taxes, I said that I believed that the Commission's investigatory function could be "substantially stepped up to cover subjects such as those you mentioned and others that you have not mentioned which are facing us as trade policy questions over the next several years". Regional arrangements are, in my opinion, prominent among those subjects calling for such factual studies.

There could be a question of securing sufficient money to carry on a substantial number of investigations at one time, but there is in my view no question as to the desirability of factual studies by the Commission of these important questions to the limit of the resources which are made available, so that the Congress, the President, and the public can be as fully informed as possible when they formulate policies designed to promote our national interest in the conduct of the foreign trade and commerce of the United States.

The European Economic Community has a system of export rebates and border taxes which have the double effect of placing a barrier on United States exports to the common market, while subsidizing EEC exports to this and other countries. The Common Market plans to adopt a common value added tax by 1970 which will increase the subsidization of their exports and raise additional barriers against imports into the market. Many of us in the Senate are concerned about this matter. Section 332 of the Tariff Act of 1930 gives the Commission the power to investigate the effects of these foreign protectionist measures. What is your thought about the Tariff Commission undertaking studies of this sort?

Answer. I believe that factual studies by the Tariff Commission of export rebates and border taxes are very desirable, for the reasons noted in the answer to Chairman Long's first question and subject only to the limitation imposed by available resources.

3. You indicated in your statement earlier this year to the Foreign Affairs Committee of the House that the American Selling Price method of evaluation and the U.S. Anti-Dumping Statutes were non-tariff barriers. Both of these devices very definitely involve tariffs. Americans Selling Price is a device for enlarging the tariff imposed on articles subject to that form of evaluation. Anti-dumping is nothing more than a duty imposed in an amount sufficient to offset the distressed prices for which the imported merchandise is sold. How can you conclude that there are non-tariff barriers?

Answer. The problem of characterizing the Anti-Dumping statute and American Selling Price as "tariff" or "non-tariff" barriers is in many respects a semantic matter; they are probably classifiable as one or the other, or both, depending upon one's approach at a particular time. For example, suppose an anti-dumping proceeding in which affirmative findings are made under the statute, and an additional duty is imposed. This result can be viewed as a "tariff barrier". But pending the determination in an anti-dumping case there may be a withholding of appraisement which can operate to discourage imports of the product for a period of time regardless of whether there are eventual affirmative or negative findings under the statute. This action for that period of time can be viewed as a "non-tariff" barrier. One could say that the anti-dumping statute can act as a tariff barrier, or as a non-tariff barrier, or as both, depending upon action taken under it.

ASP is perhaps in a similar situation. As a method of valuation for the purpose of calculating tariffs, it can be said to be not in itself a "tariff barrier" in the sense of a rate, but a step in a process of establishing the duties to be collected which are almost always, though not invariably, higher than would be collected under different valuation methods. If one looks at the normal consequence of the ASP method of valuation, however, one can characterize the result, higher duties, ar partaking of the nature of a tariff barrier.

4. Before the ASP was worked out, the Special Trade Representative requested the Tariff Commission to determine those rates of duty for products subject to ASP valuation "which would in its judgment have provided an amount of collected duy on imports equivalent to that ammount" currently applicable. The Tariff Commission was in effect asked for a mechanical conversion of duty and it devoted 52 pages of its report to this mechanical function. On page 55, it exercised its judgment by *acknowledging* that "a more equivalent degree of protection might have been achieved by establishing a rate for competitive compounds and a rate for non-competitive compounds in the basket categories". This ASP report seems to have been designed to facilitate the agreement which was subsequently entered into rather than to present an impartial and unbiased view. How would you react to a similar request for a directed conclusion?

Answer. I have not studied the particular "ASP conversion" report referred to, nor do I have any knowledge of the circumstances of the request for the study.

I can say, however, how in general I would envisage the procedure which would be most conducive to effective and responsive studies by the Tariff Commission. If, for example, the Senate Finance Committee desired the Commission to study a commodity, or the impact of regional arrangements on American exports, or of the variable levy system upon our agricultural exports, Tariff Commission experts should sit down with the Finance Committee staff and interested staff members of concerned Senators and seek to reach an agreed frame of reference for the study—its precise scope so far as possible, the length of time to complete it in view of its intended scope, etc. The Commission and the Committee

would then go over the handiwork thus produced, and make whatever changes seemed indicated. The Finance Committee's ensuing resolution would thus have been the consequence of a cooperative effort to establish a scope and duration of study most likely to give promise of an effective and useful study. If this procedure, or something resembling it in substance, were employed, it should at the least minimize the production of studies which are deemed not as useful as had been hoped for.

5. Today, the principal purpose of a tariff is to provide protection for domestic industries and workers. If the rate of duty is based upon the foreign export value, the more an import undercuts the U.S. price, the less duty we charge them. The amount of protection afforded actually decreases as the foreigner's competitive advantage increases. Also, we charge more duty to the higher priced products of higher wage countries than we do for the same product imported from a low-wage country. Wouldn't it seem that we should be doing just the reverse?

Answer. If one's object is to make a tariff as protective as possible on lower-priced products, specific rates (x cents per pound) or combined rates (x cents per pound plus y% ad valorem) can be more protective than straight ad valorem rates, at least if they are changed to keep pace with rising price levels. Whether this is a desirable objective of trade policy is, of course, another matter, for the Congress, the President, and the public to decide.

Additional Questions Submitted by Senator Hartke and Answers by Stanley Metzger

Question 1. Do you agree with the finding of injury in the Cast Iron Soil Pipe from Poland Case decided September 5, 1967?

Answer. The Cast Iron Soil Pipe from Poland case decided September 5, 1967, resulted in a 2–2 decision, with Commissioners Sutton and Clubb finding injury, and Commissioners Culliton and Thunberg finding no injury. All of them had an opportunity to hear witnesses, study factual submissions and staff papers, consider briefs of interested parties, conduct independent researchers as necessary, and discuss the case amongst themselves and with staff experts.

I have had no such opportunity. In the absence of this kind of consideration in a case of this kind, I am unable to indicate agreement or disagreement with either group in this case. Were I serving as a Commissioner and for some reason, such as illness, found myself unable to give that kind of consideration to a case, I would not participate in the decision.

Question 2. In his affirmative determination in this case Commissioner Clubb said: "It might be noted in conclusion that the imposition of dumping duties here as provided in the Antidumping Act is consistent with the liberal trade policy of the United States.

> "When the sales at less than fair value have stopped, the dumping finding can be revoked. Thus the domestic industry is not being protected against the ingenuity or the natural advantages of the foreign producer. Rather, it is being protected from the effects of a trade practice which Congress has found to be unfair and injurious."

Do you concur in Commissioner Clubb's view that measures aimed at proscribing the unfair trade practice of dumping are entirely consistent with the liberal trade policy of the United States?

Answer. I believe that measures aimed at preventing injury to an industry in the United States by reason of sales of imported articles at less than their fair value—the Anti-Dumping Act concept—are justified and are not inconsistent with the trade policy of the United States embodied in the Reciprocal Trade Agreements Program of the United States, often referred to as our liberal trade policy.

Question 3. In the Polish Case Commissioner Clubb applied a test of causality that required merely that price fluctuations were "at least in part" due to dumping. Is it your opinion that Commissioner Clubb, in so doing, acted properly under the Antidumping Act?

Answer. The Anti-Dumping Act requires the imposition of an antidumping duty when it is determined that imported goods are being or are likely to be sold at less than fair value and an industry in the United States or elsewhere is being or is likely to be injured or is prevented from being established, "by reason of the importation of such merchandise into the United States." A synonym for "by reason of" is "cause". (See Webster's Collegiate Dictionary, 5th Ed., P. 828).

The Congress chose not to be more specific in spelling out the desired degree of causation before a case would be deemed to be made out—for example, it did not say "entirely" or "exclusively by reason of," or "by reason of in whole or in part," nor did it give any other specific language guidelines, as has sometimes been done in other statutes in the trade field. A continuing Commission charged with administering and applying the law to the facts of cases as they come before it was charged with making its best informed judgment in each case whether there was injury "by reason of," or caused by, dumped imports. I am not aware that the Commission has in the past laid down defined additional standards beyond the statutory words in this area of administration of the law, nor has the Congress to the best of my knowledge.

I have examined Commissioner Clubb's opinion in the Polish Pipe Case and do not read it as indicating an intention on his part to apply an additional or different test of causality than the statutory language provides. His opinion was largely devoted to the degree of injury he believed the statute required as a general matter, and whether that necessary degree of injury was present in that case.

The paragraph relating to price fluctuations (Page 19 of TC Publication 214) begins with the sentence, "Is the necessary degree of injury present in this case?" He then adverted to causation not in doctrinal terms but rather with the observations that the Polish Soil Pipe was sold "in competition with the domestic product;" that it was "a significant competitive factor"; that while domestic producers could offer a full line of pipe and fittings (as could the importers of Polish pipe) and a shorter delivery time, the importers could offer a "substantially lower price"; and that Polish pipe imports were growing at a rapid rate.

At that point in the paragraph, Commissioner Clubb stated that, "At least in part to prevent further inroads by the Polish Pipe sold at less than fair value, the domestic producers kept their prices in that market (New York—Philadelphia) fluctuating around the same level during this period in the face of rising costs and increasing prices in other markets." That this fact was adverted to as evidence of injury, rather than as an element in causation, is further indicated by the succeeding paragraph in which he quotes from a 1919 Tariff Commission report on dumping which talked of the injurious effects of less than fair value sales when they cause "domestic manufacturers" to sell their entire output at a small margin of profit, or even at a loss."

In my opinion, Commissioner Clubb's opinion, insofar as it related to causation, did not purport to define or refine the "by reason of" language of the statute. As I read his opinion he applied it to the best of his judgment by reciting briefly the factual considerations, in the first part of the paragraph referred to above, which satisfied him that the statutory causation standards were met.

Question 4. In this same case Commissioner Sutton based his determination that injury resulted from dumping on his conclusion that the price instability in one regional market would not have occurred had it not been for the presence of the dumped import. Do you believe that Commissioner Sutton properly interpreted the causality standard in the Antidumping Act?

Answer. Commissioner Sutton's opinion in the Polish Pipe case also discloses, in my opinion, that he was applying, in his best judgment, the statutory language "by reason of," and not attempting to define or refine or interpret it in doctrinal terms. There appears to be nothing at all improper about the manner or method of any of the four Commissioners in this case. On the question of agreement or disagreement with their differing views, please see my answer to question 1.

Question 5. It is true, is it not, that something can be a partial cause without being the principal cause that outweighs the combined importance of all other causal factors?

Answer. Yes.

Question 6. It is also true, is it not, that something can be an essential causal factor and still not outweigh the combined importance of nine or ten other causal factors, all of which may be equally essential to a given result?

Answer. I think so, though the formulation is somewhat abstract.

Question 7. If your answers to the four preceding questions are in the affirmative, you admit, then, that factual circumstances which satisfy the simple causality standard in the Antidumping Act as properly interpreted by Commissioners Clubb and Sutton, may not satisfy the more demanding "principal cause" standard in the Code?

Answer. Since my answers to the four preceding questions are not in the affirmative, this question is required to be answered in the negative.

Question 8. Without inquiring into how you would decide any particular case, from the foregoing analysis of the differing causality standards in the Act and in the Code, would you agree that cases such as the recent Polish Case which resulted in affirmative determinations of injury under the Act may have to be reversed if they come up anew under the Code?

Answer. Since I do not believe, for the reasons given in my answers to questions 3 and 4, that the Polish case constituted an analysis or interpretation of the causation language "by reason of," in the Act, I do not believe that the case raises a question of consistency in this regard with the causation language of the Code.

Question 9. Does the change in the causality standard constitute an amendment of the Antidumping Act?

Answer. First, nothing in the Code, as I read it constitutes an amendment to the domestic statute. The Code's Article 14 states that each country which is a party to it must "take all necessary steps . . . to ensure . . . the conformity of its laws, regulations, and administrative procedures with the provisions of the Antidumping Code." As I understand it, that means that the Code itself does not purport to change domestic laws. If a country is of the view that there is a need to make changes in its domestic law in order for it to conform with Code requirements, any such changes would have to be achieved through domestic law changes in the usual manner—in the United States through Congressional action amending our statute.

Second, as to the specific reference in the question to a "change in the causality standard", this apparently has reference to the language in the Code, "demonstrably the principal cause of," which is different from the language, "by reason of" in the antidumping Act. As I indicated in my answers on September 28, whether this language difference amounts to a "change in the causality standard" so as to make for a conflict between the statute and the Code is a question which I would want to examine quite carefully. I would want to deal with that question in the context of specific facts of specific cases so as to avoid so far as possible abstractions which cannot be tested out for their consequences against specific conditions of carrying on the trade and commerce of our country in a successful and prosperous manner. I would also want to see the question thoroughly briefed and argued. If there proved to be a conflict after such an examination, as I stated on September 28, I would apply the antidumping statutory standard to the facts of the case, not the Code provisions. Please see also my statements on September 28 with reference to prejudicial predetermination of issues which may be the subject of litigation before the Commission.

Question 10. If the change in a legal standard is so substantitve as to require predictably and absolutely contrary results in identical cases, is it not amendatory?

Answer. No, the Code does not amend the Act, for the reasons stated in the first part of my answer to question 9. However, if the Code's provisions and the Anti-Dumping statute's provisions are such as "to require predictably and absolutely contrary results", then the United States could not conform with its international obligation without amending the domestic statute. This I understand to be the plain meaning of Article 14 of the Code, referred to in my answer to question 9.

Question 11. Commissioner Sutton attached some significance to the fact that Congress used the word "injury" in the Act without qualification of degree. He concluded that "the only exception that one might reasonably apply to the word is the old legal maxim that 'the law does not concern itself with trifles.'" In your opinion, was it proper for Commissioner Sutton to draw this implication from the absence of qualifying language in the Antidumping Act?

Answer. Commissioner Sutton, in his opinion in the Polish Soil Pipe Case (T. C. Publication 214, at pages 6–7) said that Congress used the word "injury" in the Antidumping Act, "without qualification of degree." He also stated, however, that the word "injury" in the Act "has been construed by the Commission as meaning 'material injury.'" It has been my understanding that the Commission has so construed the Act for many years (Commissioner Clubb's opinion in the Polish case contains some citations to Commission decisions so stating) and that the public and the Congress have long been so aware.

I do not read Commissioner Sutton's opinion as indicating a belief that this Commission interpretation is or has been legally improper or as evidencing his desire to change it; he does not so state. What he appeared to do in his opinion was to accept "material injury" as an established construction, and then interpret that phrase to mean "any injury which is more than *de minimis*." He believed that he was justified in so interpreting "material injury" in virtue of the absence

of qualifying language in the Act. It was quite "proper" for him so to do in the sense that he was constitutionally interpreting and applying the Act in a case before him, in accordance with his statutory duty. If the question is whether I agree with his interpretation of the phrase "material injury" or his application of it to the facts of the case, please see my answer to questions 1 and 9, and Transcript, pages 71-73, 101-102, concerning my desire to study such a question in context of facts, and with benefit of adversary views, and not to express views in advance of litigation so as to avoid prejudice.

Question 12. Would he necessarily have been driven to the same conclusion if the word "injury" had been qualified by the additional requirement of materiality?

Answer. I do not know what his views would have been.

Question 13. Commissioner Clubb, in his opinion, points out that in 1951 the House Ways and Means Committee struck out a provision in an Administration bill that would have required a finding that a domestic industry was being "materially injured," rather than merely "injured." The Committee decided not to include this change in the bill "in order to avoid the possibility that the addition of the word 'materially' might be interpreted to require proof of a greater degree of injury than is required under existing law for imposition of the anti-dumping duties." Now the Code purports to achieve exactly that which Congress denied as a statutory amendment—a more rigid standard of injury. Is this amendatory?

Answer. The answer to question 11, sets forth my understanding that the Commissioner's interpretation that "material injury" is required to be found has been of long standing, known to the public and the Congress. As I there stated, I do not read Commissioner Sutton's opinion as indicating any view that it is or has been an improper interpretation. I also do not so read Commissioner Clubb's opinion. He cited Commission opinions so interpreting injury without indicating that they were improper and he too appears to accept and adopt "material" or "significant" and then define it or them in a manner similar to Commissioner Sutton's (TC Publication 214, Page 18).

Thus, in quoting from H.R. Rep. No. 1089, 82 Cong., 1st Session (1951), he included the following sentence from the Report: "The Committee decision [not to amend the law by adding 'material" to "injury"] is not intended to require imposition of anti-dumping duties upon a showing of frivolous, inconsequential, *or immaterial injury*." (Italics added.) Commissioner Clubb then added, in his own language, "The refusal to legislate in 1951 left intact the original injury standard developed thirty years earlier—frivolous, inconsequential, or immaterial injury would not call for application of dumping duties, but anything greater would." Since, he, like the House Committee, appears to rule out "immaterial injury," it appears to be his view that the statute has always required "material injury." His position thus appears to be the same as Commissioner Sutton's in this respect.

Therefore, there does not appear to be a difference between the opinions of Commissioner Sutton and Commissioner Clubb and the Code insofar as all seem to be addressing themselves to the question of "material injury."

Question 14. What kind of change would, in your opinion, constitute amendments of the Act?

Answer. This is a speculative question. An example that comes to mind (and is deliberately unreal in order not to prejudge questions which might be litigated) might be the following: If the Code had purported to bind countries to refrain from imposing anti-dumping duties unless existing industry was being or was likely to be injured, this would appear to require a change in our domestic law, by calling for that elimination of the present phrase in our law, "or is prevented from being established," in order for the United States to comply with Article 14 of the Code, and thus avoid being charged with a violation of the Code upon its entry into force. Please see my answer to question 9 concerning Article 14 of the Code for my views as to why nothing the Code could have contained would constitute amendments of the statute.

Question 15. None of the "industry" standards set forth in the Code were applied in the Polish Cast Iron Soil Pipe Case. There was no evidence that all the producers within the two regional markets examined sold "all or almost all" of their production in the designated market but this would have been required under the Code, would it not?

Answer. I do not read either Commissioner Sutton's opinion or Commissioner Clubb's opinion as having relied on the "geographical segmentation" or regional

market concept. This, I understand to mean a situation where the Commission has determined that "an industry in the United States" is not to be considered as the entire American industry for purposes of determining whether injury to "an industry" has occurred, but rather that a geographical segment of it can be considered to be "an industry" for such purposes.

Commissioner Sutton refers, in his opinion, specifically to substantial price depression in one market area, but as I read it, he uses this as evidence to show that in his view material injury was being caused "to the *nation-wide* domestic industry". (T.C. Publication 214, page 8. (Italic added.)

Commissioner Clubb likewise does not, as I read his opinion, purport to rely on the segmentation or regional market concept; he refers to what he views as evidence of injury in the New York-Philadelphia and in "other markets".

I note that Commissioners Culliton and Thunberg refer in their opinion to the "market area" concept of their colleagues, but as indicated above, I do not read the opinions of Commissioners Sutton and Clubb as having been based upon the geographical segmentation concept enunciated by the Commission in other cases. Therefore, the Code's segmentation standards, on the one hand, and the Polish pipe opinions of Commissioners Sutton and Clubb on the other, do not appear to be at issue with each other.

Question 16. There was evidence that some of the soil pipe produced outside of the regional markets was sold in these markets since Commissioner Sutton found that some of the domestic producers sell their pipe throughout most of the states. The Code, therefore, would have compelled the contrary result in this case, would it not, since the Code would permit the use of regional markets only where none or almost none of the product produced elsewhere in the country is sold in the regional market?

Answer. For the reasons set forth in my answer to question 15, I believe that Commissioner Sutton's opinion was not based upon the geographical segmentation of industry concept. Hence the basis of the question does not appear to be present—the Code's provisions on segmentation and the Polish pipe case opinion of Commissioner Sutton do not appear to be at issue with each other. I would note that the Code's provisions (Article 4(ii)) appear to permit segmentation in other circumstances than those related in the question, as well. Please refer further to the answers to questions 1, 9, and 11 concerning my three reasons for desiring to consider precise comparison questions between the Act and the Code in cases as they arise before the Commissioner.

Question 17. Is not this change—compelling contrary results in identical cases—amendatory?

Answer. I do not believe, for the reasons stated in answer to questions 15 and 16, that this question is presented. Please see also the answer to question 9.

Question 18. In the Polish Case the dumped imports accounted for only 4% of the sales in one regional market. The Code, therefore, would have compelled the contrary result in this case on an additional ground, would it not, since the Code would permit finding of injury in regional markets only if there is injury to "all or almost all of the total production of the product in the market as defined?"

Answer. Please see the answer to questions 15, 16, and 17. For the reasons there stated, I do not believe that the basis for the question has been established.

Question 19. The industry definition in the Code is a change from the definition in the Act that is so substantive as to compel contrary results in cases identical to those that have been brought under the Act. Is this amendatory?

Answer. There is a somewhat detailed industry definition in the Code (Article 4.). There is no definition in the Act that I can discover—it refers only to "an industry in the United States." The Commission in the past has interpreted the provision as indicated in the answer to question 15 and thus has considered that it had authority so to do. Whether the difference in language between the Code and the Act constitutes a conflict between the two so as to "compel contrary results" in identical cases I am not now in a position to say. Please see answer to question 9, where I detail the reasons for my desire to deal with such questions in factual settings. Please also see my statements on September 28 and my answer to questions 1, 9 and 11 for my three reasons for desiring to consider such an issue in cases as they arise before the Commission.

Question 20. Subsection 8(e) of the Code would make it possible under some circumstances for a violating dumper to escape antidumping duties altogether, even after there has been both a determination of dumping and of injury to a domestic industry, if the exporter give adequate assurances that he will cease dumping in the future, would it not?

Answer. This question relates to the administration of the duty-collection aspects of the antidumping law in relation to the Code, a matter which I understand to be the statutory responsibility of the Treasury Department and not of the Tariff Commission. I would respectfully request that the Treasury Department be requested for their views on this question.

Question 21. Is such an escape for a guilty party available under the Act?

Answer. Please refer to my answer to question 20.

Question 22. Are not special dumping duties automatically imposed after a determination of dumping and injury under the Antidumping Act?

Answer. Please refer to my answer to question 20.

Question 23. Is this change amendatory?

Answer. Please refer to the answer to question 20. On the general question of any Code provision being "amendatory", please see the answer to question 9 where I have detailed my reasons for believing that nothing in the Code amends the Act.

Question 24. Ambassador Roth appeared before the Subcommittee on Foreign Economic Policy of the Joint Economic Committee of Congress on July 11. In the course of his testimony Ambassador Roth stated:

> "Unfortunately, however, the adjustment assistance provisions have not had the expected beneficial effect, because in practice the present test of eligibility to apply for the assistance has proved too strict. In fact, in no case brought under the act have any firms or workers been able to prove eligibility.
>
> "The present test of eligibility requires (1) that tariff concessions be shown to be *the major cause* of increased imports and (2) that such increased imports be shown to be *the major cause* of injury to the petitioner
>
> "In the complex environment of our modern economy, a great variety of factors affect the productive capacity and competitiveness of American producers, making it virtually impossible to single out increased imports as *the* major cause of injury. In fact, it has usually been impossible to prove that tariff concessions were *the* major cause of increased imports."

Answer. Ambassador Roth made the statement quoted. There appears to have been an ommission of a question.

Question 25. It is the fact, it is not, that since the Trade Expansion Act went into effect there has not been one single affirmative finding of injury under the adjustment assistance provisions?

Answer. Yes. I answered this question in the affirmative on September 28.

Question 26. Yet there have been numerous applications for adjustment assistance under the Act?

Answer. Yes. I answered this question in the affirmative on September 28.

Question 27. Is it pure coincidence that the Tariff Commission has never made an affirmative finding under these provisions?

Answer. I think it likely that it is in part a consequence of what I characterized as their "overly rigid" interpretation of the adjustment assistance provisions, as I indicated in answer to a question on September 28.

Question 28. Would you feel obligated to follow the precedents of the Tariff Commission in this area?

Answer. As I stated on September 28, I would feel obligated to follow the law, but on the question of following the way in which the Commission has interpreted or applied it, I believe that the Commission can change its views so long as it is applying the law.

Question 29. If it is "virtually impossible" to single out increased imports as a "major cause" of injury under the adjustment assistance provisions of the Trade Expansion Act, would it not by the same process of reasoning be "virtually impossible" to single out dumped imports as the "principal cause" of injury, as the Code requires?

Answer. I refer to my reply to the question on September 28. I think the task of determining causation to be a difficult one, which, of course, has to be done to the best of one's ability. When the degree of causation is expressed in language which is not a model of precision, it is necessary to apply it in the context of the particular statute and the particular case so as to carry out the purpose of the law.

Question 30. Article 3(a) of the International Antidumping Code after stating the "principal cause" test makes it clear, does it not, that the "principal cause" test is certainly no less rigid than the "major cause" test in the adjustment assistance provisions of the Trade Expansion Act, to which Ambassador Roth was referring?

(See answer to question 31.)

Question 31. In fact, the "principal cause" test is even more rigid since Article 3(a) requires that dumped imports must be "demonstrably" shown to be the

"principal cause" of injury, and since Article 3(a) also specifically requires that dumped imports alone must be found to outweigh "*all other factors taken together which may be adversely affecting* the industry?"

(The following will answer 30, 31, 32, 33, 34, 35 and 36.)

Answer. Please refer to the answer to question 29 and to my answers on September 28, where I indicated the difficulty of giving precise meaning to these terms. The causation terms used by the statute must, in my judgment, be applied to the facts of particular cases in accordance with their meaning in terms of the context and purposes of the particular law.

As Justice Frankfurter said when he had to deal with the meaning of "substantial evidence" in the famous *Universal Camera* case:

> "There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape in regard to this problem [defining "substantial evidence"] the use of undefined defining terms". (Universal Camera Corp. v. N.L.R.B. 340 U.S. 474 (1951).)

Question 32. In view of this qualifying language in Article 3(a), the term "principal cause" could not be interpreted to mean merely that cause which is more important than any other single cause of injury?

(See answer to question 31.)

Question 33. But without such qualifying language it would be appropriate to interpret the word "principal" to mean that cause which is more important than any other single cause of injury?

(See answer to question 31.)

Question 34. The words "major cause" in the adjustment assistance provisions of the Trade Expansion Act mean that cause which is more important than any other cause?

Question 35. Or at least this is an interpretation which would be proper since there is no qualifying language such as that found in the Code which requires that the "major cause" be that cause which outweighs all other causes taken together?

(See answer to question 31.)

Question 36. Therefore, if the "major cause" test in the adjustment assistance provisions makes it "virtually impossible" to find injury, then the even more rigid test of the Antidumping Code would make it even more impossible than "virtually impossible" to find injury caused by dumped imports?

(See answer to question 31.)

Question 37. Since it will be virtually impossible, at the least, to find injury caused by dumped imports under the Code, isn't it undeniable that the Code would amend the injury provisions of the Antidumping Act in a substantive manner?

Answer. For the reasons detailed in the answer to question 9, nothing in the Code amends the Act. The task of the Commission to administer the provisions of the Act in accordance with law remains, including the task of finding whether there has been injury and whether it has been caused by less than fair value imports.

Question 38. Do you reaffirm your testimony before the Committee on September 28 that if the Code would amend the Antidumping Act substantively the Code cannot become effective unless approved by the Congress?

Answer. I reaffirm my testimony that the Code cannot amend the Act. If there is a conflict between the provisions of the two instruments, the Act governs as the domestic law to be applied by the Tariff Commission unless and until changed by Congressional amendment.

Question 39. If making it not only "virtually" but literally impossible to find injury caused by dumping does not amend the injury provisions of the Act, what would be necessary to constitute an amendment?

Answer. For the reasons stated in my answer to question 9, nothing in the Code can constitute an amendment to the Act. For a hypothetical example of a provision which could raise the conflict issue, please see the illustration offered in my answer to question 14.

Question 40. With reference to the industry provisions of the Code: Article 4 of the Code defines domestic industry. The definition states that the term domestic industry shall include *all* producers in the United States of the product which is "like" the dumped product under consideration. A regional industry as distinct from national industries could be found under Article 4 of the Code only if there exist "exceptional circumstances"?

Answer. Article 4 of the Code appears to be worded somewhat differently from the paraphrase in question 40. It refers to "domestic producers as a whole of the

like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of these products", not to "all producers in the United States . . .". There are some language differences as well between the text of the Code and the paraphrase in question 41. (below)

On the principal question in this series (40, 41, 42), question 42, nothing in the Code changes the existing anti-dumping law, including the authority of the Tariff Commission to interpret and apply in accordance with law those portions of the Act committed to its administration.

Question 41. And such exceptional circumstances can be recognized *only* if the domestic producers supplying a regional or limited competitive market "sell all or almost all of their production of the product" in such regional market?

Answer. Please see my answer to question 40.

Question 42. Would this provision in Article 4 of the Code restrict the existing authority of the Tariff Commission under the Anti-dumping Act?

Answer. See my answer to question 40.

Question 43. Article 4 of the Code would impose still another restriction on the Tariff Commission's authority to find injury to a regional industry in that industry must be "demonstrably" shown to be the "principal cause" of injury to "all or almost all of the total production of the product" in the particular regional market?

Answer. Please see my answer to question 40 for it applies here as well.

Question 44. Has the Tariff Commission ever applied this test in its determinations of regional industries and regional markets?

Answer. I do not recall, though I have not gone back over all the cases to refresh my memory, that the Tariff Commission has ever used the phraseology, "demonstrably" the "principal cause" of injury. I have not checked on the latter part of the statement in the question but the answer in the first sentence of this answer covers the totality of the question.

45. In the Soil Pipe Case in 1958, and later in six cement cases, in two steel cases and in at least one chemical case involving the West Coast, the Commission found regional industries, did it not?

Answer. I have not gone back to reread all the enumerated cases, but I recall that the Commission in a number of them found that circumstances indicated that a geographical segment of an industry was "an industry in the United States" for the purposes of the Anti-Dumping Act.

46. In any of those cases did the Commission require a showing that "all or almost all of the production" of the members constituting the regional industry was sold in the regional market involved?

47. In each of those cases is it not the fact that the record made it impossible for the Tariff Commission to make a finding that "all or almost all" of the product involved by the members of the regional industry was sold in the regional market?

48. If the answer to the above question is in the affirmative, do you agree that the Code would amend in a substantive manner the industry provisions of the Act?

Answer. (Questions 46, 47 and 48). On questions 46 and 47, I have not gone back to reread those cases, and I do not recall the enumerated circumstances. The gravamen of these questions, however, is that, assuming the accuracy of the statements contained in them, does the Code amend the Act? In my opinion, for the reasons stated in the answer to question 9, the Code cannot and does not amend the Act.

49. In each of those cases in which injury to a regional industry was found by the Tariff Commission, if the Code had been in effect would not the Tariff Commission have been required to make exactly the opposite findings, to wit, no injury?

Answer. The Tariff Commission would not be required by the Code to interpret the Act differently. For the reasons stated in the answer to Questions 9 and 40, the Code does not amend existing law, including the authority of the Commission to interpret those provisions of law entrusted to it for administration. The Commission will continue to have the authority and duty to interpret and apply the Act, so far as it is entrusted to the Commission's administration, in accordance with American legal principles.

50. In any of these cases, did the Tariff Commission require a showing that all or almost all of the producers constituting the regional industry had suffered material injury from dumped imports?

51. Under the Code, such a showing would be required before the Commissioner could make a determination of injury, would it not?

52. No such showing is required by the Act?

53. In this respect would not the Code amend the Act?

Answers to questions 50, 51, 52 and 53. The answer to questions 46, 47, and 48 appears to be applicable to these questions as well.

54. An Article 10 forbids the institution of any provisional measures, such as the withholding of appraisements, unless there is "sufficient evidence of injury" as well as of dumping prices?

55. Must there be findings of dumping prices and of injury before appraisements may be withheld?

56. Must there be "reason to believe or suspect" the existence of dumping prices and of injury?

57. Yet the Act requires the Secretary of the Treasury to order the withholding of appraisements whenever he has reason to believe or suspect dumping prices are being charged, does it not?

58. The Secretary is required by the Act to take such action without inquiring into the question of injury?

Answers to questions 54, 55, 56, 57 and 58. These questions on withholding of appraisement are in the area of the Treasury Department's responsibilities. Treasury is the agency empowered to withhold appraisement. It is my understanding that the Tariff Commission has no responsibilities under the Act in respect of withholding of appraisement, and no authority to question the actions of the Treasury Department in respect of its fulfillment of its statutory responsibilities. I respectfully request, therefore, that these questions be asked of the responsible Department.

59. In 1954, Congress took away from Treasury the power to determine injury and gave this power to the Tariff Commission?

Answer. Yes.

60. Does not the Code require simultaneous investigations of injury and dumping prices?

Answer. Article 5 of the Code states that "evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied . . .".

61. The Act specifically provides that injury investigations shall be undertaken by the Tariff Commission only *after* it has received advice by Treasury of affirmative determination by Treasury of dumping prices?

Answer. The Act states that whenever the Secretary of the Treasury determines that foreign goods are being, or are likely to be sold, in the United States or elsewhere at less than fair value, he "shall so advise" the Commission, "and the said Commission shall determine within three months thereafter whether an industry is being or is likely to be injured or is prevented from being established, by reason of the importation of such merchandise into the United States".

62. Would the Code in this respect conflict with and amend the Act?

Answer. I respectfully request that the Treasury Department be asked to comment upon the question whether it prohibited by the statute from considering simultaneously evidence of both sales at less than fair value and injury in deciding whether to initiate an investigation as to the question of whether or not there have been sales at less than fair value. This question, like questions 54 through 58, is in the Treasury's area of responsibility, not in the area of responsibility of the Commission. The Tariff Commission, in my opinion, is required to determine the injury question within three months of receiving the advice required by the statute, and not at some earlier time.

63. Do you agree that the Act would be greatly weakened by the Code? Was not this the aim and objective of the Code?

64. Can you cite one instance in which the Act was strengthened?

Answers to questions 63 and 64. As stated in the answer to question 9, the Act is not amended by the Code in any respect.

As I understand it, the object of the Code was to impose international obligations upon countries party to it, in regard to the administration of anti-dumping measures. The thrust of the Code's provisions appears to be in the direction of a greater degree of predictability, and a shorter period of uncertainty in the administration of anti-dumping measures than was believed to be the practices of many countries in the past; and toward the end that anti-dumping practices "should not constitute an unjustifiable impediment to international trade", which it was believed was the case for some countries.

Whether in fact those objectives will be realized is a matter of speculation at this time. It depends upon what countries do in fact.

(Whereupon, at 12:30 p.m., the committee adjourned, subject to call of the Chair.)

(By direction of the chairman, the following letters are made a part of the printed record:)

UNIVERSITY OF CALIFORNIA, LOS ANGELES,
SCHOOL OF LAW,
Los Angeles, Calif., September 25, 1967.

Senator RUSSELL B. LONG,
Chairman, Financial Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: It was a great pleasure for me, not long ago, to read in the newspaper that President Johnson has nominated Stanley D. Metzger to the position of Chairman of the United States Tariff Commission. My immediate reaction, upon reading of this, was that the designation of Mr. Metzger was one of the outstanding appointments made by the President in some time.

Mr. Metzger has been known to me over a period of approximately fifteen years, first, when he was assistant legal advisor in the Department of State, and subsequently, as a professor of law. Over that period of time I have never failed to be impressed by Mr. Metzger's wide range of knowledge, his intellectual honesty and by his objectivity and his fair-mindedness. I have no doubt whatsoever that as chairman of the United States Tariff Commission, Mr. Metzger would bring to that agency and to its operations, experience, knowledge, and impartiality of an exceptional degree. Mr. Metzger is a man of great integrity, with a profound sense of responsibility as a citizen and as a public servant, whose services the United States Government will be fortunate to have.

Sincerely yours,

PAUL O. PROEHL,
Professor of Law.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., September 25, 1967.

Hon. RUSSELL B. LONG,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: I am writing in support of the appointment of Professor Stanley D. Metzger as Chairman of the United States Tariff Commission.

I have known Professor Metzger professionally for at least ten years and have followed his work closely. He is a great authority on the law of foreign trade, in both its domestic and international aspects, and he is one of the few people in this country who are fully conversant with international economic law. His combination of public service and teaching and writing in these fields have given him a breadth of vision which commend him for the office for which he has been nominated. Professor Metzger's judgment is sound, and I am sure that he would approach questions before the Commission with judiciousness and with understanding.

It is much to be hoped that the Senate will confirm Mr. Metzger's appointment. He would, I am sure, discharge the office of Chairman of the United States Tariff Commission with the greatest distinction.

Yours truly,

R. R. BAXTER,
Professor of Law.

AMERICAN IMPORTERS ASSOCIATION, INC.,
New York, N.Y., September 26, 1967.

Senator RUSSELL B. LONG,
Chairman, Finance Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: We are writing in support of the nomination by President Johnson of Stanley D. Metzger to be Chairman of the United States Tariff Commission.

It is most fortunate that the President was able to prevail upon Mr. Metzger to accept the appointment. The President spent considerable time and effort in order to find the right man for the position and we feel it is important that his choice be supported, particularly in view of Mr. Metzger's qualifications.

His work in the trade agreements field from 1946 until the present time has been a notable contribution to the program, and we feel confident that he will bring the same inquiring mind and unbiased judgment to the Commission. We could review his achievements while with the Department of State and his subsequent work as consultant to the President and the State Department but you are well aware of these already.

Your Committee as well as the Senate as a whole have been given an unusual opportunity to support the President by giving approval to the nomination. We, therefore, urge that the appointment of Mr. Metzger be confirmed.

Sincerely,

GERALD O'BRIEN,
Executive Vice President.

YALE UNIVERSITY LAW SCHOOL,
New Haven, Conn., September 22, 1967.

Hon. RUSSELL LONG,
Chairman, Senate Finance Committee,
U.S. Senate,
Washington, D.C.

MY DEAR SENATOR: I understand that the nomination of Stanley D. Metzger to be Chairman of the Tariff Commission is before your Committee. I consider the nomination a splendid one and want to recommend it highly.

Mr. Metzger worked with me in the Department of State when I was Deputy Legal Adviser. He was Assistant Legal Adviser in charge of the Economic Division of the Legal Adviser's Office. He was charged with the work of the Office that included tariff and trade. His work, both in Washington and abroad in the negotiation of trade agreements, was always of the highest quality.

More recently Mr. Metzger has been teaching at George Washington University Law School. While there he has written in the field of his specialty, as well as serving from time to time as consultant to the Department of State. He is generally recognized as an outstanding authority.

Mr. Metzger is a man of great strength of character and firmness of conviction. I believe all who deal with him recognize him to be just and fair. I have no doubt he would be an excellent Chairman of the Tariff Commission.

Sincerely yours,

JACK B. TATE, *Associate Dean.*

SHEARMAN & STERLING,
New York, September 21, 1967.

Hon. RUSSELL B. LONG,
Chairman, Finance Committee,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: Stanley D. Metzger has been nominated to be Chairman on the Tariff Commission, and the nomination is now subject to consideration by your Committee. I take the liberty of writing you to urge approval of this appointment.

I have known Professor Metzger for some twenty years. We met when he was in the Office of the Legal Advisor to the Secretary of State and I was, as I am now, a practicing lawyer in private practice. During the ensuing years, I must confess that our acquaintance has ripened into a warm friendship, but I am, nevertheless, convinced of my objectivity when I represent to you that Stanley Metzger will be, as in the past he has been, an outstanding public servant.

It would be pointless for me to burden the Committee with a catalogue of his professional and intellectual attainments. His distinguished record speaks for itself. The reason that I trespass upon your time is that I do believe it important that I record my view as one who has met the man over so long a period in the varying roles of colleague, friend and, not least important, adversary. I regard Stanley Metzger as a man of total moral integrity and total intellectual honesty. It seems to me that these qualities are the most significant qualifications for

the post to which he has been nominated; coupled with his demonstrable experience and capacity, they make his rightness for the job overwhelmingly clear.

Faithfully yours,

HENRY HARFIELD.

UNITED CHINA & GLASS CO.,
New Orleans, La., October 3, 1967.

Hon. RUSSELL B. LONG,
Senate Office Building,
Washington, D.C.

SIR: It has just come to my attention that the Senate Finance Committee, of which you are chairman, will hold a hearing, for the purpose of confirming Mr. Stanley D. Metzger as chairman of the U.S. Tariff Commission.

We are well aware of Mr. Metzger's long service with the State Department, also his work as a consultant to the President in connection with the Trade Expansion Act of 1962, the Kennedy Round and his writings regarding American foreign trade policies.

We being one of the larger importers in the United States feel that Mr. Stanley D. Metzger's appointment as chairman of the U.S. Tariff Commission would be very beneficial to the country at large as well as to ourselves.

Also, we feel that with the legal background of Mr. Metzger the President could not have made a wiser choice in selecting a man of his stature.

We respectfully ask that you solicit your colleagues and try to get Mr. Metzger confirmed in this position.

Respectfully yours,

JEROME LEVY,
Vice President, Imports and Exports.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., October 4, 1967.

Senator RUSSELL LONG,
Senate Finance Committee,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LONG: I am writing in support of the nomination of Stanley Metzger to be Chairman of the United States Tariff Commission.

I have known Professor Metzger for many years, both personally and professionally. When I was Legal Adviser of the State Department, I consulted him on a number of occasions. In every case I found him to be a man of honesty and integrity, sound and dispassionate judgment, and highest professional commitment. He has devoted years of scholarship and action to United States trade policy. There is no one I can think of who knows more about the subject.

In my view, he is highly qualified in every way for the position to which he has been nominated. I am confident he will make a distinguished Chairman of the Commission.

Sincerely yours,

ABRAM CHAYES,
Professor of Law.

UNIVERSITY OF CALIFORNIA, BERKELEY,
SCHOOL OF LAW (BOALT HALL),
Berkeley, Calif., September 27, 1967.

Hon. RUSSELL B. LONG,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LONG: I have learned of the nomination of Stanley D. Metzger for Chairman of the United States Tariff Commission and would like to express my hope that the Senate will confirm the nomination.

Being a Professor of Law (with a specialty of International Law) at the University of California at Berkeley, I have known Professor Metzger and his achievements for many years both in his capacity as Assistant Legal Adviser in the State Department and as Professor at Georgetown University Law School.

I have high regard for the intellectual ability and statesmanlike character of Mr. Metzger. In my opinion he has always combined good judgment with a clear

appraisal of the ramifications of the questions before him. He possesses a superb knowledge of international law and insight into the forces which determine policy. I have no question that he will have the interests of the U.S. at heart at all times and that he is completely loyal to our country.

I could prolong this letter by listing individual achievements, but knowing the dimensions of the burden of your office I would like to confine myself to a statement to the effect that I wholeheartedly approve President Johnson's choice.

Very sincerely yours,

STEFAN A. RIESENFELD,
Emanuel S. Heller Professor of Law.

YALE LAW SCHOOL,
New Haven, Conn., September 25, 1967.

Senator RUSSELL LONG,
Chairman, Senate Finance Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: It has come to my attention that Professor Stanley D. Metzger has been nominated to be Chairman of the Tariff Commission.

May I take the liberty of joining with other friends in strong support of the nomination of Professor Metzger. I have known Professor Metzger well since he was an Assistant Legal Adviser in the Department of State and in more recent years we have been colleagues together in many undertakings in the field of International Law. Three summers ago we were associated in a seminar at New York University designed for the training of other teachers from all over the country.

Professor Metzger is a man of appropriate strength of character, mind and personality for high position. He is greatly respected by all of his colleagues in the teaching profession both for his scholarship and for high quality of leadership.

Your most sympathetic consideration of Professor Metzger's nomination will be greatly in the public interest.

Sincerely yours,

MYRES S. MCDOUGAL.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., September 29, 1967.

Senator RUSSELL B. LONG,
Chairman, Senate Finance Committee,
U.S. Senate, Washington, D.C.

DEAR SENATOR LONG: I am writting in support of the nomination of Stanley D. Metzger to be Chairman of the United States Tariff Commission.

In teaching a course on the Law of International Trade at Harvard Law School during the past 18 years, I have had frequent occasion not only to use Mr. Metzger's published works but also, to consult with him from time to time. He is, of course, one of America's authorities on the law of international trade. I can also testify that he is also a person of excellent judgment and high dedication to public service.

Mr. Metzger is the kind of person who will maintain the delicate balance between our domestic and our international interests which is required of the Tariff Commission. His nomination would do credit to your Committee and to the country.

Yours sincerely,

HAROLD J. BERMAN,
Professor of Law.

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