

# **Justice Deferred: Antidumping Legislation in the Robert Morgan Collection**

By Elise J. White

# Key Terms

Antidumping duties- Protectionist tariffs levied against imports that are priced below market value (Kenton, 2020)

Countervailing duties- Import taxes meant to counter the affects of import subsidies (Business Standard, n.d.)

Subpoena- A formal order to testify or produce certain documents in court (Kenton, 2024)

Fiscal Year- A 12-month period, also known as a financial year (*What Is the Fiscal Year? | Definition*, n.d.-a)

The Antidumping Act of 1921- Established a “special dumping duty” (Committee on Finance, 1968, p. 1)

To be levied on offending goods

The Tariff Act of 1930- Raised import duties on agricultural and industrial goods (The Editors of Encyclopaedia Britannica, 2024)

GATT- “A world organization established in 1947 to work for freer trade on a multilateral basis” (Goldstein & Pevehouse, 2020, p. 336)

Lobbying- “an attempt to influence government action through either written or oral communication.” (*How States Define Lobbying and Lobbyist*, 2024)

Subsidies- a sum of money given to assure that the price of goods remains low (*Subsidy*, 2024)

Supracompetitive Pricing- pricing above what can be sustained in a competitive market (*Supracompetitive Pricing*, n.d.)

# Major Parties

Senator Morgan (D-NC)

Zenith Radio Corporation: John J. Nevin, Bernard Nash

Japanese Companies: Matsushita, Hitachi, Sanyo, Sharp, Sears, Toshiba

Zenith, National Union, and Nash Legal Team:

- Blank, Rome, Klaus, and Comisky (Zenith, National Electric)
- Morton P. Rome (National Union Electric)
- Blum, Parker, and Nash (The law firm of Bernard Nash)

Matsushita, et al. Legal Team:

- Morgan, Lewis, and Bockius (Matsushita, Quasar)
- Kirkland and Ellis (Motorola)
- Arnstein, Gluck, Weitzenfeld, and Minow (Sears)
- Drinker, Biddle, and Reath (Toshiba, Tokyo Shibaura)

Hon. Edward R. Becker, J. (Judge)

David R. MacDonald (Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations.)



# Introduction

In March of 1968, numerous petitions were sent to the Treasury regarding the television industry. U.S. companies claimed that Japanese television sets were being dumped into the market, harming their businesses. These companies cited the Antidumping Act of 1921 as the basis for their claims against Japanese Electronics Companies such as Matsushita, Sanyo, Sharp, and many more (Zenith, 1979). They alleged that Japanese television sets were being dumped into the United States markets, in violation of both the Antidumping Act of 1921 and the GATT. Article VI of the GATT, also known as the General Agreement on Tariffs and Trade, states:

- “It was generally agreed that anti-dumping duties should remain in place only so long as they were genuinely necessary to counteract dumping which was causing or threatening material injury to a domestic industry” (WTO, 1947, p. 237).

# Introduction

The U.S. Tariff Commission was advised to investigate in 1970. By 1971, they confirmed that the market was being injured. However, duties were not collected. Companies continued to lose money as late as 1978. In response to this, Senator Robert Morgan and his associates began their work with Zenith Radio Corporation and in the Senate to amend previous legislation and reform the way that tariffs and duties are levied in the United States.

# Background – Robert Morgan on Antitrust law

In a Raleigh speech in March 1972, then Attorney General Robert Morgan spoke regarding Antitrust law and enforcement.

“Reliable studies have found that every year our country loses a minimum of \$50 to \$60 billion because of monopolies and other industrial crimes. Other estimates put this figure at over \$100 billion in terms of higher prices, economic waste and lost production.” (Morgan, 1972)

While Morgan’s words likely referred to domestic examples, the issue he described soon presented itself via international commerce.

# Background – Millions lost

1968: 9/16 American producers lost money  
1969: 8 of the remaining 15 lost money  
1970: 10/15 lost money (Zenith, 1979, p. 1)  
1973: 5/11 TV companies lost money  
1974: 7/11

*Exhibit I in Zenith's case against Matsushita, et al.*

1975: 5,021,000 dollars in sales of Japanese color television sets, fewer than 500 imported  
1976: 5,011,000 (Nevin, 1978, p. 169)

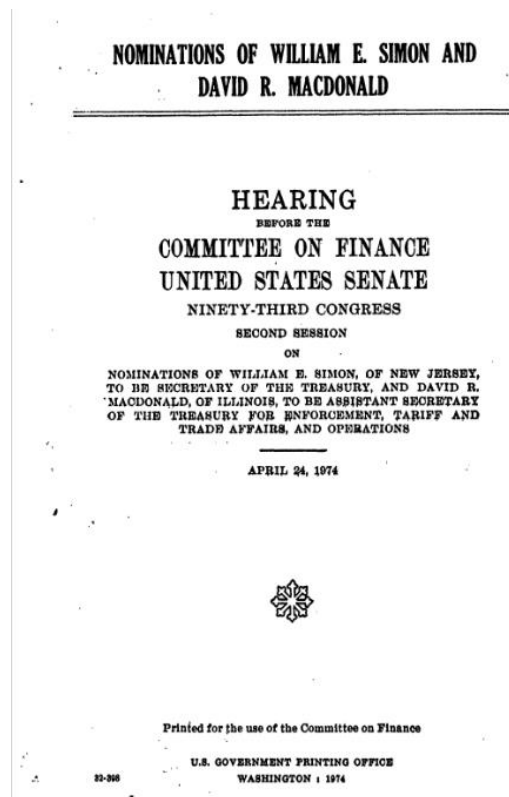
According to Zenith Radio Corporation, by the time Attorney General Morgan became Senator Morgan in 1975, millions had already been lost in uncollected duties from Japanese electronic companies. By dumping television sets in the U.S. at a lower price than market value, the Japanese companies were undercutting domestic manufacturers.

The Treasury had allegedly failed to collect duties on the offending goods. Furthermore, they had ruled that duties were **not necessary**.

# Background – The Treasury’s Ruling

## *Overseeing the Case*

David R. MacDonald, assistant secretary for enforcement, tariff and trade affairs, and operations.

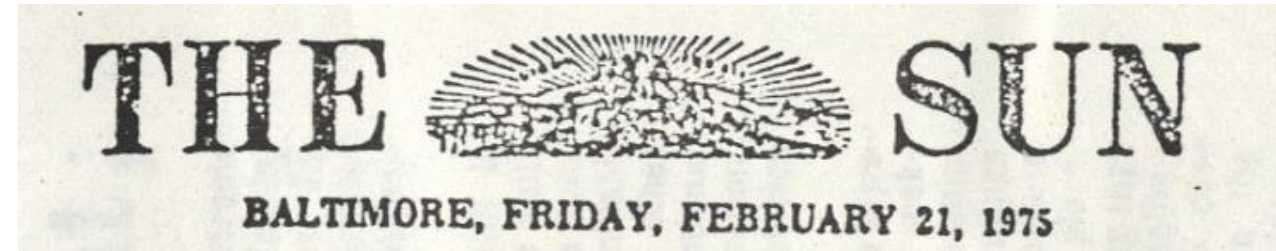


Assistant secretary MacDonald ruled that countervailing duties were not necessary against more than **4 billion** dollars worth of Japanese electronic products.

However, questions quickly arose regarding MacDonald’s past affiliations.



# Baltimore Sun Article



On February 21<sup>st</sup>, 1975, the Baltimore Sun newspaper published an article titled “Conflict raised in duty ruling” by Thomas Pepper. The article discusses previous developments in the case, mainly, the ruling of Assistant Secretary to the Treasury David R. MacDonald.

Secretary MacDonald ruled that countervailing duties were not necessary against over \$4 billion worth of Japanese-made electronic products. However, Mitsubishi Electric Corporation was represented by Baker & McKenzie in Chicago, who also represented the Japanese Government in this case.

Baker & McKenzie is one of six firms secretary MacDonald was involved with prior to his confirmation to the Treasury. Although the firm was not recorded to have submitted arguments in the case, it raises the question: **Was Mr. MacDonald biased towards the Japanese Government?**

# Baltimore Sun Article

Assistant Secretary MacDonald originally stated in his confirmation:

“Most of my professional career as a lawyer has been with the firm of Baker and McKenzie, in Chicago, where I specialized mainly in corporate law with some involvement in international finance. I have also been a director of the Chicago City Bank and Trust Company, Seaboard Life Insurance Company of America, and Scheer Financial Corporation. I have resigned from the directorships and my resignation from my law firm will become effective upon confirmation.” (MacDonald, 1974, p. 35)

Despite the potential conflict, Assistant Secretary MacDonald did not recuse himself from this case. However, according to the article, there was no evidence of Baker & McKenzie submitted any arguments in the case (Pepper, 1975, p. 5).

Regardless of whether the decision was just, American electronic companies received little assistance. Having been denied relief in the Treasury, companies turned to the House of Representatives for a reprieve.

# Court Case

Before the case entered the Senate, though, Zenith and Matsushita participated in a legal battle over potential damages.

“In 1974, Zenith Radio Corporation, an American manufacturer of consumer electronic products, and National Union Electronic Company (collectively referred to as Zenith) sued 21 Japanese-owned or -controlled manufacturers of consumer electronics and claimed that these companies conspired to drive the American companies out of the market” (*Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, n.d.).

# Matsushita Electric Industrial Co., LTD., et al., v. Zenith Radio Corporation et al.

Zenith's argument against Matsushita, et al. was reliant on multiple factors, such as:

1. Japanese companies were pricing their products higher in Japan, allowing them to underprice them in the United States.
2. Japanese companies were purposefully dumping television sets into the United States, taking advantage of fraudulent business practices.
3. A conspiracy to take over the American market was being facilitated by Japanese companies.
4. The ensuing "cartelization" damaged profits for numerous American companies.

# Zenith's Argument

Zenith believed that the check prices on customs forms, minimum price points for Japanese television sets, were not the real prices at which these sets had been bought (Zenith, 1979, p. 2).

# Lower Court Decisions

## The Eastern District Court of Pennsylvania

- The District Court found most of Zenith's evidence inadmissible. They ruled in favor of the Japanese companies. The court granted a summary judgement, or judgement without trial.

## The U.S. Court of Appeals for the Third Circuit

- This court reversed the previous decision, deciding that the evidence was admissible and therefore the District Court was not justified in granting summary judgement for the Japanese companies.

# Supreme Court Case

After the previous rulings, the case made its way to the U.S. Supreme Court. Justice Lewis F. Powell Jr delivered the majority opinion of the court.

In a 5-4 ruling, despite agreeing with some of Zenith's claims, the Supreme Court dismissed large parts of their argument. The Court stated in their ruling:

“We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies” (*Matsushita v. Zenith*, 1986).

The court essentially says that the U.S. cannot regulate the Japanese market for them. **There is no way to collect damages based on the idea that the Japanese market violates American laws.**

# Supreme Court Case

Furthermore, the court denied damages for claims of conspiracies regarding industry pricing, stating:

“Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five-company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages” (*Matsushita v. Zenith*, 1986).



# The Issue Enters Congress

On June 30<sup>th</sup>, 1977, a bill was introduced to the House of Representatives, and referred to the Committee on Ways and Means. This committee handles tax-based issues in the U.S., and they began drafting a bill to reform the procedures that the U.S. Tariff Commission uses to collect duties.

# Legislative Action – H.R. 8149

Referred to the Senate Financial Committee on October 19th, 1977, the **Customs Procedural Reform and Simplification Act of 1978** aimed to solve the issues of illegal dumping and uncollected duties.

# H.R. 8149

The bill consists of four titles:

**Title I** – this title is designed to allow customs the ability to institute up-to-date business practices.

**Title II** – this title simplifies and updates parts of the Tariff Act of 1930, and other related laws.

**Title III** – this title incorporates other legislation to ensure annual authorizations for appropriations beginning in fiscal year 1980.

**Title IV** – this title declares portions of this act severable. If a part of the bill is unenforceable or illegal, the rest still applies.

# Challenges

The bill was not without faults, however. Zenith representative Bernard Nash, a lawyer, expressed concerns in a private letter to Senator Morgan. He pointed out how an American company, Magnavox, was forced to sell itself to North American Philips Corporation. The parent company, Philips N.V., is a co-venturer of Matsushita. Matsushita is one of the largest Japanese television manufacturers. Mr. Nash used this as an example of a so-called “Japanese cartel” that he believed was weakening the American market (Nash, 1978).

Furthermore, he pointed out that the new bill retroactively lowered penalties for false customs declarations, an act that Japanese companies performed to lower the cost of importing their goods to the U.S. It was clear that amendments would be needed to ensure the quality of the bill.

# Amendments

There were no less than 56 amendments made to the bill before it passed in the senate. Many of these were changes to the language of the bill, such as the Curtis-Morgan amendment co-sponsored by Senator Carl T. Curtis (R-NE) as well as Senator Morgan. The Curtis amendment was also supported by Mr. Nash, who worked closely with Senator Morgan to gain evidence in support of the bill.

The Curtis-Morgan amendment is notable, not only for its content, but for the ensuing legal battle it caused.

# The Curtis-Morgan Amendment

The Curtis-Morgan amendment changes the language of the bill, exempting some violations from certain parts of the bill. It includes this passage, stating:

“ (C) The amendments made by subsections (a) through (d), other than new section 592(e) of the Tariff Act of 1930 as added by subsection (a), shall not apply to alleged violations of section 592 of the Tariff Act of 1930 resulting from intentional acts or omissions committed before the date of enactment of this Act if such violations were the subject of a formal or informal investigation by the United States before such date.” (U.S. Senate, 1978).

Senator Morgan rebuked criticisms from those lobbying against the amendment, stating, “If the bill is as innocent... as they maintain, why then are they so anxious to have the Curtis-Morgan amendment dropped?” (Morgan, 1978, pp. 1-2).

Despite Senator Morgan’s rebuke, the Curtis-Morgan Amendment faced legal challenges due to how it was defended.

# Judicial Challenges – Matsushita, et al. v. Zenith

On July 28<sup>th</sup>, 1978, a subpoena was issued against Zenith Radio Corporation representative Bernard Nash. It demanded that he appear in court on August 3rd and bring any documents supplied to any member of the Senate, any data, any memorandum, the names of staff members and other Senators (U.S. Senate, 1979, p. 55). This subpoena is significant not only because of its content, but because the lawyers issuing the order previously lobbied in favor of Mr. Nash and the Curtis Amendment.

This disturbed Senator Morgan, who was worried that they could contact anyone he talked to in NC and go after them (U.S. Senate, 1979, pp. 55-56). Furthermore, if they couldn't afford a lawyer, they wouldn't want to help him for fear of being taken to court.

# Senator Morgan's Legal Actions

Along with his concerns about the precedent this case set, Senator Morgan believed there were certain protections that prevented the information from being subpoenaed. Thus, Senator Morgan was compelled to assist Mr. Nash and Zenith in fighting the subpoena and gaining a protective order against the use of documents requested through it.



# Senator Morgan's Legal Actions

According to Senator Morgan, all information given by Mr. Nash was in the public record in Philadelphia (U.S. Senate, 1979, p. 56). After appearing in court for a deposition, the defense began fighting back.

The defense against the subpoena included legislative privilege and immunity, such as the Speech and Debate clause of the constitution.

In response to the filings of the defense claiming certain privileges, a briefing was held on August 16<sup>th</sup>, 1978. This briefing pertained to the possibility that members of congress may share Mr. Nash's view on constitutional privileges.

# Senator Morgan's Legal Actions

Senator Morgan intervened on August 22, 1978, two days before the deadline to file (Plesser, 1979, p. 3).

Senator Morgan retained Paul Bender as his legal counsel. Paul Bender was a professor, and had previously represented the Senate Rules Committee (Plesser, 1979, pp. 3-4). On September 28<sup>th</sup>, 1978, Professor Bender represented Senator Morgan in a hearing in Philadelphia.

# How did the court respond?

The Honorable Judge Becker ruled on April 12<sup>th</sup>, 1979, that the motion for a protective order was granted, and the subpoena was quashed. However, Judge Becker stated during the trial that:

“I have grave doubts about the vitality of the various privileges asserted by Mr. Nash, the legislative privilege, the various First Amendment privileges... and I have grave doubts as to the vitality or viability even of Senator Morgan’s speech or debate” (*IN RE: JAPANESE ELECTRONIC PRODUCTS ANTITRUST LITIGATION*, 1979, p. 61).

Much like other cases brought by Zenith, there were some doubts involved in the final ruling.

# Conclusion – The Matter of the Subpoena

Despite the doubts of the court, Senator Morgan successfully aided Mr. Nash. He remained involved while Senators such as Senator Mark O. Hatfield (R-OR) confirmed that there would be no more legal fees on the behalf of his representation (U.S. Senate, 1979, p. 59).

# Passing of H.R. 8149

While the case was ongoing, H.R.8149 made its way through congress. On October 3<sup>rd</sup>, 1978, H.R. 8149 was enrolled in the Senate. This means that the final version of the bill was printed to be sent to the President.

With the new amendments, H.R. 8149 successfully updated the procedures by which Customs processes imports.

The bill was signed into law by President Jimmy Carter.

# Conclusion - Robert Morgan's total impact

The majority of the changes Senator Morgan was involved in succeeded. H.R. 8149 was signed into law in 1978. It successfully altered the way that duties are collected on imports. Senator Morgan co-sponsored the Curtis-Morgan amendment to prevent Japanese companies from circumventing duties. He successfully assisted Bernard Nash in quashing the subpoena against him and worked to support Zenith in its case against Matsushita and other companies like it.

While Zenith's case against Japanese companies resulted in no damages being awarded, Senator Morgan's work permanently changed the way that the U.S. handles imports.

# Conclusion - Robert Morgan's total impact

In regard to H.R. 8149, former president Jimmy Carter stated, “This is the first major legislation in more than 20 years to streamline Customs clearance of merchandise and passengers” (Carter, 1978).

By fighting to protect the television industry, Senator Morgan not only improved the country's laws, but made it possible for American businesses to thrive.