The ASSISTANT SECRETARY. On page 198, after line 4, the committee proposed to insert the following paragraph:

PAR. 1435a. Harness, saddles, and saddlery, in sets or parts, except metal parts for any of the foregoing, finished or unfinished, 35 per cent ad valorem.

The PRESIDENT pro tempore. The question is on agreeing to the amendment.

The amendment was rejected.

Mr. McCUMBER. On page 223 I ask that the Senate disagree to the committee amendment beginning on line 16.

The PRESIDENT pro tempore. The Secretary will state the amendment.

The ASSISTANT SECRETARY. On page 223 the committee proposes to strike out paragraph 1582, as follows:

PAR. 1582. Hides of cattle, raw or uncured, or dried, salted, or pickled.

Mr. McCUMBER. Senators will understand that this was in the free list and the committee proposed to strike it out. I ask now that the Senate disagree to the committee amendment, which will place the hides back on the free list.

The PRESIDENT pro tempore. The question is on agreeing to the committee amendment.

The amendment was rejected.

Mr. McCUMBER. On page 224 I ask that the committee amendment, beginning on line 19, be disagreed to.

The PRESIDENT pro tempore. The amendment will be stated.

The ASSISTANT SECRETARY. On page 224, after line 18, the committee proposes to strike out paragraph 1600, as printed in the House bill, as follows:

PAR. 1600. Leather: All leather not specially provided for; harness, saddles, and saddlery, in sets or parts, except metal parts, finished or unfinished; leather cut into shoe uppers, vamps, soles, or other forms suitable for conversion into manufactured articles; and leather shoe laces, finished or unfinished.

Mr. WALSH of Massachusetts. The action requested by the Senator would put harness and saddlery on the free list?

Mr. McCUMBER. Yes; it would put leather not specially provided for, including saddles, and so forth, made of leather, also upon the free list.

The PRESIDENT pro tempore. The question is upon agreeing to the committee amendment.

The amendment was rejected.

Mr. McCUMBER. On page 225 I ask that the Senate disagree to the committee amendment beginning on line 1.

The PRESIDENT pro tempore. The amendment will be stated.

The ASSISTANT SECRETARY. On page 225 the committee proposed to strike out lines 1 and 2, as follows:

PAR. 1601. Boots and shoes made wholly or in chief value of leather.

Mr. WALSH of Massachusetts. The action the Senator requests will restore boots and shoes to the free list?

Mr. McCUMBER. Yes; it restores boots and shoes to the free list.

The PRESIDENT pro tempore. The question is on agreeing to the amendment of the committee.

The amendment was rejected.

Mr. SMOOT. Mr. President, I desire to offer an amendment at this time. On page 222 I move to insert a new paragraph, to read as follows:

PAR. 1573a. Gloves made wholly or in chief value of leather made from hides of cattle of the bovine species.

Mr. STERLING. The effect of that is to put the articles named on the free list?

Mr. SMOOT. On the free list.

The PRESIDENT pro tempore. The question is on agreeing to the amendment offered by the Senator from Utah.

The amendment was agreed to.

Mr. McCUMBER. Mr. President, this completes the matters which, under the unanimous-consent agreement, we were compelled to dispose of to-day. The next paragraph which we will present to the Senate will be the paragraph relating to presidential powers. The majority members of the committee will meet to-night after we close the session to-day, and we shall try to have it remolded and printed to-night, so that it will be on the desks of Senators in the morning.

Mr. SPENCER submitted an amendment intended to be proposed by him to the pending bill, which was ordered to lie on the table and to be printed.

PETITIONS AND MEMORIALS.

Mr. WARREN presented resolutions of the Lions Club, of Rock Springs, and the town councils of Wamsutter and South Superior, all in the State of Wyoming, protesting against any action tending to set aside the United States Supreme Court decree divorcing the Central Pacific Railway from the Southern Pacific Co., which were referred to the Committee on Interstate Commerce.

Mr. WILLIS presented petitions of sundry citizens of Cincinnati, Uhrichsville, Dennison, Marion, Columbus, Chesapeake, and Marietta, all in the State of Ohio, praying that only a moderate duty be imposed in the pending tariff bill on lightweight kid gloves, which were referred to the Committee on Finance.

BILLS INTRODUCED.

Bills were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. WILLIS:

A bill (S. 3899) granting a pension to Ella Williamson (with accompanying papers); to the Committee on Pensions.

By Mr. HARRELD:

A bill (S. 3900) for the relief of Washington Gill Squires; to the Committee on Military Affairs.

RECESS.

Mr. McCUMBER. If there is nothing more to be presented at this time, I move that the Senate take a recess until to-morrow at 11 o'clock.

The motion was agreed to, and (at 8 o'clock and 5 minutes p. m.) the Senate took a recess until to-morrow, Thursday, August 10, 1922, at 11 o'clock a. m.

SENATE.

THURSDAY, *August 10, 1922.*

(Legislative day of Thursday, August 3, 1922.)

The Senate met at 11 o'clock a. m., on the expiration of the recess.

THE TARIFF.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 7456) to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.

Mr. McCUMBER. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The Secretary will call the roll.

The reading clerk called the roll, and the following Senators answered to their names:

Ashurst	Gerry	Moses	Spencer
Ball	Gooding	Myers	Stanfield
Brandegee	Hale	New	Stanley
Bursum	Harreld	Newberry	Sterling
Calder	Harris	Nicholson	Sutherland
Cameron	Heflin	Oddie	Swanson
Capper	Jones, N. Mex.	Overman	Townsend
Caraway	Jones, Wash.	Pepper	Trammell
Culberson	Kendrick	Phipps	Underwood
Cummins	Keyes	Pomerene	Wadsworth
Curtis	Ladd	Ransdell	Walsh, Mont.
Dial	Lenroot	Rawson	Warren
Dillingham	Lodge	Sheppard	Watson, Ga.
Edge	McCumber	Shortridge	Watson, Ind.
Ernst	McKellar	Simmons	Willis
Fletcher	McLean	Smith	
Frelinghuysen	McNary	Smoot	

Mr. CURTIS. I wish to announce that the Senator from Minnesota [Mr. NELSON] is absent on account of a death in his family.

Mr. UNDERWOOD. I wish to announce that the Senator from Nevada [Mr. PITTMAN] is absent on account of illness in his family.

The PRESIDENT pro tempore. Sixty-six Senators have answered to their names. There is a quorum present.

Mr. KENDRICK. Mr. President, I present a telegram transmitting a resolution adopted by the Wyoming Druggists' Association at a recent convention in reference to the chemical schedule of the bill which we have under consideration. I ask that the telegram may be read at the desk and referred to the Committee on Finance.

The PRESIDENT pro tempore. Without objection, the Secretary will read as requested.

The telegram was read and referred to the Committee on Finance, as follows:

[Western Union telegram.]

LARAMIE, WYO., *August 7, 1922.*

Hon. J. B. KENDRICK,
United States Senate, Washington, D. C.:

Our committee as a whole in convention assembly has unanimously adopted the following resolutions and requested that you use all possible influence in the proper direction there, as the retail druggists of the country recently have been charged with "profiteering" on the floor of the United States Senate:

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

"Whereas the Senate has defeated the embargo on German dyestuffs, chemicals, and medicinals; and

"Whereas the Germans have driven American manufacturers from South and Central America since the late World War; and

"Whereas under German monopoly before the war phenacetine, aspirin, veronal, trional, sulfonal, and similar products sold in the United States at $1 per ounce instead of $1 per pound as at present: Therefore

"*Resolved*, That the Wyoming State Pharmaceutical Association urges the Senators and Representatives in Congress from this State to make adequate provision in the tariff revision bill, H. R. 7456, pending in the Senate, for the protection of American industries and consumers by incorporating the amendment now before the Senate Finance Committee which would prohibit the importation of merchandise into the United States bearing any trade-mark, label, print, or other mark registered in the United States Patent Office and owned by any person domiciled in the United States, unless imported by such owner, provided the owner shall file with the Secretary of the Treasury a certified copy of the registration of the mark."

WYOMING PHARMACEUTICAL ASSOCIATION,
L. R. TYSON, Jr., *Secretary*.

Mr. SHEPPARD. Mr. President, I request that a similar telegram from the Texas State Pharmaceutical Association be printed in the RECORD and referred to the Committee on Finance.

There being no objection, the telegram was referred to the Committee on Finance and ordered to be printed in the RECORD, as follows:

[Western Union telegram.]

FORNEY, TEX., *August 2, 1922*.

Senator MORRIS SHEPPARD,
Washington, D. C.:

Whereas the retail druggists of the country recently have been charged with profiteering on the floor of the United States Senate; and

Whereas the Senate has defeated the embargo on German dyestuffs, chemicals, and medicinals; and

Whereas the Germans have driven American manufacturers from South and Central America since the late World War; and

Whereas under German monopoly before the war phenacetine, aspirin, veronal, trional, sulfonal, and similar products sold in the United States at $1 per ounce instead of $1 per pound as at present: Therefore

Resolved, That the Texas State Pharmaceutical Association urges the Senators and Representatives in Congress from this State to make adequate provision in the tariff revision bill, H. R. 7456, pending in the Senate, for the protection of American industries and consumers by incorporating the amendment now before the Senate Finance Committee which would prohibit the importation of merchandise into the United States bearing any trade-mark, label, print, or other mark registered in the United States Patent Office and owned by any person domiciled in the United States, unless imported by such owner, provided the owner shall file with the Secretary of the Treasury a certified copy of the registration mark.

TEXAS PHARMACEUTICAL ASSOCIATION,
M. C. ANDERSON, *Fort Worth, President*;
TOM COULSON, *Dallas*,
SAM P. HARBEN, *Richardson*,
COKEY EVANS, *Jewett*,
A. W. GRIFFITH, *Austin*,
HERMAN DRIES, *San Antonio*,
A. H. SEELY, *Cleburne*,
W. D. ADAMS, *Forney*,
Executive Committee.

Mr. SMITH. Mr. President, I have a few telegrams protesting against the duty on salt, which I should like to have referred to the Committee on Finance and printed in the RECORD. They are very short.

There being no objection, the telegrams were referred to the Committee on Finance and ordered to be printed in the RECORD as follows:

[Postal telegram.]

CHARLESTON, S. C., *August 7, 1922*.

Hon. ELLISON D. SMITH,
Senator for South Carolina,
Washington, D. C.:

Request you vigorously oppose proposed tax on salt provided for in tariff pending. As operators Shipping Board tonnage have found it extremely difficult to obtain homeward cargoes which practically impossible make operations financial success without. If this tax incorporated in tariff when passed will preclude salt being imported this country, thereby depriving steamers of one of the few commodities on which they can depend for homeward revenue. Confident that even with salt on free list this industry amply protected, as reliably informed that imports amount to less than 1 per cent of the total quantity of salt produced United States.

THE CAROLINA CO.

[Western Union telegram.]

CHARLESTON, *S. C., August 7, 1922*.

Hon. ELLISON D. SMITH,
United States Senator, Washington, D. C.:

Take this opportunity vigorously protest through you against proposed tax on salt incorporated in Fordney bill now pending. Confident proposed tax 20 cents per hundred pounds will prevent completely importation of this commodity on which American merchant marine relies to material extent for homeward cargo which entirely essential for successful operation.

STREET BROTHERS.

[Postal telegram.]

CHARLESTON, S. C., *August 7, 1922*.

Senator ELLISON D. SMITH,
Washington, D. C.:

We wish to protest vigorously against Fordney bill pending proposing duty $4 per ton on salt imported. The upbuilding of our merchant marine is dependent to large extent on return cargoes from European ports. If this bill passes as now pending, it will positively prohibit importation of salt, and our vessels will be unable to secure return cargoes to South Atlantic ports.

CHARLESTON SHIPPING CO.

[Postal telegram.]

CHARLESTON, S. C., *August 7, 1922*.

Hon. E. D. SMITH,
Senator from South Carolina,
Washington, D. C.:

Regret exceedingly to learn proposed tariff carries tax on salt approximately $4 per ton, which if enacted will result in making it impossible to import salt, as for past year our longshoremen have been idle greater number of days than working. Salt is one of the particular commodities on which they rely for stevedoring work on inbound vessels.

CHARLESTON STEVEDORING CO.

Mr. McCUMBER. Mr. President, I offer the following amendment to section 315, and certain minor amendments to sections 316 and 317.

Mr. UNDERWOOD. I ask that the amendments may be read.

The PRESIDENT pro tempore. The Secretary will read the amendments offered by the Senator from North Dakota.

The reading clerk read as follows:

On page 272, strike out all of the matter beginning with line 3 down to and including line 19, on page 276, and insert in lieu thereof the following:

"SEC. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in conditions of competition in the principal markets of the United States of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth of product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in conditions of competition he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or forms of duty or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in conditions of competition necessary to equalize the same in such markets of the United States. Sixty days after the date of such proclamation or proclamations such changes in classifications or in forms of duty shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such merchandise when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per cent of the rates specified in Title I of this act, or in any amendatory act.

"(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in conditions of competition in the principal markets of the United States of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of foreign countries, shall find it thereby shown that the duties prescribed in this act do not equalize said differences, and shall further find it thereby shown that the said differences can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the class or kind of merchandise to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported merchandise upon which the President has made a proclamation under subdivision (b) of this section.

"The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in conditions of competition in the principal markets of the United States necessary to equalize the differences so found in said conditions of competition, but no such rate shall be decreased or increased more than 50 per cent of the rate specified in Title I of this act upon such merchandise. Such rate or rates of duty shall become effective 60 days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such merchandise when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of merchandise, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this act.

"(c) That in ascertaining the differences in conditions of competition, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar merchandise in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign merchandise in the principal markets of the United States, but in considering prices as factors in ascertaining differences in conditions of competition, only reasonable profits shall be allowed; and (3) any other advantages or disadvantages in competition. In any investigation under the provisions of this section hearings shall be held and a reasonable opportunity to be heard shall be afforded.

"The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the competitive advantages have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer from the dutiable list to the free list or from the free list to the dutiable list. Whenever it is provided in any paragraph of Title I of this act that the duty or duties shall not exceed a specified ad valorem

rate upon the merchandise provided for in such paragraph, no rate determined under the provision of this section shall exceed the maximum ad valorem rate so specified.

"(d) For the purposes of this section any coal-tar product provided for in paragraphs 25 or 26 of Title I of this act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

"(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

"(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported merchandise of the class or kind of merchandise upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry."

On page 279, line 10, strike out "such merchandise" and insert in lieu thereof "merchandise imported in violation of this act."

On page 279, line 22, strike out "shall find as a fact" and insert in lieu thereof "has reason to believe."

On page 284, after line 19, insert a new section to read as follows:

"SEC. —. (a) That in order to secure information and to assist in carrying out the provisions of sections 315, 316, and 317 it shall be the duty of the United States Tariff Commission, in addition to the duties now imposed upon it by law, to—

"(1) Ascertain conversion costs and costs of production in the principal growing, producing, or manufacturing centers of the United States of articles of the United States, whenever in the opinion of the commission it is practicable;

"(2) Ascertain conversion costs and costs of production in the principal growing, producing, or manufacturing centers of foreign countries of articles imported into the United States, whenever in the opinion of the commission such conversion costs or costs of production are necessary for comparison with conversion costs or costs of production in the United States and can be reasonably ascertained;

"(3) Select and describe articles which are representative of the classes or kinds of articles imported into the United States and which are similar to or comparable with articles of the United States; select and describe articles of the United States similar to or comparable with such imported articles; and obtain and file samples of articles so selected, whenever the commission deems it advisable;

"(4) Ascertain import costs of such representative articles so selected;

"(5) Ascertain the grower's, producer's, or manufacturer's selling prices in the principal growing, producing, or manufacturing centers of the United States of the article of the United States so selected; and

"(6) Ascertain all other facts which will show the differences in or which affect competition between articles of the United States and imported articles in the principal markets of the United States.

"(b) When used in this section—

"The term 'article' includes any commodity, whether grown, produced, fabricated, manipulated, or manufactured;

"The term 'import cost' means the price at which an article is freely offered for sale in the ordinary course of trade in the usual wholesale quantities for exportation to the United States plus, when not included in such price, all necessary expenses, exclusive of customs duties, of bringing such imported articles to the United States.

"(c) In carrying out the provisions of this section the commission shall possess all the powers and privileges conferred upon it by the provisions of Title VII of the revenue act of 1916, and in addition it is authorized, in order to ascertain any facts required by this section, to require any importer and any American grower, producer, manufacturer, or seller to file with the commission a statement, under oath, giving his selling prices in the United States of any article imported, grown, produced, fabricated, manipulated, or manufactured by him.

"(d) The commission is authorized to establish and maintain an office at the port of New York for the purpose of directing or carrying on any investigation, receiving and compiling statistics, selecting, describing, and filing samples of articles, and performing any of the duties or exercising any of the powers imposed upon it by law.

"(e) The United States Tariff Commission is authorized to adopt an official seal, which shall be judicially noticed.

"(f) The second paragraph of section 706 of the revenue act of 1916 is amended to read as follows:

"'Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any district or territorial court of the United States or the Supreme Court of the District of Columbia in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.'"

Mr. UNDERWOOD and Mr. FRELINGHUYSEN addressed the Chair.

The PRESIDENT pro tempore. The Senator from Alabama.

Mr. UNDERWOOD. I should like to ask the Senator in charge of the bill a question. The amendment which has just been read is an amendment to the bill as reported. Without a careful comparison it is difficult to understand where the changes have been made, and I wanted to ask the Senator before the debate proceeds if he would not state to the Senate the exact changes, so that many of us may be saved the burden of making the comparisons.

Mr. McCUMBER. I intended to do that; to go right on with the discussion of the whole matter, but to introduce it by a statement as to the particular changes which have been made.

Mr. UNDERWOOD. I thought the Senator from New Jersey [Mr. FRELINGHUYSEN] was about to discuss the amendment, but before it was discussed I should like to know just what the points of difference are. If it will not inconvenience the Senator, I should like to have him make not an argument as to the reason why the changes have been made but a statement as to the manner in which the provision as reported has been changed by the proposed amendment.

Mr. McCUMBER. I should like to take up the whole question at one time, but I will first explain the differences between the amendment now presented and the amendment as originally reported in the bill. Those differences are very slight, indeed.

Mr. FRELINGHUYSEN and Mr. WALSH of Montana addressed the Chair.

The PRESIDENT pro tempore. Does the Senator from North Dakota yield; and if so, to whom?

Mr. McCUMBER. I yield to the Senator from New Jersey.

Mr. WALSH of Montana. If the Senator from New Jersey desires to address the Senate, I wish to make a suggestion.

Mr. FRELINGHUYSEN. It is only my purpose to offer a substitute for the last amendment, beginning on page 6, in line 18, together with additional sections.

Mr. WALSH of Montana. I wish to submit an observation. That part of the amendment tendered by the Senator from North Dakota this morning, to which the Senator from New Jersey now addresses himself, appertains rather to the subject of amendments to the Tariff Commission act than to paragraphs 315, 316, and 317. I understood that we were to take them up this morning in this order, namely, paragraph 315, paragraph 316, and paragraph 317, so that when those paragraphs are disposed of it seems to me it would be appropriate to take up in connection with amendments to the Tariff Commission act the concluding portion of the amendment now tendered by the Senator from North Dakota.

Mr. McCUMBER. The Senator is correct, and that is the intention.

Mr. FRELINGHUYSEN. Mr. President, I send to the desk a proposed substitute for the last portion of the committee amendment, beginning in line 18, page 6. This amendment practically recites the provisions of the committee amendment, with the addition of several sections. The committee have been agreeable to a portion of the original amendment which I introduced, and I am very glad that they have seen fit to include it in the amendment submitted by the committee. However, I do not feel that the committee have gone far enough in accepting the amendment that I originally proposed. I differ with the committee, and our differences are fundamental.

Mr. WALSH of Montana. Mr. President, a parliamentary inquiry.

The PRESIDENT pro tempore. The Chair desires to make an inquiry. Has the Senator from North Dakota yielded the floor.

Mr. McCUMBER. If the Senator from New Jersey is going to make a speech I do not want it to be charged up to my time. I have yielded the floor without making my speech, and the Senator can take his time, and I will proceed after he is through.

Mr. WALSH of Montana. Mr. President, a parliamentary inquiry.

The PRESIDENT pro tempore. The Chair thinks that under the unanimous-consent agreement the Senator from New Jersey must confine himself to section 315.

Mr. FRELINGHUYSEN. May I be permitted to offer at this time a substitute for the amendment submitted by the committee?

The PRESIDENT pro tempore. The Chair is of the opini n that under the unanimous-consent agreement section 315 must be first considered.

Mr. FRELINGHUYSEN. I do not intend to make a speech on this amendment. I intend to offer a substitute, and explain why I am offering it. Am I in order?

The PRESIDENT pro tempore. The Chair believes that the Senator from New Jersey must defer offering his amendment until after section 315 is disposed of.

Mr. FRELINGHUYSEN. May I offer the amendment to the present amendment offered by the committee, and ask that it be read?

The PRESIDENT pro tempore. Is there objection? The Chair hears none, and it will be read.

The READING CLERK. On page 284, after line 19, it is proposed to insert the following new section——

Mr. FRELINGHUYSEN. Mr. President, I think I can save the time of the Senate by making a suggestion. I simply want two paragraphs of this amendment read. It is similar to that offered by the committee.

Mr. UNDERWOOD. I think it is an important matter, and if it is going to be presented by way of amendment I wish the Senator would allow it to be read.

Mr. FRELINGHUYSEN. Very well.

The READING CLERK. On page 284, after line 19, it is proposed to insert the following new section:

SEC. —. (a) That in order that the necessary data may be provided (1) to determine and fix the proper rates of duty to equalize wherever possible differences in conversion costs of articles grown, produced, or manufactured in the United States and of articles grown, produced, or manufactured in foreign countries and differences in competitive conditions in the principal markets of the United States, and (2) to amend from time to time the existing rates or forms of duty on one or more articles, as economic or industrial conditions change, in addition to the duties imposed by law, the United States Tariff Commission shall—

(1) Ascertain conversion costs in the principal growing, producing, or manufacturing centers of the United States of articles of the United States, whenever in the opinion of the commission it is practicable;

(2) Ascertain conversion costs in the principal growing, producing, or manufacturing centers of foreign countries of articles imported into the United States, whenever in the opinion of the commission such conversion costs are necessary for comparison with conversion costs in the United States and can be reasonably ascertained;

(3) Ascertain costs of production in the United States, whenever in the opinion of the commission it is practicable;

(4) Select and describe articles which are representative of the classes or kinds of articles imported into the United States and which are similar to or comparable with articles of the United States; select and describe articles of the United States similar to or comparable with such imported articles; and obtain and file samples of articles so selected, whenever the commission deems it advisable;

(5) Ascertain import costs of such representative articles so selected;

(6) Ascertain the grower's, producer's, or manufacturer's selling price in the principal growing, producing, or manufacturing centers of the United States of the articles of the United States so selected; and

(7) Ascertain all other facts which will show the differences in or which affect competition between articles of the United States and imported articles in the principal markets of the United States.

(b) When used in this section—

The term "article" includes any commodity, whether grown, produced, fabricated, manipulated, or manufactured;

The term "conversion cost" means the cost of growing, producing, fabricating, manipulating, or manufacturing an article, including the cost of material as to which there is no prior ascertained cost of conversion;

The term "import cost" means the price at which an article is freely offered for sale in the ordinary course of trade in the usual wholesale quantities for exportation to the United States plus, when not included in such price, all necessary expenses, exclusive of customs duties, of bringing such imported article to the United States.

(c) Not later than December 1, 1923, and at least once every six months thereafter, the commission shall report to Congress the results of the investigations completed at the time of the report showing—

(1) The conversion costs in the United States;

(2) The conversion costs of articles imported into the United States;

(3) The differences between such conversion costs;

(4) The costs of production in the United States;

(5) The scope and methods of the investigations for ascertaining or determining and the items of cost included within such conversion costs and costs of production;

(6) The differences between import costs and selling prices, ascertained in accordance with the provisions of subdivision (a) of this section;

(7) The differences in competitive conditions in the principal markets of the United States;

(8) The rate or rates of duty which it deems necessary to equalize, such differences in conversion costs, import costs, and selling prices, and in such competitive conditions, the proper classification, and whether the duty should be specific, ad valorem, or ad valorem and specific; and

(9) The probable effect in dollars, as nearly as it can be estimated, of each rate proposed as it affects American growers, producers, manufacturers, and consumers; and the probable revenue to be derived from the imposition of each duty.

(d) In carrying out the provisions of this section, the commission shall possess all the powers and privileges conferred upon it by the provisions of Title VII of the revenue act of 1916, and in addition it is authorized in order to ascertain any facts required by this section to require any importer and any American grower, producer, manufacturer, or seller to file with the commission a statement under oath giving his selling prices in the United States of any article imported, grown, produced, fabricated, manipulated, or manufactured by him.

(e) Any commissioner, officer, employee, or agent of the commission who divulges any information or data received relating to the importation, growth, production, fabrication, manipulation, manufacture, or sale of a specific article, except in a report under the provisions of this section or except in so far as he is directed by the commission or by a court of the United States or a judge thereof or by a committee of the Senate or the House of Representatives, and any person who knowingly solicits or receives any such information or data from any such commissioner, officer, employee, agent, or adviser, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisonment for not more than two years or by both such fine and imprisonment.

(f) The commission is authorized to establish and maintain an office in the principal customs port of entry of the United States, or elsewhere, for the purpose of directing or carrying on any investigation, receiving and compiling statistics, selecting, describing, and filing samples of articles, and performing any of the duties or exercising any of the powers imposed upon it by law.

(g) A copy of each report to Congress, under the provisions of subdivision (c) of this section, shall be forwarded to the President, and the President is authorized to require such additional reports and facts as he deems necessary.

(h) The first sentence of section 701 of the revenue act of 1916 is amended to read as follows:

"SEC. 701. That each member shall receive a salary at the rate of $10,000 per annum."

Mr. FRELINGHUYSEN. I ask that the amendment be printed immediately for the information of the Senate.

The PRESIDENT pro tempore. It will be so ordered.

Mr. STERLING. Mr. President, on yesterday I presented an amendment as a substitute for subdivisions (a) and (b) of section 315. I am not offering it now at all; it probably would be improper for me to do so; but I think it would be proper to ask that it be read at the desk at this time. I understand that there is no objection on the part of the chairman of the committee, and I ask that it be read.

Mr. POMERENE. Mr. President, I am not sure that I understood the Senator. Does he mean that he has offered it as a substitute?

Mr. STERLING. I am not offering it at the present time, but I think it would be proper to have it read at the present time.

Mr. POMERENE. But is it to be, when offered, a substitute for——

Mr. STERLING. A substitute for subdivisions (a) and (b) of section 315.

Mr. POMERENE. I know, but of the amendment as originally offered by the Finance Committee or the one offered this morning?

Mr. STERLING. It was drawn to be offered as a substitute for the original offering of the committee.

The PRESIDENT pro tempore. If there be no objection, the Secretary will read the proposed amendment.

The READING CLERK. Beginning on page 272, line 3, it is proposed to strike out down to and including line 19, on page 274, being all of subdivisions (a) and (b) of section 315, and to insert in lieu thereof the following:

SEC. 315. (a) In fixing the rates of duty provided for in this act it is hereby declared to be the purpose of Congress to equalize the differences in conditions of competition in trade in the markets of the United States in articles wholly or in part the growth or product of the United States and in like or similar articles which are wholly or in part the growth or product of competing foreign countries. For the purpose of assuring such equalization the President is authorized to at any time request in writing an investigation by the Tariff Commission of the differences in conditions of competition of any such article or articles. It shall be the duty of the Tariff Commission, upon such request, to investigate said differences in conditions of competition, taking into account differences in conversion costs and costs of production in the United States and in such competing foreign countries and also the costs of importation of any such article or articles, and upon conclusion of such investigation to make report of its findings of facts to the President, including a finding as to what duty or duties in the opinion of the commission are necessary to equalize differences in conditions of competition in trade in the markets of the United States.

If it be found on such investigation that any duty fixed in this act does not equalize the said differences in conditions of competition in trade, the President shall then, upon and according to the findings reported by said commission, have authority to determine and proclaim the changes in classification or forms of duty or the increase or decrease in any rate of duty provided in this act which is shown by any ascertained differences in conditions of competition in trade to be necessary in order to equalize said conditions in the markets of the United States. That 30 days after the date of such proclamation or proclamations such changes in classification or in forms of duty shall take effect and such increased or decreased duties shall be levied, collected, and paid on such merchandise when imported directly or otherwise from the country of origin into the United States: *Provided*, That until further provided by law the total increase or decrease of such rates of duty shall not exceed 50 per cent of the rates specified in this act or in any amendatory act.

(b) If any investigation and report by the Tariff Commission made on the request of the President shall disclose the fact that an industry in the United States is being or is likely to be materially injured by reason of the importation into the United States of foreign merchandise, and if it shall be further shown by such investigation and report that the value of said foreign merchandise as determined under provisions of paragraphs (1), (2), or (3) of subdivision (a) of section 402 of this act is not a certain basis for the assessment of particular duties, the President shall by proclamation make such findings public, together with a description of the class or kind of merchandise to which they apply and in such detail as he may deem necessary for the guidance of appraising officers; that in such cases and upon the proclamation by the President becoming effective as hereinafter provided the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this act, of any similar competitive article manufactured or produced in the United States and embraced within the class or kind of imported merchandise upon which the President has made public such a finding and proclamation.

That the ad valorem rate or rates of duty based upon such American selling price shall be the rate found upon said investigation by the Tariff Commission to be necessary to equalize the said differences in conditions of competition of trade in the markets of the United States, but no such rate shall be decreased or increased more than 50 per cent of the rates specified in Title 1 of this act upon such merchandise. Such rate or rates of duty shall become effective 30 days after the date of the said proclamation of the President, whereupon the duty so estimated and provided shall be levied, collected, and paid upon such merchandise in the manner herein provided when imported directly or otherwise from the country of origin into the United States.

Mr. McCUMBER. Mr. President, I desire to say, first, that there has been very little change made in section 315. It is shortened by the proposed amendment; it is more logical, I think, in its construction. It makes clear that which was not clear in the original amendment—that the President shall not

use the American-valuation basis for levying a duty until he has ascertained that the duties which he might levy by an increase of 50 per cent upon the foreign valuation will not effectuate the purposes of the section, and he is to go to the American-valuation basis only when he has ascertained the impossibility of effectuating the purpose by imposing the rate upon the foreign-valuation basis, and has proclaimed that fact, and has, in addition, proclaimed the rate necessary to effectuate that purpose upon the American selling price basis.

Subdivision (c) specifically provides that the President shall not make any change which will raise the duty where the law itself has fixed a maximum rate of duty. That change is in addition to the modification of the amendment as originally proposed.

Mr. UNDERWOOD. Will the Senator allow me to ask him what he means by fixing a maximum rate of duty? Does he mean that if the duty is specific the President can not change it?

Mr. McCUMBER. No; I mean that where the law provides, as in the case of gloves, for instance, that no rate shall be higher than 75 per cent. In the other case it is not a maximum rate.

Mr. UNDERWOOD. Where Congress fixes a specific rate, of course, it has fixed by that the maximum and the minimum. I merely wanted the Senator to make the point clear.

Mr. McCUMBER. The point is clearly expressed that it is only in those cases where the law has declared that the rate shall not exceed a specified ad valorem rate. The President is not authorized to make any change where the law so declares.

Mr. SIMMONS. Mr. President, in the bill a maximum ad valorem rate is fixed, based upon the foreign valuation. The Senator means that if the President shall substitute, in the case of any particular article, the American valuation for the foreign valuation, then the maximum rate fixed in the bill upon the foreign valuation shall apply to the American valuation as fixed by the President?

Mr. McCUMBER. I do not think I quite understand the question of the Senator.

Mr. SIMMONS. In the bill maximum rates are fixed upon the foreign valuation. Now it is proposed to authorize the President, under certain conditions, with respect to certain articles, to substitute the American valuation. If he substitutes the American valuation in the case of an article on which we have fixed a maximum rate, will that maximum rate mean the maximum rate as applied to the American valuation, or as applied to the foreign valuation?

Mr. McCUMBER. It will leave it as applied to the foreign-valuation basis. Under the amendment as drawn the President has no authority to increase by any process a duty beyond that which the law itself declares to be the maximum, no matter whether he should take the foreign valuation or should accept the American valuation. If it would raise that duty so that it would be more than what was fixed by the law upon the foreign valuation, he would be prohibited from exercising his judgment on it.

There is another change. We have provided by this amendment that the President shall take into consideration a large number of conditions which we specify in fixing the rate, such as the difference in the costs of production, the difference in wages, and the difference in the wholesale selling prices; but we have provided against what we regarded as a possible danger, and that is the danger of the American or any selling price of an article being based upon huge profits. Therefore, so far as the question of the selling price is considered as affecting the differences in conditions of competition, the President is limited to an allowance of only reasonable profits in determining what the rate should be.

Again, Mr. President, we have inserted in the amendments which we have offered the provisions contained in the amendment offered by the Senator from South Dakota [Mr. STERLING], and also the provisions contained in the amendment offered by the Senator from New Jersey [Mr. FRELINGHUYSEN]. I think we have inserted practically all of them but subdivision 8 of subdivision (c) of the amendment offered by the Senator from New Jersey.

The amendment of the Senator from New Jersey [Mr. FRELINGHUYSEN] practically states that the Tariff Commission shall fix the equalizing rates—that is, if they recommend to the President what rates or what changes in classifications or forms are necessary, they thereby directly advise the President, of course, that he should follow their advice. The committee thought it hardly proper to place in the hands of a commission composed of three possibly ardent free traders, and three possibly ardent high protectionists, the duty of ascertaining and fixing those rates. We say to that commission, "Ascertain all of the facts essential to advise the President," but we do not say to that commission, "You shall also advise how he shall make these rates to comply with the provision of the law."

I am very doubtful if the six of them could agree upon the proper rate. The free trader would regard a very low rate as the proper rate. A high protectionist, I think, would possibly look at it from an entirely different standpoint, and would advocate a different rate; but when we ask them to get the facts, we do not care whether they are bipartisan or nonpartisan, they can possibly agree upon certain facts, which we ask them to ascertain.

Mr. UNDERWOOD. Will the Senator, for information, allow me to ask him another question?

Mr. McCUMBER. Certainly.

Mr. UNDERWOOD. I understand, then, the proposed amendment does not require or expect the commission to report to the President anything but facts, and does not expect them to report to the President the conclusions based on the facts they ascertain?

Mr. McCUMBER. That is correct.

Mr. UNDERWOOD. Does the Senator, then, think that if this should become a law the President of the United States would have either the time or the opportunity to take the facts presented to him and work out a conclusion from those facts, in the many intricate cases which arise in the consideration of a tariff?

Mr. McCUMBER. I do.

Mr. UNDERWOOD. I do not think the President of the United States would have a chance to do much else, then.

Mr. McCUMBER. I do not want the President to be governed entirely by even the facts which the Tariff Commission may find. We have our Department of Commerce at work gathering statistics and data. We also have our State Department at work gathering statistics and data, and I want the President to have authority to deal with all of them.

Mr. UNDERWOOD. If the Senator will allow me, of course I am very much opposed to the proposal of the Senator. I think this power should continue to be vested in Congress. But if you are going to take away this power from the representatives of the people and put it in the Executive, I have no objection to putting the responsibility on the President, the highest officer in the executive branch of the Government; but I do say that if you are going to do that, it seems to me reasonable that the men who ascertain the facts should also report their conclusions, not that the President should be bound by their conclusions but that he should have the benefit of their conclusions after they have investigated the facts. I see no reason against that——

Mr. McCUMBER. Mr. President, I have but one hour to present my views.

Mr. UNDERWOOD. Let me finish this and I will not interrupt the Senator further. I see no reason against that, unless you expect this commission to report the facts officially and their conclusions unofficially, and not let the country and the Congress have the benefit of their reasoning in considering the matter.

Mr. McCUMBER. Mr. President, if the Senator will read over carefully the directions given to the Tariff Commission, I think he will find that they are to present to the President all facts necessary for almost immediate conclusion as to the rate of duty. I do not want to convert the Tariff Commission into an organ to make tariffs for the United States. I do not want even to introduce that idea. I agree with the Senator entirely that the policy of levying tariffs and the rates on each particular matter is a policy that should always be left to the good judgment of Congress, and we can lay down no general rule under which it would be safe to place the tariff rate-making power in a commission. But the exigencies of the chaotic condition that now confronts us in the commercial world are the only justification for the added power that is to be given the President, and I want it taken away just as soon as those exigencies no longer exist.

Mr. SIMMONS. Mr. President, will the Senator allow me to ask him just one brief question?

Mr. McCUMBER. Very well.

Mr. SIMMONS. I ask the Senator if under the amendment in any case the President can raise the rate without first having an investigation made by the Tariff Commission and a report?

Mr. McCUMBER. He must have an investigation made before he can raise the rate and a full hearing must be given. The source of his information for the most part must necessarily be the Tariff Commission, but he may have information from the other departments, which would also guide him.

Mr. SIMMONS. But he can not act without a report from the Tariff Commission?

Mr. McCUMBER. He can not act without a report and without a full hearing and a declaration of what he finds.

Mr. WALSH of Montana. May I remark that there does not seem to be anything in the amendment which requires him even to consult the Tariff Commission?

Mr. McCUMBER. We provide that for the purpose of assisting the President to fix the rates of duty the Tariff Commission shall furnish certain information and investigate certain things. That is for the purpose of his using that information, of course. None of us want to say that he shall close his eyes to any other information or, if he has from the Federal Trade Commission information which the Tariff Commission does not have and which the Federal Trade Commission have obtained through investigation, that he must wait until the Tariff Commission have duplicated their efforts.

Mr. SIMMONS. I fully understood that the President might act on outside information that he saw fit to obtain from any sources, but the question I had in mind was whether the Senator thought his amendment sufficiently mandatory upon the President to take from him the right to increase the rate without an investigation and report by the Tariff Commission. It did not seem to me that the amendment was quite strong enough for that purpose, that it was merely directory to the President but not mandatory at all.

Mr. McCUMBER. He has to have an investigation made. Under existing law the Tariff Commission is directed to furnish him information upon his request. I do not know how we could make it very much stronger unless we would say that he must wait for the Tariff Commission to act upon something which he may already have obtained from other departments of the Government.

Mr. POMERENE. Mr. President, will the Senator permit me to ask him a question?

Mr. McCUMBER. Certainly.

Mr. POMERENE. I would like the Senator to define a little more clearly, if he can, what is meant by the phrase "determine and proclaim the changes in classifications." I want to explain briefly, so that the Senator may answer me more directly. We do not have a duty on shoes; but suppose we had a duty on shoes and another duty on a certain completed manufactured article of leather, which would be an entirely different proposition. Does the Senator understand by that expression that the President could, in his wisdom, take shoes out of a paragraph which related exclusively to shoes and turn it over to another paragraph which related to other leather goods, thereby advancing the rate on shoes, and then change that rate 50 per cent upward or 50 per cent downward?

Mr. McCUMBER. No. I simply understand by change in classification that in the case of a paragraph containing many articles that it might become necessary to provide different specific or ad valorem or compound duties upon the different articles in the paragraph, in order to provide rates that will equalize competitive conditions. It will be noticed that it is provided that nothing in this section shall be construed to authorize a transfer from the dutiable list to the free list or from the free list to the dutiable list. I did not think that was necessary, but we wanted to make it certain that no claim could be made that he could or should so transfer an article.

Mr. POMERENE. I had that modification in mind, if the Senator will permit me to say so, but, nevertheless, under this provision if there was a duty of 50 per cent in one paragraph and 75 per cent in another paragraph, he could change it from the 50 per cent class to the 75 per cent class and also change it from specific to ad valorem or from ad valorem to specific, and then either add to or take from it 50 per cent. Is not that right?

Mr. McCUMBER. The adding to or taking from must not be more than 50 per cent upon the rate that is fixed by law if he increases it nor less than 50 per cent if he lowers it. If he changes it and puts it into another class which would give it a higher duty he certainly then could not increase that higher duty another 50 per cent. That would be violative of the law.

Mr. POMERENE. That is one of the things about which I have not been quite clear, because if it were a 50 per cent rate and was changed to another paragraph which had a 75 per cent rate, as I construe it, he could then change that rate and add 50 per cent to the 75 per cent.

Mr. McCUMBER. No; I do not think so. The only way he could accomplish that would be by going to the American valuation basis if he found the other valuation was insufficient.

Now, Mr. President, I want to give a little time to the consideration of the proposition that the section as a whole is an unconstitutional delegation of legislative power. Section 315a reads:

SEC. 315a. That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in conditions of competition in the principal markets of the United States of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in conditions of competition he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or forms of duty or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in conditions of competition necessary to equalize the same in such markets of the United States.

The bill then provides that 30 days after the date of the proclamation of such changes in the classification of forms of duty such increased or decreased duty shall be levied, collected, and paid on such merchandise so imported. By the same section it is then provided that the rates of duty shall not be increased or decreased more than 50 per cent of the rates specified in the bill.

Mr. POMERENE. Mr. President——

The PRESIDING OFFICER (Mr. OVERMAN in the chair). Does the Senator from North Dakota yield to the Senator from Ohio?

Mr. McCUMBER. I yield.

Mr. POMERENE. I think the Senator perhaps misstated or misread the word. As he quoted the section, he said within 30 days after the date, and so forth.

Mr. McCUMBER. We have changed that to 60 days.

Now, subdivision (b) of said section, after reciting the same as subdivision (a), provides that when the President shall find it shown by the investigation—

that the duties prescribed in this act do not equalize said differences, and shall further find it thereby shown that the said differences can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the class or kind of merchandise to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this act—

And so forth.

Subdivision (c) provides:

(c) That in ascertaining the differences in conditions of competition, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar merchandise in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign merchandise in the principal markets of the United States, but in considering prices as factors in ascertaining differences in conditions of competition only reasonable profits shall be allowed; and (3) any other advantages or disadvantages in competition.

It then provides that opportunity for hearing shall be given.

It will be observed, Mr. President, that the provisions of section 315 (a) and subdivisions (b) and (c) rest not alone upon the power of Congress to impose duties, but also upon the power of Congress to regulate commerce. The whole grant of the pertinent powers reposed by the Federal Constitution in Congress reads as follows, as found in article 1, section 8:

The Congress shall have power to lay and collect taxes, duties, * * * to regulate commerce with foreign nations.

And in subdivision 18:

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

I especially call attention to the fact that the Constitution not only grants the power to Congress to do these things but to make all other laws necessary or proper to make them effective.

Returning now to section 315, subdivision (a), of the bill, it will be noted, first, that the proposed law rests upon the authority to regulate commerce as well as on the authority to collect duties; second, that the President is directed to investigate conditions of competition between domestic and foreign merchandise in the principal markets of the United States, and in such investigation he must find that the duties fixed in the act do not equalize the differences in conditions of competition; third, he must ascertain what those differences are; and, fourth, he must then proclaim the changes either in classification or form of duties or the increase or decrease in any rate of duty necessary to equalize the conditions of competition in the principal markets of the United States.

Mr. President, are the powers granted the President as herein stated in violation of the Federal Constitution? It is charged that this power is violative of the Constitution, upon the ground that it is a delegation of legislative power to the President.

In order to narrow this proposition down to only those questions as to which there may be a clear difference of opinion, we may, by a process of elimination, bring into relief the real debatable questions. We all agree, Mr. President, to the rule

so tersely stated in many legal opinions on that subject that "while the legislature can not delegate its power to make a law it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own act depend."

No one at this time, Mr. President, will deny that Congress may delegate to the President the mere administrative duty of ascertaining the difference between the cost of producing an article in a foreign country and the cost of producing a comparable article in this country, and after ascertaining that difference to apply a rate of duty upon the foreign article that will equal the difference. I think we all agree to that.

Mr. POMERENE. Mr. President——

The PRESIDING OFFICER. Does the Senator from North Dakota yield to the Senator from Ohio?

Mr. McCUMBER. I yield.

Mr. POMERENE. Right in connection with the point that the Senator from North Dakota is now making, I wish to put a question to him. As I understand him, under the decision of the Supreme Court involving similar provisions of the McKinley law it was said, in substance, that when the President found a certain state of facts then a certain specific rate of duty should obtain?

Mr. McCUMBER. Yes.

Mr. POMERENE. Does the Senator from North Dakota distinguish between such a case and a case where the President is given the authority either to increase or decrease the rate to any point within the 50 per cent limit?

Mr. McCUMBER. Mr. President, I will answer that question. We may authorize the President to ascertain the difference in the cost of production of an article at home and abroad; we may say that if he finds that the difference in the cost of the production of an article at home and abroad equals 50 per cent of the foreign valuation he shall apply that 50 per cent as the basis of a duty. He may do that, if we say that that is the rule, just as well as if we said that he might fix certain duties. That is all. He may find that it costs $1 to produce an article in Great Britain and that it costs $1.25 to produce it in the United States, and we declare the policy to be that the President shall fix a duty that will equalize those two costs of production. I am not saying that is what we proposed to do in this instance, for we do not; but I am citing that as one of the things as to which I think we all agree, under all of the authorities, might be done without questioning the constitutional authority.

Mr. JONES of New Mexico. Mr. President——

Mr. McCUMBER. I really wished to give an hour to this subject, and I think I have not over 15 minutes remaining.

Mr. JONES of New Mexico. I am sure we will all consent that the time of the Senator from North Dakota may be extended, for I believe that it will be necessary. I should like to get the view of the Senator upon one phase of his proposition to which he suggests we will all agree, and that is that we could authorize the President of the United States to ascertain the difference in the cost of production at home and abroad and specify a rate of duty which will equalize that difference. That on its face looks like a very simple proposition, and if there were only one concern in the United States producing a given article and if there were only one concern abroad producing the given article, possibly it would be a simple process; but does not the Senator recognize that there is a vast difference between that simple statement and the conditions which actually exist? We have in this country, for instance, a number of concerns producing steel products——

Mr. McCUMBER. I think I can understand what the Senator is driving at, and I can answer the question very quickly.

Mr. JONES of New Mexico. There are a number of concerns producing various other commodities in this country and many concerns producing similar commodities abroad and their costs vary in great degree.

Mr. McCUMBER. I will answer the question. Mr. President, there are a great many foreign producers of many articles that are imported into the United States. Articles are produced in France; similar articles are produced in Great Britain; they are produced in the different cities in the same country, and they are sold at varying prices; yet the appraiser must find the selling price in wholesale quantities in the particular market of exportation. We are granting no wider power than that when we provide that the President shall find the difference between the costs of production. He will have to take the general cost, just the same as the appraiser has to arrive at a general selling price in the place of production, and he may take one city instead of another, and there is no appeal from the decision. The power is granted in a thousand different ways.

Mr. SIMMONS. Mr. President, may I ask the Senator just one question?

The PRESIDING OFFICER. Does the Senator from North Dakota yield to the Senator from North Carolina?

Mr. McCUMBER. Yes.

Mr. SIMMONS. Suppose the President finds that the wholesale selling price of an article imported from France is one thing and of an article imported from Italy is another thing, and of an article imported from Great Britain is another thing, will he make his finding so as to apply only to the article from Great Britain or only to the article from France, or will he make it apply to importations from all three of those countries, notwithstanding the difference in the selling price?

Mr. McCUMBER. It so happens that when we attempt to equalize conditions in trade we equalize them on the competitive article. Articles that are competitive in one country may not be competitive in another; articles from one country may be driven out of the market entirely. The President can find the source from which the dangerous competition arises, and he must guard against that particular source, even though it may exclude the importations from another country, if it is the source that threatens to destroy or injure the competition in the markets of the United States. That is the case with all our tariffs. The pending bill as it is written excludes many articles from Great Britain that may be imported from France and from Germany.

Mr. SIMMONS. So that, as I understand—and I simply wanted to understand the Senator's position—if the President finds that the competition which is disadvantageous to the United States comes from Italy, he would base his final conclusion and action upon the difference in the cost between Italy and this country.

Mr. McCUMBER. Certainly.

Mr. SIMMONS. Although his action might not be justified if it were based upon the cost in Great Britain.

Mr. McCUMBER. Yes; the Senator is correct.

Mr. President, I think it can not be denied that the President can fix a rate of duty that will measure the difference in the cost of production after he has found it. That is a simple proposition. Likewise, I think that the President may be directed to ascertain the wholesale market price of a comparable article in this and a foreign country and apply a rate of duty which will equalize the difference in the two, if we declare that that is our policy, that we want to equalize the selling price of the competitive articles in this country; in other words, it is not necessary that Congress should prescribe just what the rate should be, but it may leave the fixing of that rate to the President in accordance with the rules provided in the law itself.

But, Mr. President, the mere difference between the cost of production in two countries or the mere difference between the selling prices of two articles in the respective countries may not be regarded by Congress to be a sufficient protective duty, and so Congress may direct the President to ascertain the cost of transporting the article from the foreign country to the principal market in this country and also ascertain the cost of transporting a comparable article from the field of production in this country to the field of consumption in this country. We do not give him that power in this bill, but I say we could give him that power, and he could take that as a basis in addition to the other bases in determining what should be a rate of duty that would equalize the two.

Mr. JONES of New Mexico. Mr. President——

The PRESIDING OFFICER. Does the Senator from North Dakota yield to the Senator from New Mexico?

Mr. McCUMBER. I do.

Mr. JONES of New Mexico. I should like to make an inquiry regarding that matter. May I inquire to what point in the United States transportation cost would be accepted as the actual cost for the purpose of fixing the duty?

Mr. McCUMBER. Mr. President, it will be observed that in the authority to take into consideration matters which shall guide the President's judgment we have left out of that consideration entirely the question of transportation. Of course, the question of transportation necessarily does figure in the question of competition; but no one wished to give the President the power to take every unimportant article that is produced in a section of the country so far distant that the freight itself would be many times what the article would be worth in the field of consumption under the ordinary tariff duties.

Mr. JONES of New Mexico. Mr. President, if I may be permitted, in order to give point to my inquiry——

The PRESIDING OFFICER. Does the Senator further yield?

Mr. McCUMBER. I yield for a question.

Mr. JONES of New Mexico. I have in mind the fact that the cost of transportation of chinaware from Japan to the United States is about two or three times as much as it is from Europe to the United States, and there would be the question of the difference in cost of transportation from the different countries of the world. Who would make the choice and say what should be the one transportation charge which should be used in fixing the rate?

Mr. McCUMBER. The real thing that the President is to determine is the conditions of competition in our own markets. The article is brought here. It is sold here. The comparable American article is produced here. It is sold here. Reduced down to the final result, the real question is the question of the wholesale quantities in the markets of the United States; but all of these things may be investigated and considered.

So, Mr. President, an export duty levied against or a subsidy given to any article of any country of export may, with equal propriety, be submitted to the President for investigation, with directions to make due allowance for it in arriving at an equalizing duty. So of the difference in exchange and so of any other advantage or disadvantage. In every one of these cases the Senator from Montana and every other Senator must concede that the power to find the facts and apply the rate necessary to equalize the conditions of competition in the United States market may be delegated to the President for the purpose of equalizing conditions of competition in the home market. In this case Congress makes the law and prescribes the conditions under which it is to be made applicable. The President performs only the administrative duty of ascertaining the facts and applying the law to those facts to bring about the result sought under the law. To be sure, the supposed cases are all simple and generally easy of ascertainment; but once admit the principle, and the complexity of or difficulty in the ascertainment of the governing facts can not overturn or destroy the rule.

So far I have cited no adjudications to prove these premises, not because of a lack of them but because they are so numerous that the principle enunciated has become a fundamental and nonassailable rule. I shall, however, present the leading cases in a more general and comprehensive brief which I shall ask later may be printed in the RECORD.

The PRESIDING OFFICER. Without objection, leave is granted.

Mr. McCUMBER. Now let us analyze section 315 in the light of the rule. Does that section in a single respect transgress or overleap the bounds of this simple rule?

In these supposed cases, Mr. President, the guide or standard to which we direct our investigation and for which we apply our ascertained necessary rate is equality of competition. We apply whatever rate is necessary to equalize the differences which the investigation discloses. The methods by which we seek to equalize these conditions may be more circuitous and the means of equalizing the advantages and the disadvantages in competition may be less direct and simple, but they reach to the same ultimate purpose—equality in competition.

Note first, Mr. President, that this section starts out with a declaration of congressional purpose. It declares—

> That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended—

And so forth. Now, what are the purposes and what is the policy "by this act intended"? Why, Mr. President, they are specified in the title itself:

> To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States—

Those are the three principal purposes.

To encourage the industries of the United States, to what extent is the policy of protection to be carried? That question is answered in this very section 315. The whole section might be summed up in the single phrase "equal opportunity of competition in the American markets." That is the policy; that is its limit; that is just what the President is directed to bring about by the application of the necessary rate to equalize competitive conditions.

What must the President do under this section? He must first investigate the difference in conditions of competition in our own principal markets between a foreign article and a comparable domestic article. What next? He must then find whether the duties fixed in the act itself do or do not equalize said differences in conditions of competition. What next? If he finds such duties do not equalize said differences, he must then ascertain just what duties will equalize them. What next? He must then either change the classification or the form of duty or he must either increase or decrease the rate provided in this bill. He may do one or he may do all three of these things necessary to bring about the result sought by Congress, namely, equality in competition.

It may be here stated in passing that while the President is authorized to change the classification in form, or the rate, the change, after all, is to effect a decrease or an increase in the duty. He may put an article into one class which, by virtue of that classification, would impose a higher rate of duty upon it, or in another class which would impose a lower rate of duty. He could change a specific to an ad valorem, or an ad valorem to a specific; but in either instance all he does in the final result is to raise or lower the duty to be paid.

We seek here to establish a relation of equality in conditions of competition in our markets. That is the real objective, and it must not be subordinated to the means, the mere evidential facts by which it is to be established.

Two men may work out a mathematical problem, each in a different way, and arrive at the same accurate solution. So Congress may direct the President to bring about an accurate result by the application of one or two or three designated methods, or by a combination of any of them that will bring about the result.

The objection that there is a discretion vested in the President as to which one of these rules he will apply is not, to my mind, a valid objection. The real thing is the result to be attained. If we wish to arrive at the result number 9, it makes no difference whether we use the formula $3\times2+3$ or use the formula $4+5$. In either instance we arrive at 9, the result we want. The law directs the President to act, and the law may direct him to act only in one way or direct him to act in one of two or three different ways, whichever seems best to effectuate the purpose.

In most of these cases there must necessarily be left to the officer a degree of discretion. In every case where power is delegated discretion is given. We have innumerable cases where far greater discretionary powers were granted to an administrative officer in the determination of what things were necessary to meet the law's requirements than is given in this section.

Let me read a single provision of section 18 of the rivers and harbors act of 1899, providing for the removal or alteration of bridges which are unreasonable obstructions to navigation. I want Senators' attention to this, if they think we are delegating discretionary power greater than we ever heretofore delegated.

It reads as follows:

> That whenever the Secretary of War *shall have reason to believe* that any railroad or other bridge now constructed * * * over any of the navigable waterways of the United States is an *unreasonable obstruction to the free navigation of such waters* on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing a draw opening or draw span of such bridge by crafts, steamboats, or other water craft, it shall be the duty of said Secretary * * * to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructive, and in giving such notice he shall specify the changes that are required to be made, and shall prescribe in each case a reasonable time in which to make them.

Just notice that it is left solely to the Secretary to determine, first, what is an unreasonable obstruction. Notice, further, that it is left to the Secretary's judgment as to what alterations shall be made; and, third, that it is left to his judgment to determine what is a reasonable time in which to make the alterations. I can not see that we, by the provision in section 315, give a discretionary power comparable to what we delegated to the Secretary of War in this provision relating to obstructions of navigable streams.

In the case of the Union Bridge Co. *v.* United States (204 U. S. 364) the court sustained the constitutionality of this section, which was challenged on the ground that it was a delegation of legislative power, and the court said:

> It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial and just sense does it confer upon that officer, as the head of an executive department, powers strictly legislative or judicial in their nature or which must be exclusively exercised by Congress or the courts.

Mr. President, in the case of the Mutual Film Corporation against the Industrial Commission of Ohio we find a case where there was granted to that commission a power enormously beyond the powers given in this case, from the standpoint of the delegation of authority, and I desire for a moment to consider it.

Appellant sought an injunction to restrain the enforcement of an act of the General Assembly of Ohio passed April 16, 1913 (103 Ohio Laws, 399), creating under the authority and superintendence of the Industrial Commission of Ohio a board of censors of motion-picture films. It was contended (1) that the statute in controversy imposed an unlawful burden on interstate commerce; (2) that it violated the freedom of speech and pub-

lication guaranteed by section 11, Article I, of the constitution of Ohio; and (3) it attempted to delegate *legislative* power to censors and to other boards to determine whether the statute offended in the particulars designated. Concretely the last objection and answer was stated by the court, and I will consider only the last proposition. This is what the court said.

Mr. SIMMONS. What court is the Senator about to quote?

Mr. McCUMBER. This is the Supreme Court of the United States. The court said:

The objection to the statute is that it furnishes no standard of what is educational, moral, amusing, or harmless, and hence leaves decision to arbitrary judgment, whim, and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the *sense and experience of men* and become certain and useful guides in reasoning and conduct. *The exact specification of the instances of their application would be as impossible as the attempt would be futile.* Upon such sense and experience, therefore, the law properly relies.

Mr. Justice McKenna for the court said (p. 246) that cases have recognized the difficulty of exact separation of the powers of government and announced the principle that legislative power is completely exercised where the law "is perfect, final, and decisive in all of its parts, and the discretion given relates only to its execution."

In this matter the law is concise and definite, that the President, by the application of these rates, is to equalize the conditions of competition in the American markets.

The court held the moving picture censorship act of Ohio was not in violation of the Federal Constitution or the constitution of Ohio either as depriving the owners of moving pictures of their property without due process of law or as a burden on interstate commerce or as abridging freedom and liberty of speech and opinion *or as delegating legislative authority to administrative officers.*

The court further declared, as expressed in the syllabus, that while administration and legislation are distinct powers and the line that separates their exercise is not easily defined, the legislature *must declare the policy of the law and fix the legal principles to control in given cases*, and an administrative body may be clothed with power to ascertain facts and conditions to which such policy and principles apply.

So, Mr. President, in section 315 Congress has declared the policy of the law—equality in conditions of competition—and directs the President, after investigation, to fix rates to effectuate that policy.

Compare the vast discretionary powers that were sustained in the film case with the carefully limited and guarded powers prescribed in section 315, subdivisions (a), (b), and (c).

I want to insert here, without reading, a brief statement of the case of the Union Bridge Co. against the United States (204 U. S. 364). I ask that all of these may be printed in 8-point type.

There being no objection, the matter was ordered to be printed in the RECORD in 8-point type, as follows:

UNION BRIDGE CO. *v.* UNITED STATES (204 U. S. 364).

"The question was whether provisions in section 18 of the river and harbor act of 1899 (30 Stat. 1121, 1153) providing for the removal or alteration of bridges which are unreasonable obstructions to navigation, after the Secretary of War has, pursuant to the procedure prescribed in the act, ascertained that they are such obstructions, were constitutional.

"Mr. Justice Harlan, delivering the opinion of the court, reviewed at considerable length decisions of the court. These conclusions were reached:

"'Congress when enacting that navigation be freed from unreasonable obstructions arising from bridges which are of insufficient height or width of span or otherwise defective may, without violating the constitutional prohibition against delegation of legislative or judicial power, impose upon an executive officer the duty of ascertaining what particular cases come within the prescribed rule *and of proclaiming the precise things to be done as a remedy therefor.*

"'The provisions in section 18 of the river and harbor act of 1899 (30 Stat. 1121, 1153) providing for the removal or alteration of bridges which are unreasonable obstructions to navigation, after the Secretary of War has, pursuant to the procedure prescribed in the act, ascertained that they are such obstructions and proclaimed the necessary remedy therefor, are not unconstitutional either as a delegation of legislative or judicial power to an executive officer or as taking of property for public use without compensation.'

"A more extended statement of the facts and holdings of this case is had in previous notes." (Sec. 6.)

Mr. McCUMBER. I now call attention to the case of Field against Clark. The Finance Committee in its report states:

These elastic tariff provisions are regarded by the committee as undoubtedly constitutional. (Field *v.* Clark, 143 U. S. 649.)

That statement is challenged by the junior Senator from Montana [Mr. WALSH]. He stated:

It will be shown presently that Field *v.* Clark affords no justification whatever for the departure proposed; in fact, that if the argument of the opinion in that case is to be followed the provisions under review must be unhesitatingly condemned as violative of the Constitution.

A close analysis of the provisions of the act of 1890 and the therein delegated powers, as instructive of *exactly what was held constitutional* in that case, is convincing that it is an ample and complete justification of this amendment.

The provision, here pertinent, the constitutionality of which was before and discussed by the court in Field *v.* Clark was section 3 of the tariff act of October 1, 1890. The claim among others was that section 3 being unconstitutional rendered the whole act unconstitutional. Section 3 provided that—

with a view to securing reciprocal trade with countries producing the following articles, and for this purpose—

Now, mark my words—

* * * *whenever and so often as the President shall be satisfied* that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides * * * *imposes duties or other exactions upon the agricultural or other products of the United States,* which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States *he may deem to be reciprocally unequal and unreasonable, he shall have* the power and it shall be his duty to suspend by proclamation to that effect the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, *for such time as he shall deem just*—

Thus leaving it entirely discretionary with him as to the time—

and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country, as follows, namely.

The court, after reviewing many acts of Congress deemed by it similar to this and as a congressional precedent therefor, and upon the authority of the case of the brig *Aurora* (supra) and the announced and approved principles by the supreme courts of Ohio and Pennsylvania, supra, said:

That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration is not inconsistent with that principle. It does not in any real sense invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries and exporting sugar, molasses, coffee, tea, and hides Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States which the President deemed—*that is, which he found to be*—reciprocally *unequal* and *unreasonable* Congress itself prescribed in advance the duties to be levied, collected, and paid.

The only difference between that case and the pending question is that Congress here says, "You shall make the same investigation relating to inequality in competition, and instead of fixing certain rates you shall fix a rate of duty that will equalize that competition; and if the rates which we provide do not fix that difference equally, you may increase those rates not to exceed 50 per cent or decrease them not to exceed 50 per cent, or if you have to proceed under subdivision (b) of section 315, under that standard you may adopt the American standard of valuation and increase the rates or decrease the rates not to exceed 50 per cent."

Mr. POMERENE. Mr. President, will the Senator yield for another question?

The PRESIDENT pro tempore. Does the Senator from North Dakota yield to the Senator from Ohio?

Mr. McCUMBER. I yield.

Mr. POMERENE. The McKinley law fixed specifically these rates. Under the proposed amendment the President, assuming that he finds certain conditions to prevail, is given a discretionary power to raise those rates to any point within 50 per cent above the rates or to lower them to any point within 50 per cent below the rates. Is not that an exercise of legislative discretion?

Mr. McCUMBER. No; I say it is not when we say it must at all times be a rate which he has found to be necessary to equalize conditions of competition. His discretion only is to find the facts and apply the rate that will effectuate that purpose.

Mr. POMERENE. But the rate he fixes is wholly within his discretion.

Mr. McCUMBER. Oh, no; it is not. He must fix a rate that will equal the difference in competition. He can not say

that he will find that it will require a rate of 75 per cent upon the foregin valuation and then raise it only 40 per cent. If he finds that the rate necessary to equalize the conditions of competition requires 75 per cent, he must fix 75 per cent, provided he does not go beyond the 50 per cent additional limitation which we have imposed.

Mr. WALSH of Montana. Mr. President——

The PRESIDING OFFICER (Mr. JONES of Washington in the chair). Does the Senator from North Dakota yield to the Senator from Montana?

Mr. McCUMBER. I yield.

Mr. WALSH of Montana. But any conclusion he arrives at is not subject to review anywhere?

Mr. McCUMBER. No, Mr. President; it is not.

Mr. WALSH of Montana. Is not the Senator from Ohio right, then, that the President can fix any rate he sees fit?

Mr. McCUMBER. He is right in saying that the President must fix the rate. We can not keep out of court the question as to whether or not the President has violated the law. That can be brought before the court in a proper proceeding.

Mr. WALSH of Montana. That is not the point.

Mr. McCUMBER. If an officer violates the provisions of law or perpetrates a fraud the matter can be reviewed in a court.

Mr. WALSH of Montana. I merely wanted to submit to the Senator not a willful violation of the law by the President, but simply a mistake by the President. He was perfectly honest about it, but he was quite wrong. He was intending to do the right thing, but he did not get it right.

Mr. McCUMBER. The evidence and the facts on which the President must investigate will all be available and the President must declare what rate is necessary, and when he has declared what rate is necessary he must apply that rate, not a higher rate, not a lower rate, but that particular rate.

Mr. POMERENE. Mr. President——

The PRESIDING OFFICER. Does the Senator from North Dakota yield to the Senator from Ohio?

Mr. McCUMBER. I yield.

Mr. POMERENE. Will the Senator permit me to ask him another question and put it in a different form for the purpose of eliciting his view? The Finance Committee have seen fit to place the 50 per cent limitation upon the President's power either in increasing or decreasing the rates. Let us assume, for the sake of the argument, that the committee had seen fit not to place these limitations upon that power, but to provide, as the committee do, that he should inquire into competitive conditions and then fix a rate which would meet the situation, without placing any limitation on it, does the Senator think from a constitutional standpoint that power could be sustained?

Mr. McCUMBER. I do.

Mr. POMERENE. Then it is placing in the President an unlimited power to exercise any discretion dependent wholly upon whether or not he finds that a rate is necessary to meet competitive conditions.

Mr. McCUMBER. If he finds that a rate is necessary to meet competitive conditions he is directed under the pending bill to fix the rate and to apply it. I presume there will not be very many cases in which the President will be called upon to act, but there might be. There might possibly be some in the chemical schedule, but probably in no other.

Mr. President, I should like to present and have printed in the RECORD, in eight-point type, a brief statement and analysis of the case of Buttfield against Stranahan and another one discussing the Hannibal-Bridge Co. against The United States.

The PRESIDING OFFICER. Is there objection to the request of the Senator from North Dakota? The Chair hears none and it is so ordered.

The matter referred to is as follows:

BUTTFIELD *v.* STRANAHAN (192 U. S. 470).

The next kindred decision of the Supreme Court was Buttfield *v.* Stranahan (192 U. S. 470), and particularly at page 496. The statute, the constitutionality of which was challenged in that case, was the act of March 2, 1897 (29 Stat. 604), entitled "An act to prevent the importation of impure and unwholesome tea." That act exercised the constitutional power "to regulate commerce with foreign nations" in two particulars: It provided for the establishment of a tea board to select certain samples of tea which when approved by the Secretary of the Treasury and made such and deposited at the various ports of entry should become exclusive standards for the admission of tea into this country. It was claimed that thereby the Secretary and not Congress established the test or rule as to what teas should be imported. The right to import tea into this country was by this act further made dependent upon the importation being deemed or judged by the designated customs examiners as up to these standards of samples selected and approved by the Secretary. Such as was so deemed or judged by the examiners was admitted, and such as was not was rejected and denied entry. Certain teas being rejected at the port of New York as not up to these standards, it was claimed that this act also vested in the officials of the customs a legislative power in that the finding of similarity to the samples, a condition precedent to entry was vested in them, and the constitutionality thereof was accordingly challenged. Denying this claim the court, at page 496 of said volume, said:

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of the opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but *expresses the purpose* to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. *This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.* The case is within the principle of Field *v.* Clark (143 U. S. 649), where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said of the legislation considered in Field *v.* Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. *Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.* To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

"Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted is a question we are not called upon to consider. *The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment,* to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him."

The court further said:

"The provisions in respect to the fixing of standards and the examination of samples by Government experts was for the purpose of determining *whether the conditions existed which conferred the right to import,* and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled not by a judicial proceeding but by the action of the agents of the Government, upon whom power on the subject was conferred."

It will be noted that the sufficiency of these samples which were to determine the right of entry of tea into this country was a matter committed to the judgment or selection of the Secretary of the Treasury. It will be further noted that the court predicated its decision upon the principle that Congress *having in the act expressed its purpose,* it was within the constitutional powers of Congress to delegate the *execution of that purpose* to the Secretary of the Treasury. The act, as said by the court, "devolved on the Secretary of the Treasury the mere executive duty *to effectuate the legislative policy declared in the statute,*" even though that executive performance involved a choice as to means to that end.

The fact of similarity of the imported teas to these standard samples as to "*purity,*" "*quality,*" and "*fitness* for consumption" was made condition precedent to admission into this country, and the determination thereof vested in the examiners. Congress here legislated in so far as practicable and delegated to the Secretary the power to establish standards and the examiners the power to find the facts as to similarity thereto necessary to the execution of the law. These officials do not thereby legislate, but they execute the legislation had by Congress by exercising their judgment or decision in the selection of samples and determining similarity, although that selection fixed the duty in the particular case.

Likewise it may be said of section 315, Congress has clearly therein set forth its legislative "purpose." That "purpose"

is made dependent upon and is controlled by varying market values. Wherefore, Congress has in so far as practically possible, by prescribing the facts and conditions of trade in our markets which shall admeasure these duties, prescribed what the duties shall be, and empowered the President to effectuate the congressional purpose to equalize by these duties the selling prices in our markets of similar foreign and domestic goods by ascertaining these facts and their equivalent duties and so proclaiming. This is not legislating but performing acts in execution of legislation.

HANNIBAL BRIDGE CO. *v.* UNITED STATES (221 U. S. 194).

In Hannibal Bridge Co. *v.* United States (221 U. S. 194) the court was again called upon to determine the validity of section 18 of the river and harbor act of 1899.

The statute proceeded under in this case was the same as in Union Bridge Co.'s case, *supra*. After due proceedings the Secretary of War found and advised the Hannibal Bridge Co., the Wabash Railroad Co., and the Missouri Pacific Railway Co. that the bridge over the Mississippi River at Hannibal, Mo., owned or controlled by said companies, was "an unreasonable obstruction to free navigation" or commerce, *and ordered certain specified changes*. The companies refused to comply with the Secretary's order, were duly proceeded against by criminal information, and convicted. On appeal they questioned the constitutionality of the act as an unauthorized delegation of congressional power. At page 205 the court, in denying this contention, said:

"The assignments of error are very numerous. But we feel constrained to say that no one of them causes a serious doubt as to the correctness of the judgment sought to be reviewed. This court has heretofore held, upon full consideration, that Congress had full authority under the Constitution to enact section 18 of the act of March 3, 1899 (ch. 425, 30 Stat. 1153), and that the delegation to the Secretary of War of the authority specified in that section was not a departure from the established constitutional rule that forbids the delegation of strictly legislative or judicial powers to an executive officer of the Government. *All that the act did was to impose upon the Secretary the duty of attending to such details as were necessary in order to carry out the declared policy of the Government* as to the free and unobstructed navigation of those waters of the United States over which Congress in virtue of its power to regulate commerce had paramount control * * *." (Union Bridge Co. *v.* United States, 204 U. S. 364; Monongahela Bridge Co. *v.* United States, 216 U. S. 177; Field *v.* Clark, 143 U. S. 649; Buttfield *v.* Stranahan, 192 U. S. 470.)

Obviously there is not an entire lack of parity in results between a rate of duty and a bridge as an obstruction to commerce. The constitutional power as to the regulation of commerce applies equally to each. The full force and effect of the Union Bridge Co. and Hannibal Bridge Co. decisions, as here applicable, can best be had by bearing in mind that full and complete authority was therein vested in the Secretary to determine and give notice of exactly what would be required to effect free navigation or an unobstructed commerce. Congress having declared the policy of unobstructed navigable rivers by bridges it was competent, the court said, *to delegate to the Secretary full power to determine what was such an obstruction and what remedy should be enforced*. So Congress having declared the policy of equalizing different competitive conditions in our markets may well on that authority authorize the President to determine those differences *and their remedy*. By section 315, however, Congress not only prescribes what the President shall determine to inaugurate action, to wit, differences in competitive conditions, but also prescribes precisely the remedy he shall apply, to wit, a duty equal to those differences or a change in classification which fixes that duty.

It will be noted that in all of the foregoing cases the principle early established in the brig *Aurora* cases and in Wayman against Southard, *supra*, that Congress, having by *general* provisions *declared its policy*, may vest those who are to act under such general provisions with full powers to put that policy into effect as and when prescribed by Congress.

Applying these principles to the proposed provisions, legislative power is exercised when Congress declares that a prescribed duty—that is, one equal to the net differences between two named trade conditions—shall be levied and collected. What the President is required to do is simply in execution of this act of Congress. His duties are neither judicial nor legislative, but purely administrative. He is vested with no discretion, but commanded to act upon certain prescribed conditions or a prescribed state of things to be ascertained and made known in the manner prescribed by Congress.

Mr. McCUMBER. I desire also to have inserted in the RECORD in eight-point type a section of the revenue act of 1916, Thirty-ninth Statutes at Large, with a very short statement and analysis of it.

The PRESIDING OFFICER. Without objection, it is so ordered.

The matter referred to is as follows:

THE REVENUE ACT OF 1916.
(39 Stat. L. 799.)

A precisely similar provision in principle is contained in section 805 of the "Revenue act of 1915" (39 Stat. 799), reading:

"SEC. 805. That whenever during the existence of a war in which the United States is not engaged the President *shall be satisfied that there is reasonable ground to believe* that under the laws, regulations, or practices of any country, colony, or dependency, contrary to the law and practice of nations, the importation into their own or any other country, dependency, or colony of any article the product of the soil or industry of the United States and not injurious to health or morals *is prevented or restricted* the President is authorized and empowered to *prohibit or restrict* during the period such prohibition or restriction is in force *the importation into the United States of similar or other articles*, products of such country, dependency, or colony *as in his opinion the public interest may require;* and in such case he shall make proclamation stating the article or articles which are prohibited from importation into the United States; and any person or persons who shall import, or attempt or conspire to import, or be concerned in importing such article or articles into the United States contrary to the prohibition in such proclamation shall be liable to a fine of not less than $2,000 nor more than $50,000, or to imprisonment not to exceed two years, or both, in the discretion of the court. *The President may change, modify, revoke, or renew such proclamation in his discretion.*"

The President therein is required to examine "the laws, regulations, or practices" of foreign nations and their effect upon our commerce, and if thereby "be satisfied" that exportations thereto from this country are "prevented or restricted" he is authorized and empowered to "prohibit or restrict" the importation of like "or other * * * products" into this country "as in his opinion the public interest may require." That paragraph is existing law and is precisely the language of the active provisions of paragraph 317, and what is here contended is too indefinite a definition or delegation of the authority and power of the President under the Constitution.

This section, 805, in legal concept is identical with several other similar sections of the unfair-competition provisions of the revenue act of 1916, Title VIII, of which it is a part. (39 Stat. L. 799.) In legal concept it is in exact accord with the active provisions of amendments 315, 316, and 317 of the pending bill, which have been criticized as unconstitutional by reason of the insufficiency of language therein made determinative of the President's action. The congressional debates show that this provision was originally offered by the late Senator James of Kentucky; that it was stated on the floor of the Senate that it received the approval of the Department of State and was prepared by that department. It distinctly received the approval of Senator UNDERWOOD. See CONGRESSIONAL RECORD, volume 53, part 13, Sixty-fourth Congress, first session, and at page 13485, wherein the following colloquy occurred:

"Mr. SIMMONS. My understanding, from the statement made by the Senator from Kentucky, was that the amendment meets the approval of the department.

"Mr. UNDERWOOD. Well, I want to say to the Senator from North Carolina in reference to this question that I am not opposed to the amendment offered by the Senator from Kentucky; as a matter of fact, I think it is an amendment that will serve a great many people in the United States. It is an amendment that will protect a great agricultural product in the United States against discrimination, and I am glad that the Secretary of State has taken the initial step toward preparing the amendment and submitting it. I intend to support the amendment. I think it will be of great value to the agriculture of the United States in protecting shipments of tobacco into neutral countries against the discriminations that are now being made against it by the warring countries of Europe. I understand that the amendment relates not only to tobacco but to many other products of the United States.

"Mr. SMITH of Georgia. It applies to all of them.

"Mr. UNDERWOOD. I am informed that it is broad enough to apply to all. It is a very meritorious amendment."

The vote upon the bill which included these provisions, and which therefore approved their constitutionality, is found in the same volume at page 13873. The approval of Senator WALSH is noted at page 13872, where his colleague, Senator

MYERS, made the statement, "My colleague [Mr. WALSH] is necessarily absent. He is paired with the Senator from Rhode Island [Mr. LIPPITT]. If my colleague were present and at liberty to vote, he would vote 'yea.'"

It can not well be said that this statute was a war measure in the sense that it was enacted under the constitutional warrant upon such occasions, when by the very terms thereof its application is made to apply "whenever during the existence of a war in which the United States is *not* engaged."

Mr. McCUMBER. I have here rather a lengthy brief or memorandum covering the whole subject. The brief for the most part has been prepared by Judge De Vries of the Customs Court of Appeals. It is rather full and it covers every possible question. While I have to some extent had a hand in the making of the brief, yet for the most part it is his language and his construction. I ask that it may be printed in the RECORD in 8-point type. It is so comprehensive that I think it would be useful to Senators who desire to investigate the whole subject.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. McCUMBER. I wish also to ask that it may be italicized as indicated in the brief itself.

The PRESIDENT pro tempore. Without objection, it is ordered as requested by the Senator from North Dakota.

The brief is as follows:

MEMORANDUM AS TO THE CONSTITUTIONALITY OF THE PROVISIONS OF H. R. 7456, AS REPORTED WITH AMENDMENTS TO THE SENATE APRIL 10, 1922, DIRECTING THE PRESIDENT TO ASCERTAIN AND PROCLAIM CERTAIN DEFINED DUTIES THEREIN LEVIED BY CONGRESS IN TERMS OF FACTS OR A STATE OF THINGS MADE BY THOSE PROVISIONS CONDITIONS PRECEDENT TO AND DETERMINATIVE OF THE COLLECTION OF THOSE DUTIES.

These provisions are typified by section 315, page 272, Title III, of the bill, which for convenience may be taken as the subject of discussion of the principles involved.

A close examination of this paragraph, in the light of the able and most illuminating debate had thereupon in the Senate, will disclose that much of the criticism thereof is answered by the terms themselves of the paragraph. We quote as exemplar of all section 315 (a), as follows:

"SEC. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in conditions of competition in trade *in the markets of the United States* of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find *it thereby shown* that the duties fixed in this act do not equalize the said differences in conditions of competition in trade he shall, by such investigation, ascertain said differences and determine and proclaim *the changes* in classifications *or* forms of duty *or* increases *or* decreases in any rate of duty provided in this act *shown by* said ascertained differences in conditions of competition in trade necessary to equalize the same in the markets of the United States; that 30 days after the date of such proclamation or proclamations such changes in classification or in forms of duty shall take effect and such increased or decreased duties shall be levied, collected, and paid on such merchandise when imported directly or otherwise from the country of origin into the United States: *Provided*, That until further provided by law the total increase or decrease of such rates of duty shall not exceed 50 per cent of the rates specified in this act or in any amendatory act."

Obviously the facts or state of things herein authorized to be ascertained and proclaimed by the President are:

(1) A difference in competitive trade conditions in our markets between like or similar foreign and domestic articles.

(2) That the particular duty applicable thereto prescribed by the act does not equalize such difference.

(3) The changed "classification" or changed "form," or "increase" or "decrease" of duty, any or all of such *shown by* the aforesaid ascertained facts or state of things *necessary* to equalize this ascertained difference, under the terms of the act.

In no particular is the President by that language invested with the slightest discretion as to any of the commanded performances.

He can act upon and proclaim only those "differences in conditions of competition" "in the markets of the United States," and the duty "shown by" such differences necessary to equalize the same. These ascertained "facts" or "state of things" "shown by" these trade conditions are by Congress made the initiative and the full control of the President's action and the measure of the proclaimed duty.

Likewise, he can not elect to proclaim a change of a rate or classification in his discretion. The language of the provision authorizes and directs that he shall proclaim *that* rate or *that* classification only, or both, "*shown by*" the ascertained "differences" "*necessary* to equalize the same in the markets of the United States."

That is the legal formula employed, and, under all the decisions and the able arguments in the Senate, that formula *is*, in legal concept, constitutional. If the words or phrases employed render it doubtful whether or not they execute that formula, such becomes a matter of correction, but absolutely not an evidence of inability of constitutional enactment.

For example, should the term "conditions of competition in trade" be deemed indefinite, specification of these conditions, such as "wholesale market value" or "cost of production," could, in accordance with the political purpose, be substituted therefor or be provided by separate limiting or controlling provision.

In abiding confidence, it is submitted that the foregoing formula is in scrupulous observance of the cardinal rule governing such cases, so well announced in Locke's Appeal (72 Pa. St. 491, 498) and applied and quoted in almost every decision and textbook subsequently speaking to the subject, particularly in Field *v.* Clark (143 U. S. 649) in construing and applying the same in a tax levy case, as follows:

"The legislature can not delegate its power to make a law, but *it can make a law to delegate a power to determine* some *fact* or *state of things* upon which *the law makes*, or intends to make, its own action *depend*."

By section 315 the President fixes no rate of nor lays any duty. He ascertains and proclaims "*facts*" "*or a state of things*" only, and those "facts" or that "state of things" only which Congress by this paragraph prescribes and directs him to ascertain and the equivalent duty mathematically therefrom calculated and proclaimed. Whereupon *Congress* by this act and not the President fixes and levies the duty *so shown by these prescribed* "*facts*" or "*state of things*" necessary to equalize said market conditions.

And so by the paragraph it is provided that if the ascertained *facts of difference* show a change of classification or change of forms of duty—ad valorem to specific or vice versa—from those prescribed in the act, *necessary* to equalize the differences in trade conditions the President shall, upon such ascertainment, so proclaim, and thereupon *Congress by this act*—and not the President—levies the *so shown* and proclaimed duties or provides the so shown classification.

In other words, having prescribed certain rates of duty predicated upon market values, for the purpose of revenue as well as regulating the commerce of the United States with foreign countries, in view of the uncertain conditions of the world's markets and the inevitable and swift changes in market values and the necessarily tardy remedy by congressional action, in order to more securely effect its intended purpose to equalize in our markets foreign and domestic market conditions, by section 315, Title III, Congress levies additional or equalizing duties to the extent it shall be shown by the differences in competitive market values in the United States necessary to equalize the conditions of foreign competition in our markets, and directs the President to ascertain and proclaim the duties *these differences in market conditions show* to be so necessary.

The extent which the Congress wishes to invest the President with such powers upon such findings—that is to say, whether to raise only or to raise and lower duties, and the limitations to be placed upon the same in either case—is, of course, a question of policy for the Congress. The legal formula of investment of this power, however, is the same in either case, and, as in this section vested, accords with many similar statutes of Congress approved by the Supreme Court since the foundation of our Government.

Indeed, every tariff act levying ad valorem duties or duties wholly or in part such accords with this section. All and every such duty is made dependent upon the finding of a fact by some official, usually the appraiser, vested by Congress with that power, of a defined market value of imported goods.

The constitutional warrant, section 8, Article I, vesting in Congress the power to levy duties, reads: "To *lay* and collect taxes, duties, imposts," and so forth.

It should be ever borne in mind in this inquiry that the constitutional authority of the Congress is not "to lay and collect" a *rate* of duty, but "to lay and collect * * * *duties*, imposts," and so forth. So that the Constitution throws around the *rate* of duty by Congress laid nothing more sacred or mystic than the *basis* of that duty by Congress provided. Each is *equally* a necessary factor of the levy and its calculation. Both are equally necessary integral parts of the exercise by Congress

of its ad valorem import duty levying functions, and the one as well as and equally with the other can, within the Constitution, be legislated. Yet since the foundation of the Government and in every tariff act Congress has laid ad valorem duties and admeasured them by providing as a necessary and integral part of that levy a designated "market value" to be ascertained by a denominated officer. Latterly, and in like but more definite manner, Congress laid these duties and admeasured them by the "wholesale market value in the principal markets of the country of exportation" and delegated to the appraiser the power to find and adopt that value. The finding of what market was the "principal" market of the country of exportation and what evidence constituted "market value" as defined by Congress in that market were by Congress expressly delegated to the appraiser, and his ascertainment and finding thereof has admeasured and consequently fixed, in conjunction with the rate of the statute, every ad valorem duty levied since the foundation of the Government. Moreover, this ascertainment and finding of the appraiser was by Congress made final and conclusive against the taxpayer and the world and not reviewable by any court. See Auffmordt *v.* Hedden (137 U. S. 310, 324), Passavant *v.* United States (148 U. S. 214, 220), Stairs et al. *v.* Peaslee (59 U. S. 521).

Thus in Passavant *v.* United States (148 U. S. 220) the Supreme Court said:

"In the tariff legislation of the Government, Congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the Government's revenues would be seriously obstructed and interfered with. The statute authorized no such proceeding, and the circuit court can exercise no such jurisdiction."

In Hilton *v.* Merritt (110 U. S. 97, 107) the court said:

"The plaintiffs in error contended further that a denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise is depriving the importer of his property without due process of law, and is therefore forbidden by the Constitution of the United States. The cases of Murray's Lessee *v.* Hoboken Land & Improvement Co. (18 How. 272) and Springer *v.* United States (102 U. S. 586) are conclusive on this point against the plaintiff in error."

MUSER *v.* MAGONE (155 U. S. 240).

If it is competent for Congress, proceeding under the Constitution, to levy a duty, to enact in integral and necessary part that it shall be laid upon a defined "market value" and then vest in the appraiser the power to ascertain and fix that "market value," why is it not equally competent for Congress, so proceeding, to enact that a duty shall be the difference between two defined market values, as in effect is provided in section 315, and then vest in the President the power to ascertain those market values and the differences between them and proclaim that difference and the equivalent rate of duty?

It is respectfully submitted that if the legal concept of section 315 is unconstitutional, every ad valorem duty now levied is, and all such levied since the foundation of the Government were, in violation of the Constitution.

En passant, the context of the constitutional investment in Congress "to lay and *collect* * * * duties," etc., vesting alike in Congress the power to levy and the power to "collect" duties, coordinating and surrounding each of these vested powers with the same authorization and limitations, in view of the present discussion, prompts the inquiry, whether or not it will be insisted that Congress alone is empowered to "collect" duties and must therefore stand at the customhouse and "collect" all duties in constitutional observance of its sworn duty? Or does the conjoint employment of the word "collect" and its necessary practical performance throw some light upon the intention of the framers of the Constitution in their adoption of the associate word "lay"?

But the constitutional warrant hereinbefore quoted for this legislation, which is that usually considered, is not the entire constitutional grant of power to Congress supporting the amendment. In fact, it omits the most pertinent part sustaining the amendment—subparagraph 18 of said Article I—which expressly relates to and grants Congress a general, unlimited power of legislation to put into execution its constitutional powers of "levying duties" and "regulating foreign commerce," and its thereto related laws. The whole grant of the pertinent powers to Congress reads:

"ARTICLE I, SEC. 8. The Congress shall have power to lay and collect taxes, duties, * * *. To regulate commerce with foreign nations * * *." And, subparagraph 18, "*To make all laws which shall be necessary and proper for carrying into execution the foregoing powers.* * * *."

While Congress alone, therefore, is authorized by the Constitution to lay and collect duties and regulate commerce, the Constitution expressly authorized the Congress to make whatever laws it may choose (except only those expressly inhibited by the Constitution) in execution of and to carry into effect these vested powers.

What authority is to finally determine which of such acts by Congress are "necessary" and proper has long since been held by the Supreme Court to be Congress itself, not reviewable by any court.

Thus in McCulloch *v.* Maryland (4 Wheaton, 316–421, 422) the Supreme Court of the United States, speaking through Chief Justice Marshall, construing these provisions of the Constitution, said:

"We admit, as all must admit, that the powers of the Government are limited and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature *that discretion*, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

* * * * * * *

"But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, *the decree of its necessity*, as has been very justly observed, is to be discussed in another place. Should Congress in the execution of its powers adopt measures which are *prohibited by the Constitution*, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects *not intrusted to the Government*, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is *not prohibited*, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the *decree of its necessity*, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

A very recent decision of the Supreme Court to the same effect is Smith *v.* Kansas City Title Co. (255 U. S. 180, 208). The constitutional power of Congress to create Federal land banks and joint-stock land banks as banks for national purposes was therein challenged. The court in part said:

"Since the decision of the great cases of McCulloch *v.* Maryland (4 Wheat. 316) and Osborn *v.* Bank (9 Wheat. 738) it is no longer an open question that *Congress may establish banks for national purposes*, only a small part of the capital of which is held by the Government and a majority of the ownership in which is represented by shares of capital stock privately owned and held, the principal business of such banks being private banking conducted with the usual methods of such business. *While the express power to create a bank or incorporate one is not found in the Constitution*, the court, speaking by Chief Justice Marshall, in McCulloch against Maryland, found authority so to do in the broad general powers conferred by the Constitution upon the Congress *to levy and collect taxes*, to borrow money, *to regulate commerce*, to pay the public debts, to declare and conduct war, to raise and support armies, and to provide and maintain a Navy, etc. Congress, it was held, had authority to use *such means as were deemed appropriate to exercise the great powers of the Government by virtue of Article I, section 8, clause 18, of the Constitution, granting to Congress the right to make all laws necessary and proper* to make the grant effectual. In First National Bank *v.* Union Trust Co. (244 U. S. 416, 419), the Chief Justice, speaking for the court, after reviewing McCulloch *v.* Maryland and Osborn *v.* Bank, and considering the power given to Congress to pass laws to make the specific powers granted effectual, said:

"'In terms it was pointed out that this broad authority was not stereotyped as of any particular time but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion *enabling it to take into consideration the changing wants and demands of society* and to adopt provisions appropriate to meet *every* situation which it was deemed required to be provided for.'

"That the formation of the bank was required, in the judgment of the Congress, for the fiscal operations of the Government was a principal consideration upon which Chief Justice Marshall rested the authority to create the bank; and for that purpose, being an appropriate measure *in the judgment of the Congress*, it was held *not to be within the authority of the court to question the conclusion reached* by the legislative branch of the Government."

When we bear in mind the remote connection between the legislative functions "to lay and collect taxes," "to borrow money," "to regulate commerce," and so forth, as the powers recited by the court as aided by the creation of national banks, the propriety of this amendment in aid of the power to lay and collect duties can not be questioned.

The here particularly important point, however, is that the exercise of judgment and power by Congress under said subsection 18 of section 8, Article I of the Constitution, in aid and regulation of its power to lay duties and regulate commerce, previously or by the instant act exercised, is wholly within the discretion of Congress and not reviewable by any court for impolicy or abuse. State of Pennsylvania *v.* Wheeling & Belmont Bridge Co. (59 U. S.; 18 How. 421, 439).

While it is well settled that Congress can not under the Constitution, unaided by special constitutional warrant, delegate its legislative power, it is equally well settled that the enactment of a conditional statute to become effective or be suspended upon the ascertainment or determination of a prescribed fact or state of things, condition, or group of conditions, controlling and admeasuring the enforcement of the statute and the time and extent of its application by some administrative or other official, as prescribed by the statute, is not within that constitutional inhibition.

The foregoing analysis clearly shows that this amendment is complete in and of itself, *delegating no power whatsoever to add to its terms*, provisions, or requirements, but delegating solely and only the power to ascertain therein prescribed "facts" or "state of things," upon which the statute by its own terms operates in carrying out the legislative purpose, to wit, market values, differences in market values, and duties equivalent to such values and differences, under the terms of this act.

Perhaps no question of greater magnitude or of more far-reaching consequence in our system of government has ever been presented to our Supreme Court than the principle supporting such legislation. Only upon the extended development of our national enterprises did the importance of the issue become apparent and the question of whether or not our Constitution was adequate to our national development become dominant. Accordingly no question before the Supreme Court has received more extended or thorough consideration. Its more extended consideration and development was initiated in the great case of Field *v.* Clark (143 U. S. 649). This was followed by Buttfield *v.* Stranahan (192 U. S. 470), particularly at page 496, decided in 1904; Union Bridge Co. *v.* United States (204 U. S. 364), particularly at pages 385 and 386, decided in 1907; Monongahela Bridge Co. *v.* United States (216 U. S. 177), particularly at page 192, decided in 1910, and in United States *v.* Grimaud (220 U. S. 506), particularly at page 521, decided in 1911.

In those five cases the Supreme Court so thoroughly considered, amplified, and decided the question that in subsequent decisions the doctrine therein announced has been merely referred to as *stare decisis* as therein determined. (See Hannibal Bridge Co. *v.* United States, 221 U. S. 194, 205; Intermountain Rate cases, 234 U. S. 476, 486; Mutual Film Corporation *v.* Ohio Industrial Commission, 236 U. S. 230, 246; First National Bank *v.* Union Trust Co., 244 U. S. 416, 427; Selective Draft Law cases, 245 U. S. 366, 389; and Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149, 164.)

The case of Field *v.* Clark may well be considered the foundation case of this doctrine. The opinion was by Mr. Justice Harlan. While it refers to the original case of the Brig *Aurora v.* United States (7 Cranch., 382), wherein for the first time this principle was announced by the Supreme Court of the United States, and the case of Wayman *v.* Southard (10 Wheaton, 1, 41), opinion by Chief Justice Marshall announcing the same doctrine, the decision in Field *v.* Clark is more particularly predicated upon the long-continued sanction given by Congress to precedents of legislation similar to that then the subject of consideration by the court.

The case arose upon an importation by Marshall Field & Co. at the port of Chicago of woolen dress goods and other materials. That firm protested the duties levied under the act of October 1, 1890, claiming the act unconstitutional.

The provision here pertinent, the constitutionality of which was before and discussed by the court in Field *v.* Clark, was section 3 of the tariff act of October 1, 1890. The claim, among others, was that section 3 being so, rendered the whole act unconstitutional. Section 3 provided that "with a view to securing reciprocal trade with countries producing the following articles and for this purpose, * * * *whenever and so often as the President shall be satisfied* that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, * * * *imposes duties or other exactions upon the agricultural or other products of the United States*, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States *he may deem to be reciprocally unequal and unreasonable*, he shall have the power and it shall be his duty to suspend by proclamation to that effect the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, *for such time as he shall deem just*, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely:" (Here follows an enumeration of such articles and the prescribed duties.)

The court, after reviewing many acts of Congress deemed by it similar to this and as a congressional precedent therefor, and upon the authority of the case of the brig *Aurora* (supra) and the announced and approved principles by the supreme courts of Ohio and Pennsylvania, *supra*, said:

"That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries and exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States which the President *deemed*, that is, *which he found to be*, reciprocally *unequal* and *unreasonable*, Congress itself prescribed, in advance, the duties to be levied, collected, and paid, on sugar, molasses, coffee, tea, or hides produced by or exported from such designated country while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words '*he may deem*' in the third section, *of course, implied* that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, *and form a judgment as to whether they were reciprocally equal and reasonable*, or the contrary, *in their effect upon American products. But when he ascertained the fact* that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, *it became his duty to issue a proclamation* declaring the suspension as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the *enforcement* of the policy established by Congress. *As the suspension was absolutely required when the President ascertained the existence of a particular fact, it can not be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.* Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. *What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.* It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugar, molasses, coffee, tea, and hides from particular countries should be suspended in a given contingency and that in case of such suspensions certain duties should be imposed."

"The true distinction," as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, "is between the delegation of power *to make the law*, which necessarily involves a discretion as to what it shall be, and *conferring authority or discretion as to its execution* to be exercised under and in

pursuance of the law. The first can not be done; to the latter no valid objection can be made." (Cincinnati, Wilmington, etc., Railroad *v.* Commissioners, 1 Ohio Stat. 88.) In Moore *v.* City of Reading (21 Pa. Stat. 188, 202) the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it can not be said that the exercise of such discretion is the making of the law." So, in Locke's appeal (72 Pa. Stat. 491, 498): "To assert that a law is less than a law because it is made to depend *on a future event or act* is to rob the legislature of the power of acting wisely for the public welfare *whenever a law is passed relating to a state of affairs not yet developed or to things future and impossible to fully know.*" The proper distinction the court said was this: "The legislature can not delegate its power to make a law, *but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.* To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power and must therefore be a subject of inquiry and determination outside of the halls of legislation."

While it has been stated by the distinguished Senator from Montana [Mr. WALSH] that the case of Field against Clark is not a "full justification" of this amendment, it is respectfully submitted that when its full import and all therein declared are weighed, it completely supports the amendment *in doctrine* announced, and in the things decided in many respects is squarely authoritative.

Viewing that decision with reference to what delegation *of authority* was in fact necessarily upheld, most important and here pertinent is that the facts, conditions of trade, or "state of things," by comparison of which the President was to determine "reciprocal equality and reasonableness," were the *effects upon our trade of the tariff laws* not only of the United States but of foreign countries. He was to investigate and determine the effect of foreign tariffs upon the exports of our *agricultural and other products* to foreign countries and the effects of our tariffs—free entry—upon imports of certain foreign articles from such countries, *balance and admeasure these resulting trade conditions one with the other*, and, if he "deemed" the relative trade conditions so resulting "reciprocally unequal and unreasonable," so proclaim, suspend our tariff laws, and put into effect certain rates of duty by Congress prescribed, which in turn he might also suspend "for such time as he may deem just."

The true import of section 3 of the tariff act of 1890 in practical operation could only be that the President was to ascertain *the effect in the markets of foreign countries* of the rates of duty established by those countries upon the selling prices of our agricultural and other products, of course, necessarily, as compared with the selling prices of their products competing in said markets, ascertain the effects upon or advantages to the trade of those countries *in our markets* by reason of the free entry permitted by our tariff laws of certain products of such countries, in comparison with our like products, compare and admeasure these ascertained respective *conditions of trade* one with the other, and if thereby he *deemed* these conditions of trade reciprocally unequal and unreasonable, suspend the free-entry provision of our tariff and proclaim in effect in lieu thereof certain rates prescribed in the act. The President was by that act empowered to suspend free entry and proclaim those prescribed rates in effect "whenever and so often as he shall be satisfied" and continue them in effect "for such a time as he shall deem just." In other words, Congress by that act made *both the dutiable rates levied* and the free-entry provisions therein provided effective, *subject to a* finding and proclamation by the President as to competitive *conditions in trade to be by him ascertained and proclaimed* not only in the markets of the United States but also in the markets of foreign countries. The sole pertinent difference between that act and this amendment in principle is that therein Congress prescribed the substitute rates in terms of fixed figures, *and herein Congress has prescribed the substitute rates in terms of prescribed "facts" or "state of things."*

Congress by that act vested in the President the admeasurement of defined trade conditions under and resulting from prescribed rates of duty in foreign countries upon our products therein imported and the determination of their equality with the trade conditions under and resulting from free entry allowed their products in our country as determinative of his action. In other words, that act required of the President the function of admeasuring and equalizing trade conditions with rates of duty—a translation of the one into the terms of the other, a determination of their differences, and proclamation accordingly. That and nothing more is precisely the function by this amendment vested in the President. Of the delegation of this function in that act the Supreme Court in Field *v.* Clark, *supra*, said:

"What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect."

While Field *v.* Clark approves and announces the *doctrine* supporting the power of Congress to so levy an import duty as by this amendment provided, express declaration, in that many words, as stated by Senators, to sustain a grant of power *to the President* "to fix rates" is not therein had. Nor is that by this amendment attempted. Nor would anyone conversant with the law upon the subject so attempt. What *is* here done by *Congress* is not to delegate a power "to fix rates" but to itself fix or levy a duty, not in terms of fixed figures but in terms of certain prescribed "facts" or "state of things," and authorize and empower the President to ascertain and proclaim the duty or rate thereby fixed by Congress.

It would seem appropriate while comparing section 3 of the act of 1890, as considered in Field *v.* Clark, with this amendment, particularly in view of the criticism of that case by Senators, that two of the justices dissented therefrom to point out that the grounds of dissent therein are cured by appropriate language in this amendment. The grounds of that dissent related solely to the words authorizing action by the President upon an ascertainment which "he may *deem* to be reciprocally unequal and unreasonable," and that he might continue the suspension of the free list or continue proclaimed rates of duty in effect "for such time as he shall *deem* just." It was urged by the dissentients that the word "deem" permitted a judgment by the President, and that the latter phrase vested in him an unlimited discretion. These objections are met and avoided in this amendment by investing the President with no discretion or judgment whatever in proclaiming a duty but authorizing him to proclaim only the duty *shown by prescribed* facts or state of things. So, by the last phrase of 315 (c) he can only suspend a proclaimed duty not in his discretion but as follows:

"That the President, proceeding as hereinbefore provided for the proclamation of such rates of duties, may, when he shall determine that it is *so shown* that the competitive advantages have changed or no longer exist which led to such proclamation, accordingly *as so shown* modify or terminate the same."

It will contribute to the completeness of the consideration of Field *v.* Clark case to note that the majority opinion, appreciating the force of the minority view as stated, justified its disregard of the discretionary import of the word "deem" as employed in the act by holding that the context *implied* that the President would examine all the pertinent laws and regulations of the foreign country "*in their effect upon American products*," wherefore his discretion or judgment was *by the act* not unlimited but so controlled. (See Field *v.* Clark, 143 U. S. 649, at page 693.) In fact, the majority opinion (p. 692) expressly so interprets the word, saying "*deemed*, that is, which he *found* to be." The soundness of the principles and decision enunciated in Field *v.* Clark, however, have so commended themselves to the Supreme Court that they have subsequently been quoted *in extenso* and applied, and the case is uniformly referred to as the leading case upon the subject. (See Union Bridge Co. *v.* United States, 204 U. S., pp. 378 and 383; United States *v.* Grimaud, 220 U. S. 506, 520.)

The next kindred decision of the Supreme Court was Buttfield *v.* Stranahan (192 U. S. 470), and particularly at page 496. The statute, the constitutionality of which was challenged in that case, was the act of March 2, 1897 (29 Stat. 604), entitled "An act to prevent the importation of impure and unwholesome tea." That act exercised the constitutional power "to regulate commerce with foreign nations" in two particulars: It provided for the establishment of a tea board to select certain samples of tea, which, when approved by the Secretary of the Treasury and made such and deposited at the various ports of entry should become exclusive standards for the admission of tea into this country. It was claimed that thereby the Secretary and not Congress established the test or rule as to what teas should be imported. The right to import tea into this country was by this act further made dependent upon the importation being deemed or judged by the designated customs examiners as up to these standards of samples selected and approved by the Secretary. Such as was so deemed or judged by the examiners was admitted and such as was not was re-

jected and denied entry. Certain teas being rejected at the port of New York as not up to these standards, it was claimed that this act also vested in the officials of the customs a legislative power in that the finding of similarity to the samples, a condition precedent to entry was vested in them, and the constitutionality thereof was accordingly challenged. Denying this claim the court, at page 496 of said volume, said:

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of the opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but *expresses the purpose* to exclude the lowest grade of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. *This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.* The case is within the principle of Field *v.* Clark (143 U. S. 649), where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said in the legislation considered in Field *v.* Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. *Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.* To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

"Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted is a question we are not called upon to consider. *The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment*, to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him."

The court further said:

"The provisions in respect to the fixing of standards and the examination of samples by Government experts was for the purpose of determining *whether the conditions existed which conferred the right to import*, and they therefore in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding but by the action of the agents of the Government, upon whom power on the subject was conferred."

It will be noted that the sufficiency of these samples which were to determine the right of entry of tea into this country was a matter committed to the judgment or selection of the Secretary of the Treasury. It will be further noted that the court predicated its decision upon the principle that Congress *having in the act expressed its purpose*, it was within the constitutional powers of Congress to delegate the execution *of that purpose* to the Secretary of the Treasury. The act, as said by the court, "devolved on the Secretary of the Treasury the mere executive duty *to effectuate the legislative policy declared in the statute*," even though that executive performance involved a choice as to means to that end.

The fact of similarity of the imported teas to these standard samples as to "purity," "quality," and "fitness for consumption" was made condition precedent to admission into this country, and the determination thereof vested in the examiners. Congress here legislated in so far as practicable and delegated to the Secretary the power to establish standards and the examiners the power to find the facts as to similarity thereto necessary to the execution of the law. These officials do not thereby legislate, but they execute the legislation had by Congress by exercising their judgment or decision in the selection of samples and determining similarity, although that selection fixed the duty in the particular case.

Likewise, it may be said of section 315, Congress has clearly therein set forth its legislative "purpose." That "purpose" is made dependent upon and is controlled by varying market values. Wherefore, Congress has, in so far as practically possible, by prescribing the facts and conditions of trade in our markets which shall admeasure these duties, prescribed what the duties shall be and empowered the President to effectuate the congressional purpose to equalize by these duties the selling prices in our markets of similar foreign and domestic goods by ascertaining these facts and their equivalent duties and so proclaiming. This is not legislating but performing acts in execution of legislation.

The case following was that of the Union Bridge Co. *v.* United States (204 U. S. 364), particularly at pages 378 and 387, inclusive. The elaborateness of the opinion indicates the importance with which the case was received and considered by the Supreme Court. The statute the constitutionality of which was challenged was the provision of section 18 of the river and harbor act of 1899 (30 Stat. 1121, 1153) providing for the "removal or alteration of bridges which are unreasonable obstructions to navigation after the Secretary of War has, pursuant to the procedure prescribed in the act, ascertained that they are such obstructions."

The exact words of investment were:

"That *whenever* the Secretary of War *shall have reason to believe* that any railroad or other bridge now constructed * * * over any of the navigable waterways of the United States is *an unreasonable obstruction to the free navigation of such waters* on account of insufficient height, width of span, *or otherwise*, or where there is difficulty in passing the draw opening or draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, *to give notice* to the persons or corporations owning or controlling such bridge *so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed;* and in giving such notice he *shall specify the changes*, * * * *that are required to be made*, and shall prescribe in each case a reasonable time in which to make them * * *."

Proceeding thereunder, the Secretary of War found the bridge over the Allegheny River, near where it joins the Monongahela to form the Ohio, an unreasonable obstruction to navigation and the commerce among the States of the United States and required the Union Bridge Co., owners thereof, *to make certain specified changes*. The company refusing, criminal information against it and conviction was had. The authority of the Secretary of War vested by this statute was assailed as an unconstitutional delegation of the legislative power of Congress to regulate commerce among the States.

The precise and here applicable point adjudicated was that whereas the Union Bridge Co. claimed that the duty of regulating commerce among the States, and consequently of what was an obstruction thereof *and what was necessary to be done in regulation thereof*, having been vested by the Constitution solely in Congress, a law enacted by Congress which was made dependent for enforcement upon the finding by the Secretary of War that a particular bridge was an "unreasonable obstruction to commerce," and a direction by him to perform certain acts determined by him necessary to render the bridge not an obstruction to navigation and commerce was a delegation to the Secretary of precisely what the Constitution required to be done by Congress. The Supreme Court held that this provision was not unconstitutional as a delegation of legislative or judicial power to an executive officer. The decision is expressly rested upon the cases of the brig *Aurora*, Field *v.* Clark, and Buttfield *v.* Stranahan, *supra*. Those cases are quoted *in extenso*, construed, and approved. The doctrine as announced by the Supreme Courts of Ohio and Pennsylvania is made the doctrine of the court. Applying that doctrine to the particular case, the court, at pages 385 to 387, said:

"It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon that officer as the head of an executive department powers strictly legislative or judicial in their nature or which must be exclusively exercised by Congress or by the courts. *It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained over them.* That such an object was of common interest and within the competency of Congress under its power to regulate commerce everyone must admit, for commerce comprehends navigation and, therefore, to free navigation from unreasonable obstructions is a legitimate exertion of that power. (Gibbons *v.* Ogden, 9 Wheat. 1, 189, 190.) *As appropriate to the object to be accomplished*, as a means to an end within the power of the National Government, Congress, *in execution of a declared policy, committed to the Secretary of War the duty of ascer-*

taining all the facts essential in any inquiry whether particular bridges over the waterways of the United States were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself primarily the fact whether the bridge here in question was an unreasonable obstruction to navigation, and if it was found to be of that character could *by direct legislation* have required the defendant *to make such alterations of its bridge as were requisite for the protection of navigation and commerce* over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case separately would be impracticable in view of the vast and varied interests which require national legislation from time to time. *By the statute in question Congress declared in effect* that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. *It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases.* In performing that duty the Secretary of War will only execute the clearly expressed will of Congress and will not, in any true sense, exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertained whether a particular applicant for a pension belongs to a class of persons who under the general rules prescribed by Congress are entitled to pensions. If the principle for which the defendant contends received our approval, the conclusion could not be avoided that executive officers in all the departments, in carrying out the will of Congress as expressed in statutes enacted by it, have from the foundation of the National Government exercised and are now exercising *powers as mere details* that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon executive departments in respect of the enforcement of the laws of the United States. *Indeed, it is not too much to say that a denial to Congress of the right under the Constitution to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government'* and bring about confusion, if not paralysis, in the conduct of the public business."

The same provision of the river and harbor act was again challenged upon like constitutional grounds in Monongahela Bridge Co. *v.* United States (216 U. S. 177), at page 192. The court reviewed with approval its previous decisions upon the subject and expressly declined to recede from the doctrine of the Union Bridge Co. *v.* United States and the cases upon which that decision had been predicated.

The statute challenged in the next ensuing case of similar import, United States *v.* Grimaud (220 U. S. 506), was a provision of the act of June 4, 1897 (30 Stat. 35; Rev. Stat., sec. 5388), providing that the Secretary of Agriculture could make rules and regulations governing the national parks, and such a rule so made as to grazing sheep on forest reserves, having the force of law and providing criminal punishment for violation thereof, was not unconstitutional as a delegation of legislative power. The case reached the Supreme Court when one Grimaud, without permit and in violation of the prescribed regulations for the Sierra Forest Reserve, Calif., grazed sheep thereupon and was proceeded against criminally under said regulations. He contended the regulations prescribing a crime were unconstitutional as a delegation by Congress to the Secretary of Agriculture of its power to define and establish what *shall* constitute a crime against the United States. In denying this plea the Supreme Court, quoting from Union Bridge Co. *v.* United States and Field *v.* Clark (supra), said at page 521:

"That 'Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' (Field *v.* Clark, 143 U. S. 649, 692.) *But the authority to make administrative rules is not a delegation of legislative power, nor are such rates raised from an administrative to a legislative character because the violation thereof is punished as a public offense.*"

This is by far the broadest decision upon this subject, in that it sustained an authority to constitute a crime against the United States delegated to the Secretary of Agriculture *without prescribing* any elements, facts, or state of things controlling of the Secretary in that denouncement.

Such is not the case, however, with section 315. Therein are clearly defined and prescribed the facts and conditions, or state of things, which shall constitute and admeasure the duties laid by Congress to be ascertained and proclaimed by the President.

In Hannibal Bridge Co. *v.* United States (221 U. S. 194) the court was again called upon to determine the validity of section 18 of the river and harbor act of 1899.

The statute proceeded under in this case was the same as in Union Bridge Co.'s case, *supra.* After due proceedings the Secretary of War found and advised the Hannibal Bridge Co., the Wabash Railroad Co., and the Missouri Pacific Railway Co. that the bridge over the Mississippi River at Hannibal, Mo., owned or controlled by said companies, was "an unreasonable obstruction to free navigation" or commerce *and ordered certain specified changes.* The companies refused to comply with the Secretary's order, were duly proceeded against by criminal information, and convicted. On appeal they questioned the constitutionality of the act as an unauthorized delegation of congressional power. At page 205 the court in denying this contention said:

"The assignments of error are very numerous. But we feel constrained to say that no one of them causes a serious doubt as to the correctness of the judgment sought to be reviewed. This court has heretofore held, upon full consideration, that Congress had full authority under the Constitution to enact section 18 of the act of March 3, 1899 (ch. 425, 30 Stat. 1153), and that the delegation to the Secretary of War of the authority specified in that section was not a departure from the established constitutional rule that forbids the delegation of strictly legislative or judicial powers to an executive officer of the Government. *All that the act did was to impose upon the Secretary the duty of attending to such details as were necessary in order to carry out the declared policy of the Government* as to the free and unobstructed navigation of those waters of the United States over which Congress in virtue of its power to regulate commerce had paramount control * * *." (Union Bridge Co. *v.* United States, 204 U. S. 364; Monongahela Bridge Co. *v.* United States, 216 U. S. 177; Field *v.* Clark, 143 U. S. 649; Buttfield *v.* Stranahan, 192 U. S. 470.)

Obviously there is not an entire lack of parity in results between a rate of duty and a bridge as an obstruction to commerce. The constitutional power as to the regulation of commerce applies equally to each. The full force and effect of the Union Bridge Co. and Hannibal Bridge Co. decisions, as here applicable, can best be had by bearing in mind that full and complete authority was therein *vested in the Secretary to determine* and give notice of *exactly what would be required to effect free navigation* or an unobstructed commerce. Congress having declared the policy of unobstructed navigable rivers by bridges, "*or otherwise,*" it was competent the court said *to delegate to the Secretary full power to determine what was such an obstruction and what remedy should be enforced.* So Congress having declared the policy of equalizing different competitive conditions in our markets may well on that authority authorize the President to determine those differences *and their remedy.* By section 315, however, Congress not only prescribes what the President shall determine to inaugurate action, to wit, differences in competitive conditions, but also prescribes precisely the remedy he shall apply, to wit, a duty equal to those differences or change of classification.

It will be noted that in all of the foregoing cases the principle early established in the brig *Aurora* cases and in Wayman against Southard, *supra,* that Congress, having by *general* provisions *declared its policy,* may vest those who are to act under such general provisions with full powers to put that policy into effect as and when prescribed by Congress.

Applying these principles to the proposed provisions, *legislative* power is exercised when Congress declares that a prescribed duty—that is, one equal to the net difference between two named trade conditions—shall be levied and collected. What the President is required to do is simply in execution of this act of Congress. His duties are neither judicial nor legislative, but purely administrative. He is vested with no discretion, but commanded to act upon certain prescribed conditions or a prescribed state of facts to be ascertained and made known in the manner prescribed by Congress. Congress, therefore, and not the President, levies this duty in terms of a prescribed "state of facts" to be ascertained and proclaimed by the President.

From the foregoing it is beyond question and will not be disputed that Congress can enact an import revenue or tax statute to be *put into effect, enforced,* or *suspended* upon the ascertainment and proclamation of prescribed facts or a state of things by a denominated official or officials.

The distinguished junior Senator from Montana [Mr. WALSH], in his very able presentation of the question challenging the constitutionality of section 315, stated:

"It is not without significance in this connection that among the vast multitude of cases dealing with the subject of the delegation of legislative power *few, if any, can be found in which the delegation of the taxing power was involved*, the legislatures apparently recognizing, instinctively or otherwise, that it could be delegated or that a well-nigh universal conviction prevails that it is unwise to do so."

The proposed legislation has parallel and precedent in, and to a large extent is patterned after, several well-known, long-enforced, and often-construed acts of Congress which *in principle*, in constitutional and treaty relations and in legal concept, are alike this.

While these are here presented as precedents for the amendment, section 315, they are likewise pertinent to our next inquiry, which is the crucial, determinative, and only real question here involved, to wit:

Can Congress levy an import duty in terms of a fact or state of facts to be ascertained and proclaimed by the President?

The constitutional grant for the several acts referred to, and which will now be considered, is found in section 8 of Article I, as follows:

"SEC. 8. 1. * * * To lay and collect taxes, *duties*, imposts, and excises, * * *; but all *duties*, imposts, and excises shall be uniform throughout the United States.

"2. * * *.

"3. To regulate commerce with foreign nations, and among the several States, * * *.

"4. * * *.

"5. To coin money, *regulate the value thereof, and of foreign coin*, * * *.

"18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, * * *."

Preliminarily, it may be instanced, as before stated, that every statute prescribing "market value" as a basis for ad valorem duties, and vesting in the appraiser or some officer of the Government acting as such the power to estimate, declare, and apply the same, was a statute in integral and necessary part levying a duty in terms of a state of things to be ascertained by the named official. While the *rate* was fixed by Congress, the *actual duty levied* was dependent upon the state of things determined by the appraiser, which might and often did differ from day to day, according to the country of exportation, or as the state of things constituting "market value" varied and was *found* by the appraiser.

While, of course, these statutes were not delegations of the "legislative" power, they were a delegation of *the authority* to ascertain and apply or declare a duty, in accordance with the legislative purpose prescribed by the statute levying a duty according to and as measured by a legislatively prescribed state of things, to wit, "market values," to be ascertained and applied by a designated official, the complete fixing of which required but the mathematical process of applying the prescribed "rate" to the state of things or basis found by the appraiser. These legislative precedents were early enacted while the debates and controversies of the constitutional convention were clearly in the minds of our legislators and have been repeatedly reenacted throughout our entire natural existence.

Because the authority of Congress to levy and collect tonnage and commodity "duties" is authorized and vested by the same provision of the Constitution, the Supreme Court in discussing the constitutionality of either uniformly refers to and quotes the language and congressional course as precedent of the other. (See particularly Field *v.* Clark, supra.) Upon that authority the same course will here be pursued. (See also Union Bridge Co. *v.* United States, 204 U. S. 364.)

Precisely in principle alike the submitted provisions and substantially so in language was section 5 of the tariff act of 1897 (30 Stat. L. 151, 205). That provision reads:

"SEC. 5. That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, *any bounty or grant* upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this act, then, upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by manufacture or otherwise, *there shall be levied and paid* in all such cases, in addition to the duties otherwise imposed by this act, *an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury*, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

The provision was in substantially exact language reenacted in the Payne-Aldrich Tariff Act of 1909 (36 Stat. L. 11, 85), and again reenacted in the Underwood-Simmons Tariff Act of 1913 (38 Stat. L. 114, 193), and is presently in force.

Herein Congress levies a duty in terms of a "state of things," to wit, "a duty *equal* to the *net amount*" of a bounty or grant, to be "ascertained," "determined," and "declared" by the Secretary of the Treasury. The "*net* amount" of a bounty or grant always involves, first, a legal determination of the law bestowing the same; and, second, *the effect upon trade and commerce* of the operation of that grant. In the latter respect its determination is often quite alike the determination of the effect upon trade and commerce of import tariff laws. Such bounties or grants in fact often are effected by export laws. Wherefore in this statute we now have, and since July 27, 1897, more than a quarter century, have had a statute precisely alike section 315 levying a duty in terms of a state of things, residing in a condition of trade and commerce and the operation thereupon of laws, to be ascertained and declared by a named official.

During the existence of this statute it has in numerous cases been before the courts for adjudication. Thus, in Downs *v.* United States (187 U. S. 496) the Supreme Court construed this provision as applying to the so-called Russian Sugar Bounty cases. A reading of the intricate findings of fact and conclusions of law necessary upon the part of the Secretary in that case, in order to determine the exact duty to be levied, is convincing of the comparatively simple duties of like nature imposed upon the President by section 315.

In Nicholas & Co. *v.* United States (7 Ct. Cust. Appls. 97) the United States Court of Customs Appeals construed the section as it appeared as paragraph E, section 4, of the tariff act of 1913, as applicable to the so-called potage taxes or allowances made by Great Britain upon spirits exported to this country. That decision by the United States Court of Customs Appeals was on certiorari affirmed by the Supreme Court of the United States (Nicholas & Co. *v.* United States, 249 U. S. 34). Its repeated legislative enactment by Congresses of both political parties is of itself a legislative interpretation of the power to so enact (Field *v.* Clark, 143 U. S. 649).

It may be instructive to delineate the *modus operandi* of this provision from the actual facts occurring in the Nicholas & Co. case. The question of whether or not the so-called allowance by Great Britain upon liquors exported to this country was or was not a bounty within the provisions of section 5, as reenacted in the tariff act of 1913, was long contested by the officials of that country. The Treasury Department at times changed its decision upon the subject. Finally by Treasury Decision 34466, upon the advice of the Attorney General that the decision of whether or not such allowance by Great Britain was or was not a bounty within the provisions of said act of 1913 was "one better fitted for judicial determination than for an expression of his opinion," the amount of such allowance was ascertained and proclaimed by the Secretary of the Treasury in accordance with the provisions of said section 5, as appearing in the act of 1913, *as amounting to 3 pence per gallon upon plain British spirits and 5 pence per gallon on compound spirits.*

Upon an importation at the port of New York of such liquors the collector thereat, in obedience to the proclamation of the Secretary of the Treasury, reported as follows:

"The merchandise consists of British spirits imported from the United Kingdom of Great Britain and Ireland. Following the instructions contained in Treasury Decisions 34466 and 34572, that an export bounty is allowed on plain British spirits of 3 pence per British proof gallon and 5 pence per gallon on compound spirits, a countervailing duty, *equal to the bounty paid*, was assessed under paragraph E of section 4, act of 1913, *in addition to the regular rate of duty* provided for in Schedule H of said act."

The Board of General Appraisers affirmed the decision of the collector (G. A. 7758; T. D. 35595). Upon appeal by the importers to the United States Court of Customs Appeals the decision of the Board of General Appraisers was affirmed. Nicholas & Co. *v.* United States (7 Ct. Cust. Appls. 97), and upon review by certiorari the decision of that court was affirmed by the Supreme Court, Nicholas & Co. *v.* United States (249 U. S. 34).

Thus in all respects a statute precisely similar has long been upon the statute books, is being executed, and had been construed by the highest courts. How can it be said, there-

fore, in the presence of such an approved investment by Congress in the Secretary of the Treasury, to determine from stated things, residing in conditions of trade and commerce as affected by laws and regulations, a duty to be collected and to convert that finding into an applicable form of duty, that Congress can not so empower the President?

There will be noted in passing that Congress, by section 5 and its statutory successors, had vested in the Secretary of the Treasury the determination and *decision* as to the amount of this bounty and its equivalent in additional duties. As a matter of fact, that is a matter of daily practice at almost every customhouse in the country.

In concluding the consideration of this statute it may be well, in view of the debate in the Senate, to state that it provided no review by the courts of the *findings of the state of facts* by the Secretary of the Treasury, though the act levied a duty or tax, and has uniformly been held by the courts as conclusive upon all the courts. In this particular, in a well-considered case (Franklin Sugar Refining Co. *v.* United States, 178 Fed. Rep. 743), the court said:

"It was undoubtedly the intention of Congress, in the enactment of this section, that the findings of the Secretary as to the amount of bounties paid by the foreign countries and collectible upon importation of merchandise as a countervailing duty should be final *so far as any revision or examination by the courts is concerned.* We see no difference between this provision of the act of 1897 and that section in the various tariff acts which requires the Secretary of the Treasury to proclaim the values of foreign coins after they have been ascertained by the estimate of the Director of the Mint, *in so far as the finding of fact is to be regarded as binding upon the courts* under this provision.

"As to the values of foreign coins, the Supreme Court in four cases, to wit, Arthur *v.* Richards (90 U. S. 259, 23 L. Ed. 95); Cramer *v.* Arthur (102 U. S. 612, 26 L. Ed. 259); Hadden *v.* Merritt (115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333); and United States *v.* Klingenberg (153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647), declared that the finding or estimate of the Director of the Mint, as proclaimed by the Secretary of the Treasury, was binding not only upon the collector and the Board of General Appraisers *but upon the courts as well;* and we have no doubt it was the intention of Congress that *in the matter of the collection of the countervailing duties the amount fixed by the Secretary of the Treasury to be collected on importations can not be inquired into by the courts* but must be settled as declared by the Treasury Department. If there has been a mistake the remedy is by appeal to the Secretary. In case that has not been done, the courts can not admit evidence for the purpose of inquiring into the question as to whether the amount fixed by the Secretary was or was not correct."

The precise legal doctrine applicable to such cases will later be stated. But that Congress can lay a duty on imports and authorize some official to determine the same in a prescribed manner without judicial review of the finding is elementary in customs import law and long since established beyond controversy.

There are many acts of Congress providing discriminating duties upon tonnage which are identical in principle and pertinent. It will be noted as stated that the constitutional grant to Congress of the right to levy duties upon tonnage is by the same provision granting such right as to importations. Accordingly and uniformly such acts are reviewed by the Supreme Court as pertinent expositions of the exercise by Congress of its deemed constitutional rights as to each.

Section 4219 of the Revised Statutes in part provided:

"4219. * * * On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, *there shall be paid a duty* at the rate of $2 per ton; and none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation *if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished.*" * * *

Pertinent here is the investment by that section in the President to suspend tonnage duties upon the finding by him that the discriminating or countervailing duties levied by a foreign nation "so far as they operate to the disadvantage of the United States" were abolished. Thus a condition of trade and commerce resulting from the imposition of duties upon our trade was to be determined by the President as a condition precedent to the suspension of tonnage duties levied by the United States.

Section 2502 of the Revised Statutes provided a discriminating duty of 10 per cent ad valorem in addition to the duties imposed by law *upon merchandise* imported in vessels not of the United States.

Section 4228 of the Revised Statutes provided for the determination by the President of any discriminative duties upon *either tonnage or importations* of any foreign nation as against the United States on his proclamation to that effect, and vested in him a power upon such determination to suspend or discontinue similar discriminations made by this country. The provision as amended July 24, 1897 (30 Stat. L. p. 214), further provided:

"That the President is authorized to suspend *in part the operations* of sections 4219 and 2502, so that foreign vessels from a country imposing *partial* discriminating duties upon American vessels or *partial discriminating import* duties upon American merchandise *may enjoy in our ports the identical privileges* which the same class of American vessels and merchandise may enjoy in said foreign country."

This last provision was construed by the Attorney General not to have been repealed by section 22 of the Dingley Tariff Act of July 24, 1897 (30 Stat. L. 151), but to be continued in force therewith (21 Op. Atty. Gen. 597). It will be particularly noted that the power vested in the President by that statute in determining the *partial* discriminatory duties and putting in effect "identical privileges" *involved the power to determine the equivalent duty which this country would exact in such cases.*

These provisions of the Revised Statutes are in legal concept in exact accordance with the proposed amendment. In each, Congress laid a duty not only upon tonnage but *imports* into the United States, in terms of a state of things or conditions resulting from the effect of laws upon commerce, to be ascertained and proclaimed by the President.

Peculiarly and *exactly parallel* is the amendment to section 4228, of July 24, 1897, enacted coincident with the Dingley Tariff Act. Congress therein fixed no duty in terms of prescribed figures or rates, but levied a discriminating duty on foreign vessels and merchandise in terms of a state of things, to wit, a duty *equal* to that levied by such country on our vessels or merchandise, to be ascertained and proclaimed by the President. That is to say, the President was to investigate the effect upon our exports to the particular country of their laws and the effect of our laws upon the imports hereto from such country, and if he found that their laws discriminated less against our exports thereto than our laws did against their exports to this country, he was to calculate what duty *thereby shown* would enable them to "enjoy in our ports identical privileges," and accordingly suspend wholly *or in part* the tonnage duties levied in section 4219 *or* the discriminating import duties levied in section 2502 and proclaim in effect the duty provided by Congress and ascertained as aforesaid. Most important it should be noted that *the President was here vested with a discretion as to which duty* he would suspend. He might suspend that provided by section 4219 or section 2502, or he might suspend, in whole or in part, both, in his discretion. Likewise with the policy of Congress to equalize discriminations and their effect upon trade, it was within its power to delegate to the President a discretion as to the precise *execution* of the statute, whether as to section 4219 or 2502, or both, just as in this amendment it is competent for Congress, having declared the policy to equalize conditions of competition in our markets, to vest in the President *a discretion as to the execution of that policy* by adopting a change of rate or form of duty or classification, assuming the amendment as drawn so permits an election.

But a close study of these sections of the Revised Statutes, long if not now in force, reveals the same legal concept that supports section 315 in this bill. In all Congress laid or provided a duty in terms of a prescribed state of things, residing in defined conditions of trade as effected by laws operating thereupon, and directed the President to admeasure one set of discriminations and resulting trade conditions against the other, *and to determine what rate of duty thereby shown would equalize the discriminations against or conditions affecting this country. The act levied the prescribed duties upon imports or tonnage into this country.* The President ascertained and proclaimed the same as and in the manner prescribed by the act.

To the same effect is section 1 of the act of July 25, 1892 (27 Stat. L., 167). That section reads:

"SEC. 1. Passage of vessels through St. Marys Falls Canal—tolls: That, with a view of securing reciprocal advantages for the citizens, ports, and vessels of the United States on and after the 1st day of August, *1892, whenever and so often as the President shall be satisfied that the passage* through any canal or lock connected with the navigation of the St. Lawrence River, the Great Lakes, or the waterways connecting the same,

of any vessels of the United States, or of cargoes or passengers in transit to any port of the United States *is prohibited or is made difficult or burdensome by the imposition of tolls or otherwise*, which, in view of the free passage through the St. Marys Falls Canal now permitted to vessels of all nations, *he shall deem to be reciprocally unjust and unreasonable*, he shall have the power, and it *shall be his duty to suspend by proclamation* to that effect for such time and to such extent (including absolute prohibition) *as he shall deem just* the right of free passage through the St. Marys Falls Canal, so far as it relates to vessels owned by the subjects of the Government to discriminating against the citizens, ports, or vessels of the United States, *to to any cargoes, portions of cargoes*, or passengers in transit to the ports of the Government making such discrimination, whether carried in vessels of the United States or of other nations. *In such case and during such suspensions toll shall be levied, collected*, and paid as follows, to wit: Upon *freight* of whatever kind or description *not to exceed* $2 per ton; upon passengers, *not to exceed* $5 each, *as shall be from time to time determined by the President*."

By proclamation of August 18, 1892, the President, under the authority of the above act, and because of claimed discrimination against citizens of the United States in the use of the Welland Canal, proclaimed and enforced *a toll of 20 cents per ton on all freight* passing through St. Marys Falls Canal in transit to any part of the Dominion of Canada. Subsequently, and on February 21, 1913, by proclamation he suspended this ascertained and enforced tonnage duty. (27 Stat. L. 10650.)

So as to section 14 of the act of June 26, 1884, chapter 121 (23 Stat. L. 57), as set forth by the court in Field *v.* Clark (649, 689), as follows:

"By the fourteenth section of the act of June 26, 1884, chapter 121, removing certain burdens on the American merchant marine and encouraging the American foreign trade, certain *tonnage dutics* were imposed upon vessels entering the United States from any foreign port or place in North America, Central America, the West India Islands, Bahama Islands, Bermuda Islands, Sandwich Islands, or Newfoundland, and *the President was authorized to suspend the collection of so much of those duties on vessels entering* from certain ports *as might be in excess of the tonnage and lighthouse dues, or other equivalent tax or taxes* imposed on American vessels by the government of the foreign country in which such port was situated, and should upon the passage of the act 'and *from time to time thereafter as often as it may become necessary, by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply and the rate or rates of tonnage duty, if any, to be collected under such suspensions.*'"

In execution of that act Presidents Arthur and Cleveland issued proclamations.

This statute is precisely of the same legal concept as amendment 315a. Certain tonnage duties are levied by previous acts of Congress. In view of uncertain and varying future conditions, Congress by this act levied a substitute tonnage duty, in the terms of a certain prescribed state of things, to wit, the difference between the prescribed tonnage duties and the tonnage duties and equivalent taxes imposed by the foreign government on American vessels, and provides that such shall be ascertained and proclaimed by the President. While the act requires the President to "*indicate* by proclamation * * * the *rate* or *rates* of tonnage duty, if any to be collected," Congress had fixed the duty in terms of facts prescribed in the act and directs the President to ascertain and proclaim the equivalent rate.

It is meet to note that in the case of Field *v.* Clark, supra, at page 689, the Supreme Court of the United States *adverted to this provision of the law and all of the foregoing statutes as illustration of the powers* of Congress exercised under the Constitution and as a legislative precedent for upholding the constitutionality of the statute the subject of review in Field *v.* Clark as not in excess of the legislative power. Here again we find Congress levying a duty in terms of facts, or a state of facts, and the President empowered *to ascertain and proclaim a rate of duty which will equalize in our commerce that state of facts*—precisely the thing done in section 315.

Similar statutes are those relating to the ascertainment of the value of foreign coins. The constitutional grant in this particular is subdivision 5 of the eighth section of Article I: "To coin money, *regulate the value thereof*, and of foreign coin * * *."

Therein is an express grant to Congress to by legislation fix the value of foreign coin. Has Congress itself by act in detail fixed the value of foreign coin? Uniformly Congress, having declared its policy *by prescribing the basis of such only* as "the pure metal of such coin of standard value," has confined the necessary ascertainment and proclamations thereof to administrative officials of the Government. More particularly in point is that not only has Congress so enacted, but it has provided that in all reliquidations of duties upon imported merchandise this ascertainment and finding by an administrative official *shall be adopted as one of the elements of dutiable value*. This legislation, in principle, is in exact accordance with the proposed statute. What difference can there be in confiding the ascertainment of the value of foreign money and confiding the ascertainment of the value of foreign merchandise measured by that money to administrative officials? So intimately connected is this subject with that of the collection of duties upon foreign imports that the relevant provisions of recent years have found themselves as parts of our import tariff laws.

The provision long ago and now in principle enforced was a part of the tariff act of August 27, 1894 (28 Stats. L. 552). As section 25 it read:

"SEC. 25. (Value of foreign coins.) That the value of foreign coin as expressed in the money of account of the United States *shall be that of the pure metal of such coin of standard value*, and the value of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury immediately after the passage of this act and thereafter quarterly on the 1st day of January, April, July, and October in each year. And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is proclaimed, and the date of the consular certification of any invoice shall, for the purposes of this section, be considered the date of exportation: *Provided*, That the Secretary of the Treasury may order the reliquidation of any entry at a different value whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least 10 per cent more or less than the value proclaimed during the quarter in which the consular certification occurred."

Perhaps no provision of equal life has been the subject of more litigation than this. Its provisions have been before the Supreme Court for construction in numerous cases.

This section not only vests in the Secretary of the Treasury power to ascertain and proclaim the value of foreign coins, as found and reported to him by the Director of the Mint, but, in line with the proposed legislation, imposes upon all customs officials the duty of acceptance of that proclaimed value in the reliquidation of import customs entries. It requires but the suggestion to prove that this ascertained and proclaimed finding, by virtue of this statute, affects the amount of duties collected upon all imported merchandise. Yet this ascertainment is made and enforced by administrative officials, whereas the Constitution vests in Congress alone by legislation the power to "regulate the value of foreign coin."

In so far as the statute is made expressly applicable and controlling of customs liquidations to that extent, no doubt its constitutionality may be rested in subsection 18 of Article I, section 8 thereof, *supra*, as a law enacted "necessary and proper for carrying into execution," among other powers, section 1 of that article "to lay and collect duties." The statute, however, forms a striking illustration of the declaration by Congress of its policy, to wit, that the value of foreign coins "shall be that of the pure metal of such coin of standard value," and then delegating to the Secretary and Director of the Mint the power to find all the facts and state of facts, to wit, "values," necessary for the execution of the laws.

It is appropriate to here note also that this *finding* and proclamation of facts constituting a material factor in taxes levied upon imports and delegated to the Secretary is not under our laws made or under our Constitution of a right reviewable by any court. (Arthur *v.* Richards, 90 U. S. 259, 23 L. Ed. 95; Cramer *v.* Arthur, 102 U. S. 612, 26 L. Ed. 259; Hadden *v.* Merritt, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333; and U. S. *v.* Klingenberg, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647.)

The last foregoing statute contributes to this presentation another statutory precedent whereby Congress, having declared its policy as to what shall be the basic principle in the regulation of foreign coins, has delegated the execution of that policy to the Secretary and made his finding of the fact or state of things in pursuance of that defined policy final and the measure of a material component part of all duties levied at the customhouse. Thereby Congress lays this duty in the

terms of prescribed facts or state of facts to be ascertained and declared by the Secretary. Wherefore it is respectfully concluded that an answer to the inquiry, "*Can Congress levy an import duty in terms of a fact or state of facts to be ascertained and proclaimed by the President?*" finds abundant statutory precedent enacted by Congress from the foundation of the Government to the present, approved by the highest courts, and during all of said time and at present constituting an integral, efficient, and important part of our import revenue system. And that is precisely the legal concept of and thing done by section 315.

Legislation upon the subject of the rate-making power of railroad and public utilities commissions affords further pertinent precedents. There is a marked difference, however, in the constitutional requirements where Congress is authorizing a person or board to lay an import customs duty and to fix a freight or passenger rate. The Constitution expressly empowers Congress to lay a "duty," but does not expressly require Congress to establish a freight *rate*. The later, in so far as interstate commerce is concerned, is a "regulation of commerce among the States," and as such rate fixing may rightly be held to be a necessary incidental means to that end. It may well come within the category of the incidental powers granted Congress by subsection 18 of section 8 of Article I of the Constitution to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers," included within which "foregoing powers" is that "to regulate commerce among the several States." Therefore in delegating the duty-levying power different, or at least additional, constitutional requirements must be observed.

That investment in the Interstate Commerce Commission is in very simple language. Its constitutionality has never been considered in any of the courts. Up to the Hepburn Act of June 29, 1906, the Interstate Commerce Commission was not invested with the power to fix a rate. (See Interstate Commerce Commission *v.* Cincinnati, New Orleans & Texas Pacific Railway Co., 167 U. S. 479.)

By the Hepburn Act, however, of June 29, 1906, section 15 (34 Stat. L., chap. 3591, p. 589), that power was granted the commission by Congress. The language of the grant is very simple. It is provided:

"That the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made * * * it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, * * * are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, *to determine and prescribe what will be the just and reasonable rate or rates*, charge or charges, to be thereafter observed in such cases as the maximum to be charged; * * * and to make an order"—

And so forth.

Subsequently, by the act of June 18, 1910 (36 Stat. L., chap. 309, 551), that section was amended. The amendment, however, in so far as it vested the commission with power to fix a rate, in no material import differs from the language of the Hepburn Act. While the constitutionality of this provision was never questioned, the act was the subject of comment by the Supreme Court of the United States in Texas & Pacific Railway Co. *v.* Abilene Cotton Oil Co. (204 U. S. 426); Interstate Commerce Commission *v.* United States of America ex rel. Humboldt Steamship Co. (224 U. S. 474); Interstate Commerce Commission *v.* Louisville & Nashville Railroad Co. (227 U. S. 88); and Interstate Commerce Commission *v.* Goodrich Transit Co. (224 U. S. 194).

Should the courts, however, hold that section 315 is in fact subject to the limitations of the constitutional power to "lay * * * duties" as well as or instead of "to regulate commerce with foreign nations," the simple statutory authorization of the Hepburn Act would not suffice, but the rules laid down in Field *v.* Clark (143 U. S. 649) and other like cases cited would have to be observed in the manner done by section 315a.

The legal status or judicial status with reference to the powers vested in the Interstate Commerce Commission as to rate making is well concluded in Willoughby on Constitution, volume 2 (1910), page 1324, as follows:

"That a considerable amount of regulative control over railways may constitutionally be delegated to the Interstate Commerce Commission has not been disputed. It was not until the act of 1906, however, that that body was intrusted by Congress with the authority to fix in specific instances the rates that interstate railways might charge. By that law it is provided that the rates which these companies may legally fix, or which may be fixed for them by the commission, must be "just and reasonable." *This is, practically, the only principle legislatively laid down for the guidance and control of the commission.* The question, therefore, which still awaits final judicial settlement by the Supreme Court is whether this provision of the law may fairly be said to lay down a sufficiently definite rule which the commission is merely to apply to specific cases as they arise to warrant the determination that that body has not been endowed with a discretionary power of fixing rates which is in fact legislative. The opinion may, however, be hazarded that, arguing from Field *v.* Clark, Buttfield *v.* Stranahan, and Union Bridge Co. *v.* United States, the act of 1906 will be sustained. Indeed, in Interstate Commerce Commission *v.* Chicago, Rock Island & Pacific Railway (218 U. S. 88) and Interstate Commerce Commission *v.* Chicago, Burlington & Quincy Railroad (218 U. S. 113) the rate-making powers of the commission seem to be accepted without constitutional question."

More apposite authority will be found in cases arising in the States. The constitutions of several of the States expressly vest the rate-making power as to railroads in the State legislatures. The necessary incident to the development of public enterprises and railroad transportation has made it necessary in almost if not every State of the Union that the legislature delegate this authority to some board or commission. The constitutionality of this delegation of authority has in several of the States been frequently contested.

Thus, in Louisville & Nashville Railway *v.* Garrett (231 U. S. 298, 305) it is stated:

"It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind, * * *. It pertains, broadly speaking, to the legislative power. The legislature may act directly or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body."

In Atlantic Coast Line Railroad *v.* North Carolina Corporation Commission (206 U. S. 1, 19), the Supreme Court stated:

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their State business, to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

The constitution of the State of Missouri (sec. 1, art. 4; sec. 14, art. 12) provided as follows:

"The legislative power, subject to the limitations herein contained, shall be vested in a senate and house of representatives, to be styled the General Assembly of the State of Missouri." And "The general assembly * * * shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads and enforce all such laws by adequate penalties."

Speaking of the power of the State legislature to delegate that authority the supreme court of that State in a well-considered case, State *v.* Public Service Commission (194 S. W. 287–295), stated:

"It is also settled beyond doubt or cavil that this power of prescribing maximum rates for common carriers, which, as we have seen, legislatures possess pursuant to an untrammeled grant of powers to pass laws, may be delegated to a public service commission. To this rule, unless inhibited by express constitutional provision, there is not a reputable exception. * * * He reads the cases in vain who does not concede the authority of the legislature, absent an express constitutional provision which forbids, to delegate to an administrative body the power to fix rates for the carriage of freight and passengers."

Acting under the aforesaid constitutional authority the legislature by the laws of 1913, section 47, page 583, enacted:

"Whenever the commission shall be of the opinion * * * that the maximum rates * * * are insufficient to yield reasonable compensation for the service rendered, * * * the commission shall * * * determine the just and reasonable rates, fares, and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare, or charge has been heretofore authorized by statute."

The Missouri Supreme Court in the case cited held this to be a properly delegated function by the legislature, even to the extent of setting aside a rate previously established by the legislature itself.

Similar enactments by other States under essentially similar constitutional powers and restrictions have been upheld. (See Chicago, Burlington & Quincy Railroad *v.* Jones, 149 Ill. 361,

376; State *v.* Baltimore & Ohio Railroad, 76 W. Va. 399; State *v.* Railroad Commission, 52 Wash. 33; Georgia Railroad *v.* Smith, 70 Ga. 694, 698; Railroad Commission *v.* Central of Georgia Railway, 170 Fed. Rep. 225, 238.)

It may be said generally of all of these statutes the delegation of authority was to "make reasonable and just rates of freight and passenger tariffs," or to "make just and reasonable rates, fares, and charges."

The general delegation of authority in such cases is quite similar to that delegated the United States Interstate Commerce Commission to fix "just and reasonable" rates.

It is observable that the general ground asserted by the courts in those State cases is that the granting of the power to fix rates is not prohibited by the particular State constitution.

The general rule of construction that State legislatures possess all powers not inhibited by the particular State constitution, while Congress possesses only those powers expressly granted by the Constitution of the Untied States, is not here lost sight of, but it is confidently asserted that the express grant to Congress by paragraph 18, section 8, Article I of the Constitution of power to make all laws "which shall be necessary and proper for carrying into execution" the powers therein granted to "lay duties" and "regulate foreign commerce," may well be deemed a sufficient constitutional warrant of this amendment.

Without indulging a discriminating review of these decisions, it would seem proper to observe that while the language of many upholds a delegation of the *legislative* power, no such claim as to section 315 is made. What is here asserted is that the Congress by this amendment will delegate no *legislative* powers but enact a statute legislatively complete prescribing therein authority to the President to make the same effective as and when therein by Congress prescribed.

We now come to an important consideration attending all delegations by the legislatures of authority to execute a law.

While the Supreme Court, as has been heretofore shown, has repeatedly ruled that it is sufficient for the Congress to declare its general policy delegating to the particular official the authority to fill in the details, Willoughby on the Constitution, volume 2, page 1319, concisely states the most limited rule as adopted by a class of cases, as follows:

"The Congress can not delegate its power to make a law, but it can make a law to delegate a power to determine some *fact* or *state of things* upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power and must therefore be a subject of inquiry and determination outside of the halls of legislation.

"The doctrine thus declared is without objection so long as the *facts which are to determine the executive acts* are such as may be *precisely stated by the legislature and certainly ascertained by the Executive.* When this is not so, the officer intrusted with the execution of the law is necessarily vested with an independent judgment as to when and how the law shall be executed; and when this independence of judgment *is considerable* there *is ground* for holding that the law is not simply one *in presenti* to take effect *in futuro*, but is a delegation by the lawmaking body of its legislative discretion."

The provisions of section 315, however, are well within the more narrow rule.

Are the "facts" or "state of things" prescribed by the amendment and made determinative of his action when ascertained and proclaimed by the President "precisely stated by the legislature," and such as may be "certainly ascertained" by the Executive?

It would seem that the necessary implication, if not mandate of a statute, requiring investigation of conditions "in the *markets* of the United States," clearly directed an investigation of "market values," and when applied to imported merchandise *as imported* necessarily referred to such in *wholesale* quantities. The whole framework of our tariff laws is so obviously thus predicated that no other conception of their reference ordinarily obtains. Indeed, until enactment of the customs administrative act of 1890 the word "wholesale" did not appear in any of the acts making "market value" the basis of tariff calculations. None of the cases defining "market value" as the basis of tariff duties, the Cliquot Champagne case (3 Wall., 70 U. S. 114, 125) or Muser *v.* Magone (155 U. S. 240, 249), in any part mentions the word "wholesale." Nor does the statute construed in the former case provide other than that goods should be invoiced at their "actual market value." See act of March 3, 1863 (12 Stat. L. 727). Moreover, to-day no existing statute employs the word "wholesale" as applied to "market value" as a basis of duties. Thus paragraph R, section 3, of the Underwood-Simmons Act provides duties shall be assessed upon the "actual market value" *or* "wholesale price" of imported goods "in the principal markets of the country from whence exported." Herein, then, "market value" is, as throughout our entire tariff legislation, used as synonymous with "wholesale price." In relating the presidential ascertainment *as to imported goods to market* conditions or values in the "markets" of the United States by a member provision of our tariff laws there would seem to be no question that the reference is to wholesale sales of such.

We may therefore proceed upon the assumption that the literal and legal force of the "facts" or "state of things" "made determinative of the presidential action" by the amendment is the wholesale selling price in our markets of like or similar foreign and domestic articles competing therein and the differences between such as influenced by the competitive conditions attending each. (Supplemental thereto is 315 (c), but it is preferred to make this presentation without aid of that provision.) The debates in the Senate and the plain unequivocal meaning of the language of the section leave unmistakable that such is its unquestionable literal import. The facts or state of things embraced therewithin and therefore made determinative of the presidential action may be reduced to "market values" or "wholesale prices" and the "differences" between them. That such as herein written constitute a mandate by Congress to the Executive "precisely stated" and capable of being "certainly ascertained" is witnessed by legislative precedents and the consistent administrative practice in import customs matters since the foundation of the Government.

Commencing with the tariff act of July 4, 1789 (1 Stat. L. 26), and almost continuously since, Congress has levied ad valorem duties by predicating a prescribed rate upon the "value," "true value," "market value," or "actual market value" of the imported article, a "fact" or "state of things" constituted by Congress in these acts an integral and necessary part of such levy, and *in haec verba* delegated to a denominated official or officials the power to ascertain and apply or declare. The delegation of this authority to these officials for more than a hundred years was in these words alone for example, "actual market value," without words of further definition or direction. While the courts construed the meaning of the phrase and defined what matters could be taken into consideration by the appraisers under this delegation of authority as in the Cliquot Champagne case (3 Wall., 70 U. S. 114) and Muser *v.* Magone (155 U. S. 240), and numerous other decisions, it was not until August 5, 1909, as a part of the tariff act of that date, that Congress further stated in detail and thus more definitely prescribed the facts made determinative of "market value" when ascertained by the appraisers.

If therefore the terms "value" and "actual market value" were deemed and employed by Congress as sufficiently determinative and descriptive of a delegated authority to ascertain and proclaim a duty, or at least an integral and necessary part thereof as prescribed by Congress, why is not the language of this amendment, plainly synonymous with and the literal equivalent thereof, so sufficient?

Nor are we without abundant legislative precedent for the sufficiency, under the stated rule, of the literal expression employed in section 315 made determinative of the presidential action, to wit, "the *differences* in competition in trade in our markets as between like or similar domestic and foreign goods." This specification of facts or state of things and their ascertainment is made by Congress determinative and descriptive of the presidential mandate and authority.

The query, in other words, is, Is this statement or description of facts too indefinite to enable the President to proceed to ascertain and admeasure with, or determine the equality between the same, and an established duty, or therefrom calculate and proclaim a duty equal therewith? If so, Congress by this bill is proceeding to an idle act for this delegation to the President is exactly of the ascertainments the Congress is now endeavoring and has so endeavored in the making of every tariff.

Moreover, there are numerous statutes assigning the President similar powers of admeasuring conditions of commerce as effected by laws operating thereupon, with one another or with prescribed or authorized duties.

Thus by section 3 of the tariff act of October 1, 1890, *supra*, the subject of the decision in Field against Clark, the President was required to determine whether the laws of foreign countries in their effects upon our commerce in their markets were reciprocally "*equal*" and "*reasonable*," as compared with the effects of certain of our laws in our markets upon their commerce. To do so the President necessarily ascertained and

balanced the competitive conditions thus resulting in foreign markets with those in our markets and admeasured the extent each was affected by the rates fixed in the tariff laws of the respective countries, to determine if in trade their effects were equal. He was thereby required to admeasure and balance trade conditions with each other and with tariff rates, and determine their equality as conditions precedent to action. The facts or state of things which determine the Executive acts in this amendment are the same, more "certainly ascertainable," if anything, because of findings in *our* markets.

By section 5 of the act of July 24, 1987, *supra*, the "facts which were to determine the Executive acts" as stated in the section was a finding that any country bestowed a "bounty" or "grant," whereupon the Secretary was to determine and declare a duty equal to the "*net* amount of that bounty or grant." A bounty or grant, as shown by the voluminous litigation under this statute might consist of innumerable devices of law and fact subtly applied in different countries of the world, thereby effecting obscured conditions in competitive trade and their net equality in duties, a state of things extremely difficult of "certain ascertainment." That section, however, containing that mandate by Congress to the Secretary, has existed upon our statutes for decades and is being daily enforced. Certainly the "facts which there control the Executive acts" are neither more "clearly stated" nor more "certainly ascertainable" than the mandate of this amendment to find or determine in *our* markets the "difference" between conditions of competition or wholesale prices as between foreign and domestic goods, and mathematically convert that difference into an equivalent duty.

So, by section 14 of the act of June 26, 1884, *supra*, the "facts which were to determine the Executive acts" were a finding of the effects upon our trade of the operation of tonnage taxes, lighthouse dues, and other "equivalent tax or taxes" imposed by foreign countries. The President was required to so ascertain and remit our tonnage duties *accordingly*, thereby admeasuring said resulting conditions of trade by a rate of duty to be by him found and calculated *as shown* by said conditions and proclaimed. Certainly the effect of those foreign exactions upon our trade was no more "certainly ascertainable" than the effect of our tariff laws upon competing foreign and domestic goods in our markets. Nor was the equalizing *rate* of duty necessary under that statute any the less "certainly ascertainable" than under this amendment.

In the presence of the extended quotation and discussion of the foregoing statutes comparable in legal concept and literal import with this amendment, it seems unwarranted to extend the discussion of obvious applicable precedents.

It may be well to briefly quote what the Congress has deemed and employed in various statutes as a "precise statement" of "certainly ascertainable" "facts which are to determine the Executive acts" in delegating to an officer authority to determine some fact or state of things upon which the Congress has made its own action depend.

In section 25, act of August 27, 1894, Congress provided that "the value of foreign coin * * * shall be that of the pure metal of such coin of standard value" as a sufficient specification of the stated thing to be ascertained.

In the numerous reciprocity, retaliatory, and discriminating import tariff statutes enacted by Congress, wherein conditions of trade are made determinative of Executive action, that they "shall be reciprocally equal and reasonable," is more often than otherwise prescribed as and therefore deemed by Congress a sufficient specification of the facts which are to determine the Executive acts.

Under the Hepburn Interstate Commerce Act of 1906, *supra*, and many State acts indicated, *supra*, in regulation of freight and passenger rates the legislative mandate and specification of authority deemed ample by Congress and the State legislatures is that they shall be "just and reasonable."

In this amendment "the facts that are to determine the Executive acts" are prescribed as the "differences in conditions of competition between foreign and domestic articles," in the last analysis meaning relative wholesale selling prices therein. Because these have been the subject of similar legislative action prescribed for determination by denominated officials now and ever since the foundation of our Government, and because they have during our entire national existence been and to-day are being ascertained daily at every customhouse in the land by our appraisers, there can be no question that such are both "precisely stated" by the legislature and are "certainly ascertainable by the Executive."

Wherefore it is respectfully submitted that the specification of facts or state of things prescribed in the amendment as the basis of action by the Executive is ample and well within the most limited rule thereto relating.

The early embargo acts of Congress afford much light upon the powers of Congress, the extent to which those powers may be delegated, and what amounts to a sufficient specification of facts determinate of Executive action in delegated suspension and enforcement of legislation.

One of the earlier acts of Congress—that of July 4, 1799—levied duties upon imported merchandise. Many, if not all, of the embargo acts vested in the President enforcement and suspension upon a state of things found as prescribed in these acts. In this legislative status action thereunder by the President suspended the then existing duties levied by Congress; wherefore, Congress by these embargo acts vested in the President upon his finding as therein prescribed the power to suspend import duties exactly as he is here empowered.

Perhaps the most concise expression of the constitutionality of these acts, and the philosophy thereof, is found in State of Pennsylvania *v.* Wheeling and Belmont Bridge Co. (18 How. 59; U. S. 421, 439), wherein it is stated:

"During the existence of the embargo, in the year 1808, it was contended that under the commercial power an embargo could not be imposed, as it destroyed commerce. But it was held otherwise; so that the constitutionality of *a regulation of commerce by Congress does not depend upon the policy and justice of such an act, but generally upon its discretion.*

"An embargo is a temporary regulation, and is designed for the protection of commerce, though for a time it may suspend it."

A review of those embargo and similar acts, as approved delegations by Congress of authority to the President to suspend or enforce acts of Congress, and *particularly the literal specifications therein of the facts or a state of things, a finding of which by the President was made determinative of his action*, is had in Union Bridge Co. *v.* United States (204 U. S. 364, 380–381), reviewing them as cited with approval in Field *v.* Clark (143 U. S. 649). The court said:

"In its consideration of this question the court, after referring to the case of the brig *Aurora*, above cited, examined the numerous precedents in legislation showing to what extent the suspension of certain provisions and the going into operation of other provisions of an act of Congress had been made to depend entirely upon the finding or ascertainment by the President of certain facts, to be made known by his proclamation. The acts of Congress which underwent examination by the court are noted in the margin.

"The result of that examination of legislative precedents was thus stated:

"'The authority given to the President by the act of June 4, 1794, to lay an embargo on all ships and vessels in the ports of the United States "*whenever*, in his opinion, *the public safety shall so require*," and under regulations, to be continued or revoked, "*whenever* he shall think proper"; by the act of February 9, 1799, to remit and discontinue for the time being the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, "*if he shall deem it expedient and consistent with the interest of the United States*," and "to revoke such order *whenever*, in his opinion, *the interest of the United States shall require*"; by the act of December 19, 1806, to suspend for a named time the operation of the nonimportation act of the same year, "*if in his judgment the public interest should require it*"; by the act of May 1, 1810, to revive a former act, as to Great Britain or France, if either country had not by a named day so revoked or modified its edicts as not "to violate the neutral commerce of the United States"; by the acts of March 3, 1815, and May 31, 1830, to declare the repeal, as to any foreign nation, of the several acts imposing duties on the tonnage of ships and vessels and on goods, wares, and merchandise imported into the United States *when he should be "satisfied"* that the discriminating duties of such foreign nations, "so far as they operate to the disadvantage of the United States," had been abolished; by the act of March 6, 1866, to declare the provisions of the act forbidding the importation into this country of neat cattle and the hides of neat cattle to be inoperative "*whenever in his judgment*" their importation "may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States," must be regarded as unwarranted by the Constitution if the contention of the appellants in respect to the third section of the act of October 1, 1890, be sustained.'"

A careful study of these acts in full will reveal that undoubtedly the court had carefully considered them in both

these cases, and what in some instance might seem to have been a delegation of discretion as to legislation was not so. The context of the acts will show, it is confidently asserted after careful examination of all of them, that either, as held in Field *v.* Clark, the seeming discretion was impliedly limited by other terms of the act or they related to the *execution* of the act, wherein, we have seen, the Constitution permits a discretion to be vested in the Executive.

Particular attention is invited to the language employed in these acts in specification of the facts or state of things to be found by the Executive as determinative of his action, such as, "if he shall deem it * * * consistent with the interest of the United States" and "whenever in his opinion the interest of the United States shall require" and "if in his judgment the public interest should require it."

A precisely similar provision in principle is contained in section 805 of the "revenue act of 1916," 39 Stat. L. 799, reading:

"SEC. 805. That whenever during the existence of a war in which the United States is not engaged, the President *shall be satisfied that there is reasonable ground to believe* that under the laws, regulations, or practice of any country, colony, or dependency contrary to the law and practice of nations, the importation into their own or any other country, dependency, or colony of any article the product of the soil or industry of the United States and not injurious to health or morals *is prevented or restricted* the President is authorized and empowered to *prohibit or restrict* during the period such prohibition or restriction is in force, *the importation into the United States of similar or other articles*, products of such country, dependency, or colony *as in his opinion the public interest may require;* and in such case he shall make proclamation stating the article or articles which are prohibited from importation into the United States; and any person or persons who shall import, or attempt or conspire to import, or be concerned in importing, such article or articles into the United States contrary to the prohibition in such proclamation shall be liable to a fine of not less than $2,000 nor more than $50,000, or to imprisonment not to exceed two years, or both, in the discretion of the court. *The President may change, modify, revoke, or renew such proclamation in his discretion.*"

The President therein is required to examine "the laws, regulations, or practices" of foreign nations and their effect upon our commerce, and if thereby he "be satisfied" that exportations thereto from this country are "prevented or restricted" he is authorized and empowered to "prohibit or restrict" the importation of like "*or other * * * products*" into this country "as in his opinion *the public interest may require.*" That paragraph is existing law and is precisely the active language of the provisions of paragraph 317 and what is here contended is too indefinite a definition or delegation of the authority and power of the President under the Constitution.

The significant force of these precedents will be more fully appreciated when we bear in mind that they were statutory specifications of findings by the President *condition precedent to his suspending existing rates of duty prescribed by Congress* as well as suspending importations.

Particular attention is invited to these determinative specifications of such facts or state of things by reason of the criticisms made in the Senate of the specifications of such facts in Senate amendment, section 316. A comparison of these acts with amendment will disclose that the specifications of such facts in the former so criticized were copied *verbatim et literatim* from those acts, long enforced by our Executives and often cited and quoted by our Supreme Court as appropriate precedents for the exercise of congressional delegation of authority in such cases. In view of these precedents it is confidently submitted that in order to hold unconstitutional section 315 and section 316 upon that ground it would be necessary to hold unconstitutional the sound legislative basis repeatedly provided by the Congress and approved by the Supreme Court, throughout a century of our early history, in defense and support of our then predominant merchant marine and expanding commerce.

It will be noted that the language of the proposed provisions of law is made applicable not alone to the provisions of the contemplated tariff act, but of all following tariff acts. This, while effecting every contemplated purpose with reference to the pending tariff act, gives the provision the character of an administrative law. The value of that is found in the fact that the Supreme Court has held that administrative tariff laws are not revenue acts levying "duties" within that term as used in the Constitution and the treaties with various nations. As such it readily takes its place among the administrative and regulative laws of the Congress.

That fixing the basis of a duty is an exercise of the constitutional power "to regulate commerce with foreign nations (sub. 3, sec. 8, Art. I) and not the taxing power (sub. 1, sec. 8, Art. I), we reply that Congress in enacting section 315 *is* so proceeding under this section and has so declared by express words therein. That such a declaration in cases of doubt at least will be looked to by the courts as determinative. See Head Money Cases (112 U. S. 581, 394). Congress may employ the instrumentality of a rate of duty upon imports to effect and, in the exercise of its constitutional power, to "regulate commerce with foreign nations." See Russell *v.* Williams (106 U. S. 623).

Thus a provision which had been a member provision of tariff laws from an early date became section 3 of the tariff act of 1872. In substance, it read as follows:

"SEC. 3. That on and after the 1st day of October next there shall be collected and paid on all goods, wares, and merchandise of the growth or produce of countries east of the Cape of Good Hope (except wool, raw cotton, and raw silk, as reeled from the cocoon, or not further advanced than tram, thrown, or organzine), when imported from places west of the Cape of Good Hope, a duty of 10 per cent ad valorem, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production."

The provision long in our statutes came to be known as the "Cape rule."

That provision was before the Supreme Court in the case of Russell *v.* Williams (106 U. S. 623) for pertinent construction. The case is an interesting one, and is based upon Hadden *v.* The Collector (5 Wall. 107) and Sturges *v.* The Collector (12 Wall. 19), decisions of the Supreme Court of the United States. The importation was one of tea from China. In answer to the challenge before the court that by its terms it repealed certain specified *duties* levied in and by previous acts in force, the court held that it was a general commercial *regulation* applicable without regard to regular duties imposed for the purposes of revenue, *whether such articles were dutiable or free,* in such previous acts. The court said:

"In conformity with the principle of these decisions we are of the opinion that the law in question continues in force in reference to all goods not expressly exempted from its provisions, whether dutiable or free, *and whether new duties imposed are declared to be in lieu of all other duties or not.* Such a declaration is a mere formula to indicate that the duties newly imposed are to take the place of and supersede the previous duties especially imposed in the tariff schedules and not to abrogate any general commercial regulations not expressly mentioned. The duties on tea have been several times changed since 1861; but, in our view, these changes had exclusive reference to the ordinary duties imposed for the purpose of revenue only and not to the standing regulation which we are considering. In 1861 the regular duty on tea was fixed at 15 cents per pound; in 1864, at 25 cents; in 1870, at 15 cents; and in 1872 it was placed with coffee on the free list. In 1861, 1864, and 1870 the duty was fixed in the general tariff laws of those years, respectively, the first two of which also contained the cape clause discriminating in favor of direct importation. The tariff act of 1870 did not reenact this clause, but neither was it repealed; it remained in force as enacted in 1865 until reenacted in the general tariff act of 1872. We do not think that it was necessary to reenact it in 1870 in order to make it operative upon those imports within its scope, the duties of which were revised by that act. The object of that revision was to readjust the regular schedule of duties, not to interfere with the cape rule *as a regulation of commerce*, or any other general regulation not expressly mentioned or referred to in the act and not repugnant to its provisions. Both laws could stand together without repugnancy. The cape rule contained in the act of 1865 could only be regarded as repealed by implication, if repealed at all; and, considering the object and purpose of the rule, such an implication was not necessarily involved in the act of 1870, and therefore will not be inferred."

In this respect the provision under consideration therein by the court, and this proposed statute as drawn, have many precedents in our tariff legislation, and the holdings by the Supreme Court that they are regulations of commerce and not provisions denouncing duties are uniform.

A similar question arose in United States *v.* Nichols (186 U. S. 298, 303) as to section 19 of the customs administrative act of 1890 (26 Stat. L. 131, 139), which provided, as is provided by the current tariff act, that "whenever imported merchandise is subjected to an ad valorem rate of duty * * *

the duty shall be assessed upon the actual market price or wholesale price of such merchandise * * * including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges, and expenses * * *," and so forth.

Here is a provision that levies an additional duty to that prescribed in the schedules of the then existing tariff act, according to facts as found by the customs officials. Such provisions are numerous, not only in the current but in all preceding tariff acts since the foundation of the Government. Of this the Supreme Court in United States *v.* Nichols, *supra*, said:

"Though the tariff act of 1883 is not directly in issue in this case, it is pertinent to inquire whether the section above cited respecting duties upon glass bottles were repealed by section 19 of the customs administrative act. We are of the opinion that they were not. *The customs administrative act was not a tariff act, but, as its title indicates, was intended to simplify the laws in connection with the collection of the revenues and to provide certain rules and regulations with respect to the assessment and collection of duties, and the remedies of importers, and not to interfere with any duties theretofore specifically imposed or thereafter to be imposed* upon merchandise imported. Section 19 was intended to provide a general method for the assessment of *ad valorem* duties and to require the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind to be included in such valuation. * * *

"The large number of cases which have arisen under the tariff acts with respect to the proper classification of glass bottles show that in the mass of legislation upon that subject it is difficult to evolve a construction applicable to all such cases or to determine what particular provision of the glassware section shall be applied; but it is sufficient to say that where such elaborate provisions are made for a specific tax on glass bottles, whether filled or unfilled, and whether their contents be subject to *ad valorem* or specific duties, *it was not intended that the general word 'coverings' used in the customs administrative act, which, as before observed, is not a tariff act at all,* was intended to supply any deficiency that might exist in the tariff act with respect to those articles."

Whether, however, section 315 be deemed enacted by Congress as a duty levying provision or regulation of commerce, as authorized by the Constitution, it seems clear that its provisions are, under the authorities and precedents cited, well within the constitutional mandates to the Congress.

This presentation may well be concluded by a consideration seriatim of the remaining constitutional objections urged in the Senate debate.

1. Indirectly only was it asserted that because action by the President under the amendment, in the first instance, could be initiated or disregarded, *in his discretion;* therefore the amendment was unconstitutional. The reference is to the introductory words of the amendment: "*Whenever* the President upon investigation * * * shall find * * *," etc. If that objection were tenable the vast majority of similar statutes enacted by Congress would for that reason have been unconstitutional. The long continued congressional interpretation and persistent usage are sufficient to avoid this objection. Citation of a few precedents will suffice. The French embargo act of June 4, 1794 (1 Stat. L. 372), initiated action upon the part of the President in the discretionary words: "*Whenever* in his opinion the public safety shall require * * *." Section 3 of the act of October 1, 1890 (26 Stat. L. 567, 612), approved in Field *v.* Clark, *supra*, initiated action by the President in the words: "*Whenever* and *so often as* the President shall be satisfied * * *." Section 18 of the river and harbor act of March 3, 1899 (30 Stat. L. 1121, 1153, c. 425), approved in Union Bridge Co. *v.* United States (204 U. S. 364), initiated action by the Secretary of War by the words: "That *whenever* the Secretary of War shall have reason to believe * * *." An examination of the similar statutes enacted throughout our national existence reveals that the uniform statutory method of *initiating* action thereunder, as distinguished from the statement of facts *determinative* of executive action heretofore considered, was as in this amendment written. The justification of the well-settled practice is essayed by Willoughby on the Constitution, volume 2, page 1318, section 775, as follows:

"The qualifications to the rule prohibiting the delegation of legislative power which have been earlier adverted to are those which provide that while the real lawmaking power may not be delegated, a discretionary authority may be granted to executive and administrative authorities: (1) To determine *when* and *how* the power conferred are to be exercised, and (2) to establish administrative rules and regulations, binding both upon their subordinates and upon the public, fixing in detail the manner in which the requirements of the statutes are to be met and the rights therein created to be enjoyed.

"The principle which permits the legislature to provide that *the administrative agent may determine when the circumstances are such as require the application of a law* is defended upon the ground that at the time this authority is granted the rule of public policy, which is the essence of the legislative act, is determined by the legislature. In other words, the legislature, as it is its duty to do, determines that, under given circumstances, certain executive or administrative action is to be taken, and that, under other circumstances, different or no action at all is to be taken."

Whatever may be said of the logic of the rule its universal legislative exercise and application has no doubt established its soundness beyond controversy. Field *v.* Clark (143 U. S. 649, 690).

2. The constitutionality of the amendment is further challenged upon the ground that the legislative policy is not *expressly* recited in the paragraph. The legislative practice in this particular is not uniform. No decision has been produced, however, and it is confidently asserted that none can be, so holding. While a few of the legislative precedents expressly write in the statute the legislative policy sought to be effected, the vast majority do not. To sustain this contention would lead to endless confusion in application of the first and paramount principle of legal construction as old as statutory law itself, to wit, "that the intention or purpose of the legislature is the first and highest rule of statutory interpretation." If it were held that the courts could not indulge the long-established rule and practice of ascertainment of the legislative purpose of this amendment by examining its context and its relation to other statutes *in pari materia*, an unwarranted exception to the established law of legal construction would be introduced. That the familiar rule of statutory construction, that the statute itself is its best expositor, "reading it from its four corners," applies here, as with other statutes, was the view of Congress and the courts, and is applicable to such statutes as this amendment, is manifest from the precedents and decisions.

Thus, while section 3 of the act of October 1, 1890, expressly declared the legislative policy or purpose "That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose," section 18 of the river and harbor act of 1899 made no *express* declaration of legislative policy or purpose. The Supreme Court, however, in Union Bridge Co. *v.* United States (204 U. S. 364, 385-386), construing that act took judicial notice of the "policy of Congress" to remove obstructions from navigable waterways and, obviously from the context, held that the purpose "declared" by Congress.

An examination of the statutes quoted and construed, *supra*, wherein the policy of the Congress in enacting the statute is held controlling, discloses that in few if any of those statutes was the legislative policy or purpose *expressly* stated in, but was left to be inferred from, the context of the act.

The debates in the Senate and the context of this amendment show that the legislative policy or purpose is plainly evidenced by its context and its associate sections in the proposed act.

3. It is also asserted that the amendment is unconstitutional in that it permits the President a discretion after the prescribed investigation whether he will proclaim a changed rate of duty or classification or form of duty.

Heretofore it has been shown that the language of the amendment itself forbids exercise of such an election. The amendment *requires* the President to proclaim only that rate of duty *or* that form of duty *or* that classification "shown by" the state of facts investigated "necessary" to equalize the ascertained differences in conditions of competition.

But, it may be said, suppose those ascertained differences show more than one of these authorizations a rate of duty or a form of duty or a change of classification equally sufficient for the purpose or "necessary" thereto, must not the President in that situation exercise a discretion as to which he will proclaim? The answer is that though we assume the latter situation to be *always* present and the former argument untenable, and that the President is by that part of the amendment in all cases invested with a discretion as to which he will proclaim; nevertheless, the amendment is in that particular constitutional.

It can not be successfully, and probably will not be, disputed that the purpose of the amendment is to equalize any differences in conditions of competition resulting after application of the prescribed rates of duty and other provisions of the act between foreign and domestic goods in our markets. That is

the obvious policy of Congress *and the thing legislated* by the amendment. When this is accomplished under the amendment the policy of the Congress and *the legislation* to that end by this amendment is completely fulfilled. The authority in the amendment to proclaim a change of rate or classification or form of duty relates solely to the *execution* of the thing legislated in its pursuance. The policy of the Congress and the thing legislated is accomplished regardless of which change is proclaimed by the President. These are but instrumentalities or means of *execution* of the law.

The point is accurately stated in Field *v.* Clark (143 U. S. 649, 693-694), saying:

"The true distinction," as Judge Ranny, speaking for the Supreme Court of Ohio, has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, *and conferring authority or discretion as to its execution*, to be exercised under and in pursuance of the law. The first can not be done; *to the latter no valid objection can be made.*" (Cincinnati, Wilmington, etc., Railroad *v.* Commissioners, 1 Ohio St. 88.)

This quotation by the Supreme Court has been repeatedly approved by that court and later adopted as its own doctrine. Union Bridge Co. *v.* United States (204 U. S. 364, 382).

The principle was expressed in another form by that court in Buttfield *v.* Stranahan (192 U. S. 470, 496), *supra*, upholding the legislative designation of the Secretary to select and adopt tea standards and providing a finding by the examiner of similarity thereto as conditions precedent to the importation of teas. Undoubtedly the Secretary exercised a judgment or election in selecting these standards; they were, however, means provided by Congress in execution of the act. The Supreme Court here pertinently said:

"Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of *bringing about the result pointed out by the statute.* To deny the power of Congress *to delegate such a duty* would, in effect, amount to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficiently exerted."

Willoughby on the Constitution, volume 2, chapter 775, page 1318, expresses the same thought in the following language:

"The qualifications to the rule prohibiting the delegation of legislative power which have been earlier adverted to are those which provide that while the real law-making power may not be delegated, a *discretionary authority may be granted to executive and administrative authorities:* (1) To determine *when* and *how* the powers conferred are to be exercised; * * *."

A statutory instance of such a discretion being vested in *execution* of a statute, complete in all *legislative* details, was heretofore shown. By the act of July 24, 1897, the President was vested, in order to carry out the purposes of that statute, with the authority of either reducing the tonnage duties provided in Revised Statutes 4228 or the import duties provided in Revised Statutes 2502.

That a *discretion* may be vested as to the execution of a statute, as well as other here applicable expressions, will be found asserted in the late decision of the Supreme Court, Mutual Film Co. *v.* Ohio Industrial Commission (236 U. S. 230, 246), as follows:

"To sustain the attack upon the statute as a delegation of legislative power, complainant cites Harmon *v.* State (66 Ohio Stat. 249). In that case a statute of the State committing to a certain officer the duty of issuing a license to one desiring to act as an engineer if 'found trustworthy and competent,' was declared invalid because, as the court said, no standard was furnished by the general assembly as to qualification, and no specification as to wherein the applicant should be trustworthy and competent, but all was 'left to the opinion, finding, and caprice of the examiner.' The case can be distinguished. Besides, later cases have recognized the difficulty of exact separation of the powers of government, and announced the principle that legislative power is completely exercised where the law 'is perfect, final, and decisive in all of its parts, and the *discretion given only relates to its execution.*'"

While the earlier tariff acts prescribed this duty of the appraiser in the various terms stated, no statutory definition of "market value" was prescribed by Congress prior to the tariff act of August 5, 1909. Theretofore this congressional mandate of authority was unqualified save by the legal force and effect of the term "market value," or some like phrase. Thereunder the appraiser exercised necessarily many discretions. The legislative evolution of this delegated power, in present-day form, is embraced in paragraphs "K," "L," and "R" of Section III of the current tariff act of October 3, 1913 (vol. 38, pt. 1, Stat. L., pp. 185, 186, and 189).

Therein is confided to the appraiser an absolute discretion as to which market in the country of exportation he shall select as the "principal market" thereof. His selection or decision thereof is final upon all the world.

The Supreme Court, in Stairs *v.* Peaslee (59 U. S. (18 How.) 521), construed the phrase. The subject of decision was "cutch." It was shown to be produced in the East Indies only, Calcutta being the market of *exportation.* It was, however, shipped to Halifax, thence consigned to the importers at Boston. It was shown that London and Liverpool were the principal markets of the British dominions for cutch. There was a division of opinion among the judges of the United States Circuit Court of Appeals at Boston, wherefore they certified the following question to the Supreme Court of the United States:

"Whether, in estimating the dutiable value of the cutch, the appraisers should have taken the value at the market of Calcutta, or London and Liverpool, or Halifax, at the period of the exportation from Halifax."

In answering, the court ruled:

"It follows, therefore, as the cutch in question was shipped and invoiced from Halifax, that it was the duty of the appraisers to estimate and appraise it according to its value *in the principal markets of the British dominions.* What markets within these dominions were the principal ones for an article of this description was a question of fact, not of law, and to be decided by the appraisers, and not by the court. They, it appears, determined that London and Liverpool were the principal markets in Great Britain for the goods in question, and appraised the cutch according to its value in these markets. And as the appraisers are by law the tribunal appointed to determine this question, their decision is conclusive upon the importer as well as the Government."

So, by paragraph "L" there is vested in the appraiser a discretion or decision whether he will accept for appraisement purpose "actual market value" in that it is there provided that if such "can not be ascertained *to the satisfaction of the appraising officer,*" he can proceed to find "cost of production" and adopt the same in his determination of this controlling factor in fixing the duty to be laid in the particular case.

And, further, by the same paragraph in certain cases of consigned goods, the appraiser is required to admeasure the duty otherwise ascertained by him with the American selling prices of such or similar goods less certain deductions, *decide* which is the higher and adopt that as the essential factor controlling and determinative of the duty laid by Congress.

All of these decisions or elections by the appraiser are but in execution of the mandate of Congress to ascertain and adopt "a market value" as an integral part of a duty laid by Congress in part in terms of that fact.

Clearly whether the President proclaims a change of rate or form of duty or classification is but the selection of one of the means prescribed by Congress in the amendment for its *execution*, and the delegation of a discretion in exercise of judgment in that particular is not, under all the authorities, a violation of the constitutional inhibition against a delegation of the legislative power. The thing here legislated is that the said ascertained *differences* shall be equalized. The authorized *means to that end in execution of the thing legislated*, the differences being ascertained, are the enumerated changes. By all the authorities and precedents a discretion or judgment as to these in the execution is under the Constitution permissible.

4. It is objected that no judicial or other review is allowed or allowable from either the President's *findings* of fact or legal interpretations in execution of the amendment.

Preclusively, it may be well to bear in mind that Congress itself by this amendment levies the duty in terms of facts or a state of things, and that the President merely executes the statute in the manner therein prescribed. Any judicial review, therefore, allowed or had of the findings of the facts or state of things and the equivalent duty proclaimed by the President would be a review of a congressional conclusion of fact fixing a rate of duty. It seems trite to say that would be inhibited by the Constitution as an usurpation by the judiciary of the constitutional powers vested in Congress.

The consistent holdings of the courts is to the same effect. It has heretofore been pointed out that the findings of the appraisers of market value, entering into and a necessary part of a duty is not the subject of judicial review and the Constitution is not thereby violated.

The similarity of this congressionally delegated authority to ascertain a duty levied by Congress in terms of facts with that by this amendment provided has heretofore been discussed.

Upon this point of finality under the Constitution, the Supreme Court, in Hilton *v.* Merritt (110 U. S. 97, 107), stated:

"The plaintiffs in error contend further that a denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise is depriving the importer of his property without due process of law, and is therefore forbidden by the Constitution of the United States. The cases of Murray's Lessee *v.* Hoboken Land & Improvement Co. (18 How. 272) and Springer *v.* United States (102 U. S. 586) are conclusive on this point against the plaintiff in error."

Of like import is Muser *v.* Magone (155 U. S. 240, 246–247):

"The conclusiveness of the valuation of imported merchandise made by the designated officials, in the absence of fraud, is too thoroughly settled to admit of further discussion. Hilton *v.* Merritt (110 U. S. 97), Auffmordt *v.* Hedden (137 U. S. 310), Passavant *v.* United States (148 U. S. 214). In Auffmordt *v.* Hedden it was said: 'The Government has the right to prescribe the conditions attending the importation of goods, upon which it will permit the collector to be sued. One of these conditions is that the appraisal shall be regarded as final. * * * The provision as to the finality of the appraisement is virtually a rule of evidence to be observed in the trial of the suit brought against the collector.'"

A later expression to the same effect is found in Buttfield *v.* Stranahan (192 U. S. 470, 492–493):

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. Lottery Case (188 U. S. 321, 353–356); Leisy *v.* Hardin (135 U. S. 100, 108). Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power resulting from other provisions of the Constitution so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries, not alone directly by the enactment of embargo statutes but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. * * *

"As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country *and the terms upon which a right to import may be exercised.* This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due-process clause of the Constitution."

Likewise with the investment by Congress in the Secretary of the Treasury of the authority to ascertain and declare the amount of duties equivalent to bounties granted by foreign countries; and the like investment by Congress in the Secretary of the Treasury to ascertain and proclaim the value of foreign coins, by the same act made an integral factor of import customs duties. These findings and the equivalent duties declared thereupon have uniformly been held by the courts not to be reviewable in the courts, and that the failure to provide express statutory denial of that right was within the Constitution. The authorities upon that well settled point heretofore quoted will not be here repeated.

Whether or not, however, should the President in the commanded ascertainment of these facts, thus made final and proclaimed, *fail to follow the law* investing him with that power by this amendment or misinterpret some law affecting his findings of fact, his acts in that respect would be subject of judicial cognizance, in a proper case, is another question.

That situation develops a question of law. While the contrary view has been asserted, the opinion is here hazarded that such failure of the President to follow or his misinterpretation of a law entering into his conclusions would, in a proper case made, be the subject of judicial cognizance. If that is true no express authority therefor need be written in the amendment, but the question could and would be raised on protest as now provided before the Board of United States General Appraisers.

While it is true that the President can not be haled before the courts to explain his official acts, nevertheless his official acts without or in violation of the Constitution and statutes of the United States would seem to be of judicial cognizance.

That is true of every official of the Government. Certainly it was not the purpose of the fathers to put an official, officials, or bodies of the same above or beyond or to permit them to act in violation of the Constitution or laws of the land. While it was once a seriously debated question in the country whether or not the Supreme Court could hold an act of Congress in violation of the Constitution, and is to-day the subject of papers by eminent judicial authorities, the question would seem to be too well settled in the affirmative for serious controversy.

The true and applicable doctrine was clearly employed in an opinion by Chief Justice Chase in the great case of State of Mississippi *v.* Johnson, President (4 Wall., 71 U. S. 475, 500), as follows:

"The Congress is the legislative department of the Government, the President is the executive department. Neither can be *restrained in its action* by the judicial department; though the acts of both, when performed, are *in proper cases subject to its cognizance.*"

Apt and pertinent illustration and vindication of this pronouncement as to Congress is had in Field *v.* Clark (143 U. S. 649). Congress, of course, enacted the tariff act (McKinley law) of October 1, 1890. Marshall Field & Co., of Chicago, upon payment of certain duties at that port, by due protest before the Board of United States General Appraisers raised the question that in that enactment the Congress, for several specific reasons, had not followed or observed the Constitution, and that therefore the act was unconstitutional. If the citizen can challenge the *performances of Congress* as in violation of or did not pursue the Constitution in directly fixing a rate of duty, and the appropriate judicial avenues therefor are now provided by law, affording final decision by the Supreme Court, why can not that right be likewise litigated when Congress fixes the rate in terms of a state of facts authorizing the President to ascertain and proclaim the same, and the collector proceeds to and does collect the duty so levied?

The pronouncement of Chief Justice Chase as to Congress includes and is authority for the exercise by the citizen of the same rights when the object whereof is effected by an act of the Executive. Upon that authority and precedent, therefore, it would seem that while the performances of the President under this amendment would not be the subject of judicial cognizance to review his *findings of facts* constituting a proclaimed duty *as a finality,* nevertheless should the President, in reaching the proclaimed result, have failed to follow the law delegating his authority or misinterpreted a law which entered into and effected the result proclaimed, such would be the subject of judicial cognizance. An exactly parallel case is Downs *v.* United States (187 U. S. 496), affirming Downs *v.* United States (113 Fed. Rep. 144).

The here pertinent point was best expressed in the opinion of the Board of General Appraisers before whom the case arose and whose very meritorious opinion was approved and adopted in full by the Circuit Court of Appeals, Fourth Circuit, in turn affirmed by the Supreme Court. Therein the doctrine is thus stated:

"Under the authority conferred by this law, the Secretary of the Treasury has duly 'ascertained, determined, and declared' the net amount of the bounty or grant which, in his judgment, was bestowed by the laws of the Russian Government upon the exportation of this sugar. (T. D. 20, 407, dated December 12, 1898; T. D. 22, 514, dated February 14, 1901.) It is not denied by either party to this suit that, if in fact any bounty or grant was bestowed, the Secretary's finding as to its amount was correct. Moreover, it would seem that the decision of that officer as to this particular fact, being made in pursuance of a special statutory authority, would be quite as conclusive on this board and the courts as the finding of the value of foreign coin by the Director of the Mint, under the provisions of section 25 of the tariff act of 1894, a statute strictly analogous, which finding has been held to be conclusive, and not reviewable by this board or the courts. (U. S. *v.* Klingenberg, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647; Wood *v.* U. S., 72 Fed. 254, 18 C. C. A. 553, explaining Klingenberg's case; Hadden *v.* Merritt, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333.) *It is conceded, however, that the decision of the Secretary as to whether the laws of Russia do in fact bestow such a bounty or grant is reviewable by this board,* as it involves the construction of the laws of Russia relating to the precise subject matter covered by said section 5, above cited. The jurisdiction of the board in this particular has been sustained by the United States Circuit Court of Appeals for the Second Circuit in the recent case of United States *v.* Hills Bros. Co. (46 C. C. A. 167, 107 Fed. 107)."

Likewise, while we have heretofore shown that the finding of market value by appraisers, an integral part of import duties, is conclusive *as to the facts found,* nevertheless, the same is reviewable in the courts for a failure to *pursue* the statute as prescribed by Congress. In United States *v.* Passavant (169 U. S. 16, 20) the court said:

"And while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector *has proceeded* on a wrong principle *contrary to law or* has *transcended the powers* conferred by statute." (Oberteuffer *v.* Robertson, 116 U. S. 499; Badger *v.* Cusimano, 130 U. S. 39; Robertson *v.* Frank Brothers Co., 132 U. S. 17; Erhardt *v.* Schroeder, 155 U. S. 124; Muser *v.* Magone, 155 U. S. 240.)

To the same effect is Muser *v.* Magone (155 U. S. 240, 247):

"Yet, though the valuation is final and not subject to review and change and reconstruction by the verdict of a jury, it is open to attack *for want of power to make it*, as where the appraisers are disqualified from acting, or have not examined the goods, *or illegal items have been added independent of the value*. The principle applied in such cases is analogous to that by which proceedings of a judicial nature are held invalid because of the absence of some strictly jurisdictional fact or facts essential to their validity."

Orders or finding of the Postmaster General in fraud cases have likewise been held reviewable, though no statute so provides. In American School of Magnetic Healing *v.* McAnnulty (187 U. S. 94, 108) the Supreme Court said:

"That the conduct of the post office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is *unauthorized by the statute* under which he assumes to act. The acts of all its officers must be justified by some law, and *in case an official violates the law* to the injury of an individual, the courts *generally have jurisdiction* to grant relief."

An extended citation of other similar authorities may be found in Mills and Gibbs *v.* United States (8 Ct. Cust. Appls., pp. 39 to 60, inclusive).

It will be unnecessary to multiply precedents from the numerous cases in the books. Those quoted seem ample authority for the conclusion that while under the amendment the President's proclaimed ascertainments would be a finality as to the facts and consequent duty proclaimed, nevertheless his proceedings would, under existing procedure, be the subject of judicial cognizance upon the ground that he had exceeded his authority, failed to follow, or misinterpreted a law.

For examples of judicial cognizance of acts of the President made in accordance with authorizations by Congress in ascertainment of whether or not such acts were performed *ultra vires* of the authorization may be cited Wilcox *v.* McConnel (38 U. S. 496, 512), wherein the following pertinent pronouncement was had:

"Hence we consider the act of the War Department, in requiring this reservation to be made, as being in legal contemplation the act of the President; and consequently that the reservation thus made was, in legal effect, a reservation made by order of the President within the terms of the act of Congress."

To the same effect Wolsey *v.* Chapman (101 U. S. 755, 770), United States *v.* Midwest Oil Co. (236 U. S. 459, 468), wherein the famous order of withdrawal of oil lands by President Taft was finally reviewed and upheld by the Supreme Court. (See also United States *v.* Morrision, 240 U. S. 192, 212.) In none of these cases was the President haled before the court, though the doctrine of review as stated may well be said to be *stare decisis*.

5. It is asserted and rightfully that "necessity" is frequently invoked to support such delegations of congressional authority. If such finds logical and relevant place in a consideration of the constitutionality of a law, it must find support in some provision of that instrument.

It is here urged, for example, that if commercial conditions rendered this legislation *necessary* to lay a duty or to regulate our commerce with foreign nations, the courts would uphold its constitutionality upon that ground. Such a constitutional warrant of authority is found in subparagraph 18 of Article I, section 8, of the Constitution, providing: "The Congress shall have power to lay and collect taxes, duties * * *." "To regulate commerce with foreign nations * * *," and subparagraph 18, "*To make all laws which shall be necessary and proper for carrying into execution the foregoing powers* * * *."

Congress may, therefore, enact any law which is "necessary" to execute the power of Congress to lay and a statute laying duties or regulating our commerce with foreign nations.

Such enactments are in the nature of statutory regulations of the taxing and regulative powers of Congress. The constitutional warrant is broad and unlimited, extending to "*all* laws which shall be *necessary* and proper for carrying *into execution* the foregoing powers." In passing it may be well to emphasize this broad constitutional power of Congress to make all laws *necessary* to carry *into execution* the power to tax and regulate commerce.

It would seem thereunder that Congress, having laid a duty or provided a regulation of commerce in terms of a state of facts as by section 315, is, by the Constitution, granted *unlimited* power in providing therein or otherwise for the *execution* of that law. Congress can therefore authorize the President to act in his discretion as to the provided means to that end, or in any way Congress may deem wise, under this express authorization of the Constitution so long as this authorization is by Congress deemed "necessary and proper."

The authority that determines what statutory regulations in such cases are "necessary" and proper has long since been decided by the Supreme Court. In McCulloch *v.* Maryland (4 Wheat. 421, 422) it is stated:

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature *that discretion*, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.

* * * * * * *

"But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, *the decree of its necessity*, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are *prohibited by the Constitution*, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects *not intrusted to the Government*, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is *not prohibited*, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the *decree of its necessity* would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power."

Whether or not the particular delegation of authority in the Executive is "necessary" is a question for the Congress alone and not the courts. Congress having enacted the particular amendment, its necessity is not open to question in the courts nor subject to judicial cognizance. The only forum of discussion and final decision as to the necessity for such a statute is the Congress.

Of the matters which might well be taken into consideration by the Congress in determining the *necessity* for this amendment is that without it there is no vested power in any official or board of the United States to meet the swift changes in duties and regulations possible and frequently made by almost every other nation of the world. Almost if not every foreign country is legally equipped by investment, in some official or board, of plenary power to raise or lower their tariff rates or change their regulations so as to momentarily meet every exigency created by commercial conditions and the laws and regulations of competing nations. Some evidence of how long is required under our system, heretofore in vogue, to effect a tariff change may be had from the length of time uniformly required to enact an import tariff law. Moreover, since the World War every other commercial nation of note has proceeded to equip its officials with executive means of speedy defense and aggression in commerce.

Furthermore, the diligent inquiry upon part of the present committees of Congress, aided by officials of the Government, have disclosed that values, and particularly foreign values upon which the rates of our import duties are fixed, are more unstable than for decades past. It has been stated upon the floor of the Senate that the market values of one nation have changed as much as 25 and 28 per cent in a single month. It is a matter of common knowledge, and a necessarily inevitable fact, that a post-war readjustment of the world's prices and influencing currency values must so materially vary in short periods of time that they are unsafe bases upon which to rest our necessary revenues and the defense of our industries without providing, in any measure so predicated, a power in some official in order to preserve our revenues and industries and correct errors made to change its provisions with a swiftness equal to that possessed by other nations, and adequate of the ever-changing values upon which the act is based, with the attendant necessarily disastrous results.

From the foregoing it is respectfully submitted that it is entirely competent for the Congress to lay import duties, in terms

of "facts" or "state of things," and empower some official or tribunal to ascertain and proclaim those facts or that state of things and the equivalent duty whereupon the same shall be collected.

The question has been suggested whether or not, should sections 315, 316, and 317 be held unconstitutional, that would render invalid the whole act. That question would seem to have been conclusively answered in Field *v.* Clark, *supra*, pages 695–696, and the authorities therein cited and quoted. By that appeal there was also challenged the constitutionality of paragraph 231, section 1, of the tariff act of 1890 granting bounties upon sugar produced in the United States (26 Stat. L., 567–583).

The court dismissed consideration of section 3 of the act herein reviewed, saying:

"The court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President. Even if it were, it would not, by any means, follow that other parts of the act, those which directly imposed duties upon articles imported, would be inoperative. But we need not in this connection enter upon the consideration of that question."

And then obviously proceeded to give its reasons in another, the following, connection, as follows:

"Appellants contend that Congress has no power to appropriate money from the Treasury for the payment of these bounties, and that the provisions for them have such connection with the system established by the act of 1890 that the entire act must be held inoperative and void. The question of constitutional power thus raised depends principally, if not altogether, upon the scope and effect of that clause of the Constitution giving Congress power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States.' (Art. I, sec. 8.)

"It would be difficult to suggest a question of larger importance or one the decision of which would be more far-reaching. But the argument that the validity of the entire act depends upon the validity of the bounty clause *is so obviously founded in error* that we should not be justified in giving the question of constitutional power here raised that extended examination which a question of such gravity would, under some circumstances, demand. Even if the position of the appellants with respect to the power of Congress to pay these bounties were sustained, it is clear that the parts of the act in which they are interested, namely, those laying duties upon articles imported, would remain in force. 'It is an elementary principle,' this court has said, 'that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are *wholly independent of each other that which is constitutional may stand, while that which is unconstitutional will be rejected.*' (Allen *v.* Louisiana, 103 U. S. 80, 83.) And in Huntington *v.* Worthen (120 U. S. 97, 102) Mr. Justice Field, speaking for the court, said:

"'It is only when different clauses of an act are *so dependent upon each other that it is evident the legislature would not have enacted one of them without the other*—as when the two things provided are *necessary parts* of one system—that the whole act will fall with the invalidity of one clause. *When there is no such connection and dependency, the act will stand, though different parts of it* are rejected.' It can not be said to be evident that the provisions imposing duties on imported articles are so connected with or dependent upon those giving bounties upon the production of sugars in this country that the former would not have been adopted except in connection with the latter. Undoubtedly the object of the act was not only to raise revenue for the support of the Government but to so exert the power of laying and collecting taxes and duties as to encourage domestic manufactures and industries of different kinds, upon the success of which, the promoters of the act claimed, materially depended the national prosperity and the national safety. But it can not be assumed, *nor can it be made to appear from the act*, that the provisions imposing duties on imported articles *would not have been adopted except* in connection with the clause giving bounties on the production of sugar in this country. *These different parts of the act, in respect to their operation, have no legal connection whatever with each other.* They are entirely separable in their nature, and, in law, are wholly independent of each other. One relates to the imposition of duties upon imported articles; the other to the appropriation of money from the Treasury for bounties on articles produced in this country. While, in a general sense, both may be said to be parts of a system, neither the words nor the general scope of the act justifies the belief that Congress intended they should operate as a whole, and not separately, for the purpose of accomplishing the objects for which they were respectively designed. *Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid.* A different rule might be disastrous to the financial operations of the Government, and produce the utmost confusion in the business of the entire country."

And so it clearly can be said of these amendments that the bill is complete without them, could stand as such in their absence and, in fact, without them its integrity be the more secure. The question appears so well settled that further discussion would seem unwarranted.

Mr. McCUMBER. Mr. President, I think that is all I desire to say at this time.

Mr. WALSH of Montana. Mr. President——

Mr. SIMMONS. If the Senator thinks there is any difference in legal contemplation between the authority given the President to increase the rates of duty within the limits of 50 per cent and the authority given the President to set aside the law which provides for foreign valuation and proclaim the American valuation, I would be very glad to have the Senator's views with reference to that distinction.

To my mind, there is a very marked distinction between the power which is intended to be given to the President with reference to the raising of rates and the power given to the President to nullify or to a certain extent set aside the application of the law providing for foreign valuation and substituting therefor American valuation. In other words, in one case we are authorizing the President to carry out the law of Congress and furnishing him a rule by which he may carry out that law increasing the rate, and in the other case we are authorizing the President to set aside a specific enactment of Congress—namely, that fixing the foreign valuation as the basis for the purpose of levying taxes—and substituting therefor the American valuation, a valuation which is not anywhere enacted into law and which does not appear upon the statute books. I should like to ask the Senator from North Dakota if he does not think that possibly presents a different legal question from the one which he has been so ably discussing?

Mr. McCUMBER. Mr. President, with the permission of the Senator from Montana [Mr. WALSH]——

The PRESIDING OFFICER. The Senator from North Dakota still has the floor, the Senator from North Carolina desiring to ask him a question. After the Senator from North Dakota shall have answered the question of the Senator from North Carolina, the Chair will recognize the Senator from Montana.

Mr. McCUMBER. Mr. President, I shall now very briefly answer the Senator from North Carolina. There is no difference whatever in the character of the power delegated, whether it is delegated to make rates which are based upon the foreign valuation basis or upon the American valuation basis; the authority is exactly the same in either case. We have a provision in the proposed law for ascertaining the values of products in a foreign country. We can not always ascertain their value with precision and ascertain for what they are sold. They may be articles, for instance, that are not sold at all in the foreign country and which are imported only into the United States for sale. We have got to fix rates of duty upon articles of that character. Therefore we have a provision in the proposed law to meet such cases. We define the American valuation basis in section 402, subdivision (j). Subdivision (b) of section 315 provides that the American valuation shall be adopted when the foreign valuation, together with the power to increase rates 50 per cent, will not effectuate an equalization in conditions of competition.

Now, let me illustrate this by a single case. Here, we will say, is an article which is produced in Great Britain, which costs $1, and we put upon it a duty of 25 per cent. We find that the American article is put on the American market and may be sold only at a reasonable profit for $1.50. If the President is to take the foreign valuation, he may increase the rate provided of 25 per cent, which would be 25 cents, to the extent of 50 per cent of 25 cents, which would be 12½ cents, making the rate 37½ per cent; but he finds that 37½ per cent does not measure up to that which is necessary in order to equalize the difference, that it would require 50 per cent to do so. Therefore he is authorized to take the American valuation as a basis in determining what the rate may be.

Mr. NICHOLSON. Mr. President, will the Senator from North Dakota yield to me for a question?

The PRESIDING OFFICER. Does the Senator from North Dakota yield to the Senator from Colorado?

Mr. McCUMBER. I yield.

Mr. NICHOLSON. I was unavoidably absent from the Chamber during the major part of the Senator's address concerning the pending question, and therefore desire now to ask him a question. Where we have in the proposed law fixed specific rates and ad valorem rates, does the power proposed to be conferred upon the President go to the extent of giving him the right to change specific duties?

Mr. McCUMBER. It is proposed that the President may change specific duties to ad valorem duties or he may change ad valorem duties to specific duties, always bearing in mind that the final ad valorem duty which may be fixed shall not bring about the imposition of a duty that is an increase beyond 50 per cent of either the ad valorem or the specific or the compound duty.

Mr. NICHOLSON. Is it proposed in the pending legislation to confer upon the President a like right to reduce a duty within a limit of 50 per cent as well as to increase it within a limit of 50 per cent?

Mr. McCUMBER. Yes; under the proposed legislation the President would also have authority to reduce a duty within the limit of 50 per cent.

Mr. CURTIS. Mr. President, I merely wish to ask the chairman of the committee if he will not ask that his amendment may be printed for the use of the Senate? When the amendment was presented this morning it was not ordered to be printed, and we have only the committee print. I am told by the officers of the Senate that many requests are being made for copies of the amendment.

Mr. McCUMBER. If the Senator from Kansas will make the request that the amendment may be printed I shall be glad.

Mr. CURTIS. I request that the amendment offered this morning by the Senator from North Dakota, which we have been discussing, may be printed.

The PRESIDING OFFICER. The Senator from Kansas asks unanimous consent that the amendment proposed by the Senator from North Dakota may be printed. Without objection, it is so ordered.

Mr. WALSH of Montana. Mr. President——

Mr. LENROOT. Mr. President, will the Senator from Montana yield to me in order that I may offer an amendment so as to have it pending?

The PRESIDING OFFICER. The Chair will recognize the Senator from Wisconsin for that purpose. The Senator from Wisconsin offers an amendment, which will be printed and lie on the table.

Mr. LENROOT. I desire that it may be the pending amendment. It is an amendment to the committee amendment.

Mr. TOWNSEND. I ask that the amendment proposed by the Senator from Wisconsin to the committee amendment may be read.

The PRESIDING OFFICER. The Secretary will read the amendment to the amendment.

The READING CLERK. It is proposed wherever the words "conditions of competition" occur in the pending amendment that they be stricken out and that in lieu thereof the words "cost of production" be inserted.

The PRESIDING OFFICER. The amendment proposed by the Senator from Wisconsin to the committee amendment will be printed.

Mr. WALSH of Montana. Mr. President, on a former occasion I addressed the Senate on the features of the bill now under consideration and argued that they are violative of constitutional principles. I shall to-day review at least in outline the argument then made; but, before proceeding to that discussion, I desire to submit some very general observations touching the policy of these amendments.

Whatever doubt may be entertained by anyone concerning the constitutionality of the amendments under consideration, no doubt ought to exist in the mind of anyone, in my judgment, as to their unwisdom. Their stoutest defenders will probably disclaim any attachment whatever to the principle they represent as a feature of a permanent tariff policy; indeed, they hasten to convey the assurance that, were it not for the chaotic business conditions which prevail throughout the world and the instability of foreign exchange, they could not be induced to embrace it or even to tolerate it. Some apology, Mr. President, is certainly in order for such an astounding delegation of the functions of Congress to the Executive, vesting him with an authority no constitutional monarch may exercise, in character quite like that for the assumption of which kings have been brought to the block.

No emergency, however grave, can justify the surrender into the hands of the President of the taxing power intrusted by the people to their representatives in Congress, no matter how profound may be his statesmanship or how exalted may be the character of the man who for a brief period may be elevated to that high office. If this encroachment upon the liberties of the people is either sanctioned or condoned, there is no man wise enough nor prescient enough to foresee the ultimate consequences.

It is said that an exigency exists demanding this departure from the settled policy of our Government. Our skies are never wholly clear; emergencies continually confront us, and when they are wanting an ambitious President or an indolent or subservient Congress will have no difficulty whatever in conjuring up such.

The revered fathers of our Republic were very deeply apprehensive concerning the likelihood that the President, in view of the extensive powers they were reposing in him, and particularly of the enormous patronage at his disposal, might exercise an undue influence over the action of Congress. They took pains to insert in the great charter which they gave us some provisions which were intended to guard against or to mitigate that evil. They would have been horrified at the idea of conferring on the President of the United States the power to impose customs duties, to raise customs duties, to lower customs duties, carrying with it the opportunity to ruin or enrich the citizen, to shower wealth upon him the like of which Croesus never knew or Monte Cristo ever dreamed of. There would be more terror, Mr. President, to the business man in the presidential frown if this provision become a law than was ever occasioned by a general bank panic. There would be a new significance to him in the plaint of Wolsey:

> O, how wretched
> Is that poor man that hangs on princes' favors!

An unscrupulous political leader, presumed to have some influence at the White House, particularly if the incumbent were a candidate for reelection, would find in a law of that character a convenient instrument for fat-frying purposes, a resource of such rich possibilities as no campaign manager ever commanded in this country or in any other. At its worst a law of that character would be a menace to the perpetuity of our institutions, and at its best it would be a constant, ever-present obstacle to the stability of industrial conditions, an element of uncertainty in any calculations the business man might make concerning his future operations in any enterprise affected by tariff rates.

This bill has now been before the Congress for something like 16 months. It may be before the President for his signature by the 1st of October next, or it may, by reason of a disagreement among the conferees—the two Houses being understood to be at variance with respect to a very important principle of the bill—go over the session; but whenever it becomes a law uncertainty will still confront the cautious manufacturer or other producer. His calculations as to his future operations may be upset any day by a presidential order affecting rates that react on his business. Even the filing of a complaint asking an increase or a reduction of rates inspired by private malice or the work of some meddlesome Mattie or in an honest, commendable purpose by citizens injuriously affected to relieve themselves from burdens will constrain him to conservatism in his operations. Thus the wheels of industry will be checked, and the chilling effect which this act must inevitably have upon our foreign trade reflected on industry here will be intensified. Unfortunate, sir, as it may be that rates which are now fixed amid the shifting conditions which prevail should continue after normal times shall have demonstrated that the rates were too high or too low, it can scarcely be so disastrous as to have all the rates subject to change overnight.

I address myself now to the question of the constitutionality of this extraordinary delegation of power. I shall, as I said, attempt to review only in outline the argument heretofore made with respect to the matter. All concede the general principle that legislative power can not be delegated; that the representatives of the people, chosen for the purpose of making the laws, must make those laws and can not delegate that power to anyone else. That certain powers may be delegated to administrative officers and executive officers, however, is not open to doubt.

The Finance Committee, in their original report upon this bill, contented themselves with sayings that the powers here conferred are entirely justified by the case of Field v. Clark, reported in One hundred and forty-third United States. Apparently they are not so confident about that now. I have not had an opportunity to examine the briefs which have been submitted this morning—one, as we are told, by one of the judges of the Court of Customs Appeals. I can not refrain from expressing my surprise that a judge of a court before which the law will necessarily come

for consideration and construction should venture to advise in advance the Congress of the United States concerning the costitutionality of the measure or of any provisions in it.

Mr. SIMMONS. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from North Carolina?

Mr. WALSH of Montana. I do.

Mr. SIMMONS. I want to say to the Senator that I have been advised that he was one of the chief assistants in the framing of the law.

Mr. OVERMAN. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the junior Senator from North Carolina?

Mr. WALSH of Montana. I yield.

Mr. OVERMAN. Do they say who that judge was?

Mr. WALSH of Montana. We were told that it was Judge De Vries of the Court of Customs Appeals, who advises us in advance that the law which he will be called upon to pass upon is a constitutional measure.

Mr. POMERENE. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from Ohio?

Mr. WALSH of Montana. I do.

Mr. POMERENE. Occupying, too, a life position. I am astonished that any judge occupying that position should come here as an advocate of legislation going to the fundamental principles of a finance bill.

Mr. WALSH of Montana. I was told, however, that the question had been investigated by the attorney for the Tariff Commission, and I have been very courteously furnished by the commission with a copy of an opinion by their official counsel, who reaches the conclusion that the legislation is constitutional. It starts out, however, with the following declaration:

> Field *v.* Clark (143 U. S. 649) does not decide the question whether rates as well as facts can be left to Executive determination. The law therein construed—section 3 of the tariff act of 1890—prescribed the rates of duty to be collected.

I think that proposition must be accepted on all hands, and it is important for the reason that not only is that case not a direct authority for the legality of the provisions under consideration, but the attention of the Senate has been called to no case arising under the legislation of Congress or arising under the legislation of the various States where the taxing power was ever delegated to any official whatever. Many delegations of power have been under review by the courts. There is such a wealth of learning on the subject that it is difficult for one without exhaustive study to follow understandingly the discussions of the courts in relation to it; but among them all, from beginning to end, there appears never to have been considered an attempt to delegate power, as it is attempted here, to an executive officer to fix tax rates; and it must necessarily follow either that the policy has been universally condemned, or else that the conviction is general that it is beyond the power of the legislature to do anything of the kind.

Mr. President, the mind most naturally and readily is directed to the statutes which authorize the Interstate Commerce Commission or other bodies of similar character to fix the rates, in the case of the Interstate Commerce Commission for the transport of passengers or freight, and in the case of public-service commissions generally the rates of the corporations under their supervision and direction. Upon reflection it must be conceded that there is a wide difference between the delegation of power of that character and the delegation of power to fix tax rates.

Mr. WATSON of Georgia. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from Georgia?

Mr. WALSH of Montana. I yield to the Senator.

Mr. WATSON of Georgia. The Senator who is addressing the body will, of course, see at once the difference between a delegation of power to legislate by the President within a definite limit and to a definite end and this peculiar delegation of power in which he is given a strictly judicial power. That is to say, he may hear and determine the question of raising a rate or lowering a rate, or adopting one method of valuation or adopting another. He may decide yea, or he may decide nay, and he is, therefore, gifted with a strictly judicial as well as legislative power. Therefore, I ask the attention of the Senator from Montana to the fact that in this bill—this minor portion of the bill, which will soon become the major portion of the bill in its power to devour the minor portions of it—the President is given the judicial power, the legislative power, and left the executive power; and therefore all three separated branches are united in him, and he is made truly a monarch.

Mr. WALSH of Montana. The observations of the Senator from Georgia are entirely pertinent and quite sound, Mr. President.

Now, I want to direct the attention of the Senate, if I can, to the difference between the cases to which reference has been made and the case that is before us.

In practically every case in which the delegation of power was sustained by the Supreme Court of the United States, reference is made to the impracticability or practically the impossibility of dealing with the question in any other way; and that is the foundation for the rule as laid down by the courts generally. We understand the general rule to be that legislative power can not be delegated, and yet everybody will realize that legislative power is delegated to municipalities and other subordinate divisions of the State, and that because from time immemorial delegations of power to exercise authority locally have been extended and sustained.

Mr. STERLING. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from South Dakota?

Mr. WALSH of Montana. I do.

Mr. STERLING. Is not that, however, largely because there is no prohibition in the constitutions of the several States that delegate to municipalities legislative authority?

Mr. WALSH of Montana. No. As a rule, the constitutions of the various States declare that "all legislative power is hereby vested in the legislature."

Mr. STERLING. But is not this the rule—that unless the power is expressly prohibited in the State constitution the power exists on the part of the legislature, whereas with reference to the Federal Constitution power must be given, either expressly or impliedly, before it can be exercised?

Mr. WALSH of Montana. The distinction to which the Senator refers undoubtedly obtains; but when the constitution says "All legislative power is vested in the assembly," the assembly still may delegate power to local bodies, simply because that was the custom at the time the constitution was adopted; and such a provision is not to be understood as denying the power so to delegate authority. The power delegated will fall within that class—that is to say, where the power to delegate exists by virtue of a long-established custom—or else it exists by virtue of the fact that it is impracticable to deal with the problem in any other way.

For instance, in the case of United States against Grimaud, reported in Two hundred and twentieth United States Reports, in which the statute authorizing the Secretary of Agriculture to establish rules and regulations governing the forest reserves was under consideration, the court said:

> In the nature of things it was *impracticable* for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features, and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power (220 U. S. 516).

Senators will observe that it says:

> In the nature of things it was impracticable for Congress to provide general regulations.

Reference has been made to the case of Buttfield against Stranahan, to which I shall refer again, in which the court said:

> To deny the power to Congress to delegate such a duty (to fix tea standards) would in effect amount to declaring that the plenary power vested in Congress to regulate foreign commerce *could not be efficaciously exerted.*

So, likewise in a very learned opinion rendered in a Florida case, the court said:

> The complex and ever-changing conditions that attend or affect the performance of the useful public service rendered by common carriers make it *impracticable* for the legislature to prescribe all the necessary rules and regulations.

Reference was made by the distinguished Senator from North Dakota to the case of the Union Bridge Co. against the United States, to which I shall recur hereafter. In that case the court said:

> But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be *impracticable* in view of the vast and varied interests which require national legislation from time to time.

So, Mr. President, it must appear, in order to warrant a delegation of power of this character, that it is impracticable, almost impossible, for Congress to enact the necessary legislation to meet the situation. But what can be said in that regard with respect to the levying of customs duties? It is not impracticable to do it at all, because we are actually doing it now, and we have done it without delegating power to any extent since the commencement of our Government in 1789.

One of the first statutes passed by the Congress of the United States was a law for the purpose of raising revenue by the imposition of customs duties in which the rates were specifically prescribed, and from that time down to this Congress has done the same thing. So it can not be said that it is impracticable for Congress to legislate upon this particular subject.

In addition to that, all the authorities agree that wherever power of this kind is delegated to an administrative officer it is subject to review by the courts, in order to determine whether the law has been followed and complied with or not, and if provision is not made, or provision does not exist, for such a review in the courts the act can not be sustained.

That principle has been recognized in all of our legislation. The Interstate Commerce Commission is authorized to fix railroad rates, and to do many other things in connection with the operation of railroads and common carriers generally; but every order it makes is subject to review in the courts, as provided in the act.

In exactly the same way, when we authorized the Federal Trade Commission to issue an order commanding any person complained of to desist from practices in trade alleged to be unfair, an opportunity was given to review in the courts the decision thus made by it, that it might be set aside if the facts did not justify the order that was made.

So we gave a power of review in the case of the "packer" legislation. It becomes necessary, therefore, every time we thus delegate power to fix rates of any kind, or to make any rule or order affecting the rights of a citizen, to give him an opportunity to go into the courts to review any action taken under the power granted and to have it annulled if it shall be oppressive in any way or contrary to the rule laid down by the statute. I want to advert to what is said in a few of the authorities upon that question.

I refer, first, to the Florida case, to which I adverted a few moments ago. It is there said:

> In a number of well-considered cases it has been distinctly held that where a valid statute, complete in itself, enacts the general outlines of a governmental scheme or policy or purpose and confers upon officials charged with the duty of assisting in administering the law authority to make, within designated limitations *and subject to judicial review*, rules and regulations, or to ascertain facts upon which the statute by its own terms operates in carrying out the legislative purpose, such authority is not an unconstitutional delegation of legislative power. (Pp. 649–650.)

In a very learned discussion of this subject of the delegation of legislative power by the late Justice Timlin, of the Supreme Court of the State of Wisconsin, the conditions which justify a delegation of power by the legislative branch are set out as follows:

> The delegated power must be limited either locally or to a particular subject matter, as, for instance, the regulation of a specified corporation, department, or bureau; and when exercised be of a lesser degree of conclusiveness than a statute; that is to say, *subject to judicial review as to its reasonableness, fairness, and impartiality.*

So that such a review is an essential feature of any delegation of power proper to be exercised by the legislature. Wanting here, it necessarily follows that the provisions under consideration can not be sustained.

But not only is it wanting here, but the President of the United States is not amenable to suit by any private citizen upon any question arising under the administration of his high office, as has been repeatedly determined by the Supreme Court. Indeed, it is doubtful whether Congress could authorize the bringing of a suit against the President of the United States for any act done in his official capacity. Moreover, he is not subject to the process of subpœna to bring him into court to disclose the facts upon which his decision is founded. He is not even obliged, under the statute, to write an opinion disclosing what information he had upon the subject, or how he arrived at the conclusion which he has announced.

Another feature of the case is equally difficult. It has been admitted in the course of the argument that if power be delegated by Congress to an administrative officer to fix rates or to establish regulations it must lay down some definite rule which must be followed by the officer so empowered. He can not be intrusted with discretion to follow one policy or to follow another policy as he may see fit and as he thinks would best subserve the public interests. The policy is to be declared by Congress, and he must walk in the line that is laid down by Congress.

Under the act in question the President, when he finds upon investigation that the rates fixed by the bill do not equalize conditions in competition, is authorized to do any one of four different things. In the first place he may raise or lower the rates. In the second place he may change the classification. In the third place he may change the form of the duty from ad valorem to specific or from specific to ad valorem. Fourth, he may substitute the American valuation for the foreign valuation. Any one of those four things he is at liberty to do as, in his judgment, will best promote the public interest.

Let me illustrate the principle to which we here appeal. It is disclosed very clearly in two cases arising in the State of Wisconsin. A statute was passed by the legislature of that State which authorized the judge of one of the courts, the circuit court, I think, to issue a charter or certificate of incorporation to a village complying with its requirements. It was necessary to submit a map of the territory, a census of the population, and a statement of the resources of the municipality to be. Then it was declared that, considering those things, if the court believed it to be in the public interest that the charter should be granted he should issue the same.

That statute was held void because the power could not be reposed in the judge of the court to determine what is or what is not in the public interest. The statute was then amended so as to provide that whenever there was laid before the circuit judge a map of the territory and a census of the region to be incorporated in the city and he found that otherwise the application conformed to the law he was to issue the charter. In other words, he had nothing to do except to determine what the facts were, and if he found the facts to be as prescribed in the statute then he should issue the charter. So here, Mr. President, we can not under any circumstances repose in an administrative or an executive officer the power to say which one of two or three or four different courses it would be the wiser or the better to pursue.

Mr. WATSON of Indiana. Would the Senator mind stating the case he just cited?

Mr. WALSH of Montana. The first case is the case of In re Incorporation of Village of North Milwaukee (93 Wis. 616); the later case is State *v.* Lammers (113 Wis. 398).

I am not unmindful of the argument made by the Senator from North Dakota to the effect that whichever one of these four courses the President takes under the power granted, he is governed and controlled by the provision that it must be for the purpose of equalizing the differences in competition in trade; that that is the end to be attained, although he may reach the end by any one of these four different routes. But that does not answer the contention at all.

Of course, the purpose is, as declared in the statute, to bring about equality in conditions of competition as between a foreign product and a domestic product. But he may follow any one of these four courses with a view to attain that end, and he will follow that course which to his mind most accurately or most nearly or most effectively brings about that end.

It is a question of policy as to which one of them will most effectively and accurately bring about the result. Since we began enacting customs laws, down to this good hour, there has always been a controversy as to whether certain rates should be specific or whether they should be ad valorem. It is a question of very delicate and oftentimes profound policy, and scarcely a tariff bill comes before Congress for consideration which does not give occasion to spirited debate between the advocates of the one way of arriving at equality in conditions rather than the other way.

Everybody understands how these things operate. The President to-day finds that a certain specific rate will equalize conditions as they now exist at this very hour, but, of course, if the price of the commodity goes down the duty goes down with the ad valorem rate, whereas in a case of the specific rate, whatever changes may ensue, that rate remains the same. So that it is not a question of arriving at just exactly what will equalize conditions to-day, but to-morrow and the next day. In the consideration of the bill the Senate struck out a provision fixing an ad valorem rate upon importations of wool, because they desired to give the woolgrower the amount of protection which was intended to be accorded him whether the price went up or went down. Thus it becomes a question of policy. So, too, changing the commodity from one paragraph to another paragraph involves a matter of judgment and discretion, a matter of policy upon the one side or upon the other. That is a fatal feature of the amendment under consideration that has no counterpart whatever in any of the statutes under consideration in the cases to which reference was made by the distinguished Senator from North Dakota.

But finally, Mr. President, all concede that whenever a delegation of power is made it becomes necessary for the Congress to lay down a clear, precise rule which can be followed, so that the condition upon which action is to be predicated can be ascertained with a reasonable degree of accuracy. I have not seen that principle expressed more pointedly or more clearly

than by Judge Willoughby in his celebrated work on the Constitution, in that part of it in which he considers the case of Field *v.* Clark. He there said as follows:

The court can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation. The doctrine thus declared is without objection so long *as the facts which are to determine the executive acts are such as may be precisely stated by the legislature and certainly ascertained by the executive.*

The facts must be such as may be "precisely stated by the legislature" and exactly "determined by the executive." Now, what is the rule laid down here? It is that the rates shall be fixed "so as to equalize the differences in conditions of competition." The duty shall be fixed at such rate as shall equalize the differences in the conditions of competition. We are not unfamiliar with the contention frequently made in this Chamber, and not at all unpopular throughout the country, that rates should be fixed at the difference in the cost of production here and abroad. The committee have chosen to discard that old and somewhat well-known rule—sustained somewhat generally by public opinion. They have chosen to substitute some other rule. They want some other test than that thus declared or, of course, they would have used the very language in which it has been customarily expressed. Thus, Mr. President, the Republican platform in 1908 declared as follows:

In all tariff legislation the true principle of protection is best maintained by the imposition of such duties as will equal the difference between the cost of production at home and abroad, together with a reasonable profit to American industries.

The last clause, "together with a reasonable profit to American industries," was added in that platform in 1908 to the principle as it had theretofore been advocated within and without this Chamber.

As I understand the amendment offered by the senior Senator from New Jersey [Mr. FRELINGHUYSEN]—I have not had an opportunity to examine the amendment offered to-day, but the amendment heretofore offered by him—it was in strict conformity with the principles thus so frequently supported, namely, the difference in what he speaks of as the conversion cost—that is to say, as he explained, the difference in the cost of production at home and abroad. I shall advert to this presently.

I am calling attention to the fact that the Senate Committee on Finance, in the amendments which they have tendered to us, do not choose to follow, for some reason or other, the well-supported rule to which I have adverted. But if they did do so, let us consider for a moment about what that means. How shall the President ascertain the difference in the cost of production at home and abroad and fix a rate which shall equal such difference? As pointed out in the discussion of the subject this morning, the cost of production varies in different countries. It has been disclosed in the debates time and again that at the present time Germany, with respect to many commodities, can produce at a cost much less than other competing European countries or perhaps even Asiatic countries. When the President goes to ascertain what is the difference in the cost of production between this country and the countries abroad, which country shall he take as his guide? Shall he fix the rate at what will equalize the difference in competition between this country and Germany, or between this country and France, or between this country and England, or shall he average them all and govern himself accordingly?

But we do not end our difficulties there. As pointed out, if the rates were fixed at such a figure as would take care of the differences in the conditions of competition between this country and Germany, they would have to be so high that all importations from other European countries would be excluded and we would give to Germany a monopoly of our foreign trade in this country. So it is, Mr. President, with respect to individuals in the same country. I have no doubt that the same conditions exist in Germany and in this country. Some of our manufacturers are able to produce their products at a much less price than their domestic competitors. Mr. Gary stated some time ago that the United States Steel Corporation is able to produce steel at $5 a ton less than any competing independent company in this country. When we come to consider the difference in the cost of production shall we take as the standard the foreigner who has the highest cost of production or shall we take as the test the foreigner who has the lowest cost of production?

So with the other factor, the cost in the United States, shall we take the producer who has the most efficient plant, the greatest business organization, the most highly developed system, or shall we take the man who operates in a small way, whose costs are high, whose plant is inefficient, and so on? In other words, what the Congress may do easily it is simply impossible for the President to do under such a rule as is suggested. That is to say, the Congress is not obliged to be logical. We may fix any rate we see fit and we may solve the situation when it is utterly impossible for the Executive or an administrative officer to do it. But when we come to consider the question before us under the rule which is prescribed by the committee, we are involved in difficulties compared with which those to which I have heretofore adverted are slight indeed. The test it proposes is the differences in the conditions of competition. Now that involves something more, obviously, than the differences in the cost of production. But what more does it involve?

At an early stage of the debate the Senator from North Dakota [Mr. MCCUMBER] said the guiding principle which actuated the Finance Committee in fixing rates in the bill was to fix them at such an amount as would equalize the difference in the cost of production plus the cost of transportation to this country. Well, either under that rule or under the general statement that the rates must be fixed so as to equalize the differences in conditions of competition, how can we avoid taking into consideration the cost of transportation in this country from the point of production to the point of consumption? Take manganese, for instance, produced in my State and throughout the Western States. A small duty was put upon manganese equal possibly to the difference in the cost of production in this country and in Cuba or Brazil, but by no means high enough to equal the difference in the cost of transportation from the mines of the West to the consuming centers in the East as compared with the cost of transportation from the countries of foreign production. That is one of the conditions of competition.

Will the President be obliged to take into consideration those differences in the cost of transportation in order to arrive at what rate will equalize the differences in conditions of competition? That is one of the conditions of competition. But if that is the case, taking manganese again for the purpose of illustration, from what point to what point will he calculate the cost of transportation? Shall he take into consideration the difference in the cost of transportation from Butte to Duluth or from San Francisco to Pittsburgh or from Denver to Birmingham? We immediately get an impossible problem which is presented to the President by the rule.

But there is more than that. The committee have given us a detailed rule from which to determine the significance and meaning of the general rule to which I have adverted before. Thus—

(c) In ascertaining the differences in conditions of competition, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar merchandise in the United States and in competing foreign countries—

Now it will be observed that this is a frank abandonment of the old rule of difference in the cost of production, as the President may go further under this rule and take into consideration—

(2) the differences in the wholesale selling prices of domestic and foreign merchandise in the principal markets of the United States, but in considering prices as factors in ascertaining differences in conditions of competition, only reasonable profits shall be allowed.

Now there is a very important consideration. That gets us to the rule which was laid down in the Republican platform of 1908, that tariff rates should not only cover the differences in competition but also be high enough to give the American manufacturer a reasonable profit upon his goods. Of course, everybody understands that the European manufacturer, as a rule, is content with a lower rate of profit than is the American manufacturer. I am glad it is so. We in this country are not satisfied with the living conditions which prevail in Europe, neither are our energetic and enterprising people satisfied with the small margin of profit which manufacturers in Europe, as a rule, realize from their business. When, however, the President is called upon to determine what is a reasonable profit, what guide has he? A reasonable profit in one line of business might be 5, 6, or 7 per cent, but it would be entirely inadequate in another line of business. In respect to one commodity the profit ought to be very high, while with respect to another it ought to be extremely low, as in the case of staple commodities. How then is the President to determine what is a reasonable profit upon any particular commodity?

Moreover, Mr. President, the same man often handles a long line of goods. Take steel manufacturers, for instance. When it comes to a rate of duty that ought to be imposed upon some particular commodity, how can the President determine what

the rate of duty should be in order that there should be a reasonable profit upon the sale of a particular commodity?

Subdivision 3 of this section of the amendment, giving the element to be considered, continues:

Any other advantages or disadvantages in competition.

Mr. President, that was a little different in the original draft as it came before. In that draft it was as follows:

(c) That in any investigation provided for in this section account may be taken of the price at which like or similar merchandise is sold in the United States and competing foreign countries, wages, prices of materials, and all other items in costs of production of such similar merchandise in the United States and competing foreign countries and any advantages of domestic and foreign producers in competitive trade, including laws and regulations affecting the same.

In other words, the President was obliged to convert into dollars and cents any advantage that might arise by reason of the laws of this country as compared with the laws of the competing country.

Mr. TOWNSEND. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the Seantor from Michigan?

Mr. WALSH of Montana. I yield.

Mr. TOWNSEND. I have not been in the Chamber all the morning and I am wondering if there has been any proposition presented to amend the provision with reference to this subject.

Mr. WALSH of Montana. The Senator from Wisconsin [Mr. LENROOT] has proposed an amendment to it.

Mr. TOWNSEND. Such an amendment has been offered?

Mr. WALSH of Montana. Yes.

Mr. President, it has been frequently charged on this floor that the rates have been fixed in the pending measure not in order to take care of the difference in the cost of production here and abroad but in order to insure to the American manufacturer the prices which he is now asking for his products; and apparently the President, under this rule, is required not only to take into consideration the difference in the cost of production here and abroad but he is also to consider the wholesale prices here and the wholesale prices abroad and to allow that element to enter into his computation of what is the rate that will equalize the difference in competition here and abroad.

However, Mr. President, let us get back to the rule of the amendment as it has finally come before us. No change is really made in the meaning by the excision of the words "including laws and regulations affecting the same." The language of the pending proposal is exceedingly broad—"any other advantages or disadvantages in competition." Why will not that include the difference in the cost of transportation? Take manganese again for the purpose of illustration. It is brought here from Brazil or from Cuba in ballast at practically no cost at all. On the other hand, the American producer is obliged to pay the exorbitant, and I might even say the extortionate, freight rates to carry his products clear across the continent. So the conditions of competition are such that he can not compete with the foreign producer; yet here the President is obliged to take into consideration any advantage and to fix the rate at such a figure as will absolutely equalize the differences in the conditions of competition, though the Congress has refused expressly to fix the rates so high.

Let us go a little further, Mr. President. Everybody realizes that many elements enter into the matter of competition between traders in the same commodity. Many goods sell in this country—particularly women's clothes and perhaps also fabrics of various kinds that are of foreign make—simply because they are of foreign make. One goes to a tailor, who tells him, "Here is a domestic piece of goods, and here is one of foreign manufacture." The price is fixed upon both, but the tailor calls attention to the fact that the one piece is foreign goods, expecting that that will attract the customer, who will pay a higher price for that kind of goods. No one can gainsay the fact that because many articles are of foreign manufacture they command a higher price upon the American market. How shall the President convert the advantage which the foreigner has because his goods are of foreign make into dollars and cents and thus determine the rate which he is called upon to fix?

The amendment as originally drawn provided that the President was to take into consideration any advantage arising from the laws. That language is not found in the proposition as it is amended. It now reads "any other advantages," but it is really here in effect, although not so expressly stated.

It is contended that the foreign manufacturer and foreign producer of goods have a decided advantage over our producers in this country because the manufacturers and producers in foreign countries are allowed to combine, while our manufacturers and producers are forbidden to combine, an advantage which must be converted likewise by the President into dollars and cents in order to arrive at the rate which will actually equalize competitive conditions.

A multitude of factors enter into competition that defy reduction to a mathematical basis.

Mr. EDGE. Mr. President——

The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from New Jersey?

Mr. WALSH of Montana. I yield.

Mr. EDGE. If the authority is delegated at all to the President to review and take into consideration possible changes in tariff duties, does the Senator contend that the latitude should not be sufficiently comprehensive to enable the President at least to weigh any possible advantages or disadvantages, whatever they might be, in order to reach a logical and proper conclusion?

Mr. WALSH of Montana. No; I do not so contend. I should say that, if we were going to lodge the power in the President at all, we ought not to tie him down by any hard and fast rule, but we ought to allow him to attack the problem exactly the same as Congress attacks the problem and give consideration to everything which would be pertinent to the question before us. However, the point I am making is that when that is done the Constitution is violated.

Mr. EDGE. Leaving aside the constitutional question, which I can not discuss, do not the general terms of the language, as well as the specific meaning of the words "other advantages or disadvantages in competition," tend to give the President just exactly that authority in order to enable him to discover everything that might possibly affect the determination of the rates?

Mr. WALSH of Montana. The Senator will understand that I am not finding any fault with that as a matter of policy.

Mr. EDGE. I thought the Senator was.

Mr. WALSH of Montana. Oh, no; I am arguing now that it is proposed to lay down an impossible rule; the President can not carry it out.

The PRESIDING OFFICER. If the Senator from Montana will suspend for a moment, the Chair feels that he should advise him that he has used his hour on the paragraph. Under the ruling of the Chair the Senator is at liberty to consume an hour on the amendment pending.

Mr. WALSH of Montana. Mr. President, before concluding I desire to advert to a few of the cases which, in the judgment of the chairman of the Finance Committee, warrant this delegation of power.

Mr. BORAH. Mr. President, before the Senator proceeds to that discussion will he permit me to interrupt him?

The PRESIDENT pro tempore. Does the Senator from Montana yield to the Senator from Idaho?

Mr. WALSH of Montana. I yield.

Mr. BORAH. As I view this authorization to the President, he may under the power conferred, assuming that it is constitutional—and I will leave that question out of consideration for the moment—practically remake this entire tariff bill?

Mr. WALSH of Montana. Within a range of 50 per cent.

Mr. BORAH. Yes; but within the wide discretion which he has as to investigation, and so forth, 50 per cent is only in a sense a limitation. A President who believed in a very low tariff could give us a tariff law imposing very low tariff rates, while a President, on the other hand, who believed in a very high protective tariff could give us a very high protective tariff law under the discretion which is proposed to be lodged in him.

Mr. WALSH of Montana. There is no doubt about that.

Mr. BORAH. So that he could practically make the entire tariff law.

Mr. WALSH of Montana. There is no doubt about it; that is the point I am making, that no two men will be able to take this rule, either as it is expressed generally in the proposed statute or as it is expressed in detail, and arrive at exactly the same result. In other words, it becomes very largely a matter of predisposition and discretion on the part of the President. I also wish to call attention particularly to the proposition that no matter what the President does, no matter at what conclusion he arrives, whether the action taken by him does or whether it does not equalize the difference in conditions of competition, nobody can question his action; so that we really do invest him with perfectly unrestrained power to fix whatever rate he sees fit within the limit of 50 per cent.

Mr. LENROOT. Mr. President, will the Senator yield at that point?

Mr. WALSH of Montana. I yield.

Mr. LENROOT. May I suggest that two men might take the same factors into consideration and yet not arrive at exactly

the same results, but, under the pending amendment, the two men might not take into consideration the same factors, which would be a very different proposition.

Mr. WALSH of Montana. Yes; and we have seen the situation illustrated here on this floor time and again. Both sides of the Chamber have taken exactly the same facts and figures furnished them by the Tariff Commission, and one side would reach the conclusion that a rate of duty of 20 per cent would equalize the differences in the cost of production here and abroad, while the other side would maintain that the rate would have to be at least 50 per cent in order to equalize the difference.

Mr. LENROOT. My point is that where they are not required to take into consideration the same factors it makes it that much more indefinite.

Mr. WALSH of Montana. Exactly; and whenever the factors are thus doubtful——

Mr. BORAH. Mr. President, I do not want to take up the Senator's time, because I know it is limited. I merely wish to make a brief statement, in order that my position may not be misunderstood. I should like very much to see some kind of a tribunal created so that we could have tariff laws hereafter which were not made as the pending bill has been made; but I do not believe that it is wise policy, even if we had the constitutional power, to lodge this authority in the President, and I do not believe that we have the constitutional power to lodge it in the President so that the President could do really effective work in the way of making a tariff. I think it would be a wise thing if we could create some kind of a commission and exhaust the power of Congress in that commission to enable the commission to go as far as it possibly could under the Constitution in making a tariff law.

Mr. WALSH of Montana. I desire to say to the Senator that that will be under consideration immediately after the disposition of paragraphs 315, 316, and 317, upon the amendment tendered by the senior Senator from New Jersey [Mr. FRELINGHUYSEN] and the Senator from New Mexico [Mr. JONES], but I am in entire accord with the views now expressed by the Senator from Idaho. I also deplore this method of attempting to fix tariff rates. I am convinced, however, that the widest latitude that we can give to the Tariff Commission is to authorize them not only to find the facts but also to recommend to Congress the rates which they believe ought to be enacted, and then Congress can either enact those rates or depart from them, as they see fit. However, that is a matter which will come up directly.

Mr. President, much reliance seems to be placed by the Senator from North Dakota in support of his contention upon the bridge case, involving the statute which authorized the Secretary of War to direct the removal of an obstruction to navigation in one of the navigable streams unless the bridge were made to comply with the requirements laid down by him; but that is a very simple matter. The United States can prevent the occupation of a navigable stream by any kind of a structure. It can say that none shall be placed there at all; and having the power to say that no structure shall be placed there at all, of course, it can say, "You can place there only such a structure as is approved by the Secretary of War." But the court not only put its decision upon that ground but put it upon the ground to which I have heretofore adverted, namely, that it is impracticable to deal with the problem in any other way.

They say:

> By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval, the conclusion could not be avoided that executive officers in all the departments, in carrying out the will of Congress as expressed in statutes enacted by it, have from the foundation of the National Government exercised and are now exercising powers as to mere details that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon executive departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.

Then reference was made to the case of Buttfield against Stranahan, the tea-standard case, considering a statute in which it was provided that the Secretary of Agriculture should fix standards of tea, and that if the teas did not come up to this standard they should be excluded from the country. But Congress has plenary power to exclude from this country any commodities that it may see fit. No one has any right to introduce commodities into this country from another country except by the express or the tacit permission of Congress, and Congress can lay down the conditions under which commodities may be imported from a foreign country, and may declare that teas can not be imported into this country unless they conform to the regulations of the Secretary of Agriculture. But I called attention awhile ago to the further declaration of the court in that case that it would be impracticable to legislate with respect to the matter except the power were thus delegated.

No answer whatever thus far, so far as I have been able to discover, has been made to the contention which I have advanced, that the power thus delegated, in order to be constitutional, must be subject to review by the courts in order to determine whether the statute was actually followed or was not followed by the legislative officer to whom the power had been intrusted.

The brief to which I called attention, though, prepared by counsel for the Tariff Commission, has the following to say about that:

> Nor does denial of appeal from the Executive action go to the essence of the constitutional question. Congress has the power to limit or prevent litigation in governmental matters, and has in fact made the decision of the Commissioner of Navigation final in the interpretation of laws relating to the collection and refund of tonnage taxes.

That refers, no doubt, to section 3 of a statute approved July 5, 1884:

> That the Commissioner of Navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final.

That is to say, the commissioner demands of a vessel owner the payment of a tonnage tax, and he has misconstrued the law and demanded of the shipowner more than the law requires him to pay. That statute has been given different constructions. A number of the courts have held that all that that statute means is that the Commissioner of Navigation, who is a subordinate of the Secretary of Commerce, shall determine the matter finally and that the question shall not go up to his chief. Another court has decided that it goes beyond that, and that it denies the man who has overpaid the right to go into court and demand a refund of the excess tax that he has paid. That the former decision is correct I can not entertain a doubt, because I can not believe that Congress ever intended to deny to the citizen the right to go into court to recover an excess tax which had been exacted of him by the collector. But, however that may be, even if the construction contended for is correct, it simply means this: The Government of the United States can not be sued except with its consent, and it refused to give its consent to be sued in this particular case. That is all that that decision amounts to. It does not by any means lay down the proposition that any legislation that Congress may enact, delegating power, is valid, even though there is no redress in the courts from oppressive action or action that does not follow the statute.

Mr. President, I recognize how futile it is to discuss questions of this kind in this body.

I entertain no doubt, from my past experience, that the decision of this very important question of constitutional law will follow almost exactly the votes upon other features of the bill. The division, in all probability, will be just exactly the same. However, I could not content myself without expressing my very pronounced conviction that this is an unwarranted action on the part of Congress, and that, as a matter of policy, it is vicious and most unwise.

Mr. EDGE. Mr. President, I have already briefly discussed the intent of the pending amendment, and I am going to take only a few moments of the time of the Senate to discuss it further.

Of course it is impossible for a layman to determine the constitutionality or unconstitutionality of the section proposed. I have great regard for the knowledge of the law possessed by my friend from Montana, and yet on this side of the Chamber many able lawyers are equally positive that the pending amendment is entirely constitutional. I recognize that we take an oath to support the Constitution. I do not know what a layman is to do under those circumstances but to try to assist in preparing and developing legislation, and if the question of constitutionality is raised, as it is being very seriously raised

in this important change in policy, then wait for the natural course of a decision from the Supreme Court, which I suppose in due time, should this become a part of the law, will be handed down. In the meantime it appeals to me that our activities should be along the line of endeavoring to organize machinery which will meet practically a situation which I think everyone will agree, whether questioning the constitutionality of the pending amendment or otherwise, should be met and must be met by some elasticity in the administration of tariff legislation or the imposition of tariff duties.

I assume, from the few words the Senator from Idaho uttered, that he is not in sympathy, and of course the Senator from Montana is not in sympathy, with this amendment; but they apparently both recognize that the present policy of administering the tariff could be greatly improved in order to meet the business and economic conditions which we must face, especially in these days, with much more frequent changes, much more seriously affecting our daily business life than perhaps ever before in the history of the country. Therefore, I am convinced that it is the duty of Congress to at least prepare the machinery. If it is unconstitutional we will be so informed in due time.

There seems to be no method—certainly no method has been suggested—whereby we can introduce elasticity in tariff schedules in order to meet rapidly changing conditions, other than the method suggested by the Committee on Finance. My colleague [Mr. FRELINGHUYSEN] proposes to go a step further, in an amendment already introduced, in order that an existing tribunal of the Government—the Tariff Commission—may be charged with securing and disseminating additional information upon which changes in tariff schedules can be based. I think the two taken together are not only necessary but they furnish a practical method through which we can to some extent, at least, meet a situation which I think we must all agree exists.

We have been laboring for months on a tariff bill. We have heard arguments on both sides, frequently inspired by sectional demands and conditions, all of which has gone to demonstrate the necessity for higher or lower schedules, and we have voted upon them time after time, time after time; and the bill is now, perhaps, three-quarters or seven-eighths passed so far as the individual schedules are concerned. Yet I know that we all feel that we have not sufficient information, speaking individually, to be equipped to vote very intelligently on the schedules as presented either by the committee or by individual amendments. The committee, I know, have worked hard and earnestly and zealously, and have secured all the information that it was possible to secure in order to guide them in presenting and suggesting the various schedules upon which we have acted; and yet we know that in these days, shortly after the Great War, when abnormal conditions exist throughout the world, it is absolutely impossible for any Congress to produce a tariff bill which will meet scientifically or semiscientifically the conditions which exist to-day.

We have been working for months, and in the two Houses for over a year, taken together, on tariff legislation. The country demands a solution of many other problems, and is entitled to it. Business awaits congressional action more than it has ever before in the history of the country awaited congressional action. It is unthinkable to anticipate a return to the consideration of tariff legislation in the near future, after this bill shall be disposed of. So what are we going to do when the bill is passed and becomes a law, so far as that great responsibility is concerned? If we do not erect or prepare some machinery to meet a situation which every one of us must know we will be asked to face, a change in conditions in countries abroad, in their manufacturing outputs, conditions of exchange, conditions of rehabilitation which will permit them to increase their products and their output, all of which affect prices and competition with our products—if we do not erect some machinery to meet a situation which will go to the very bedrock of the daily life of all classes of the people, then, in my judgment, we will not have fulfilled a very clear duty which confronts us.

Much of the criticism of the Senator from Montana seems to be predicated upon a possibility of the President of the United States, not necessarily abusing this great power, but being importuned by political representations and thus, perhaps without full knowledge, being induced to make a decision raising or lowering tariff duties which might not be based upon a full knowledge of the situation. It seems to me that if that criticism could be applied at all, it could be more justly applied to Congress. Here the Members of the Senate and of the other House, representing as they do certain subdivisions of the country, are approached on every hand by letter, committee, and otherwise, to particularly look after the interests of this or that manufacturing industry or other organization, and the Members of Congress naturally feel some individual responsibility to look after those requests. If the concentration of some qualified responsibility in the President should be carried out, it seems to me that the result, instead of inviting political control in the making of a tariff, would be just the opposite. The President is President of the entire country. He does not represent any particular congressional district, farming industry, or other activity. He must listen to any suggestions of a change of tariff, as the amendment clearly defines, with a careful consideration of the differences of conditions of competition, having power, of course—as it should be, in my judgment—to take into account and into consideration everything entering into that competition.

So any decisions made by the President of the United States would, it seems to me, be to a great extent removed from sectional control and influence, which everyone of us knows perfectly well have had much to do with the passage or defeat of many a schedule in the last three or four months of tariff consideration, and always will have.

I feel that that particular criticism is unjustified; if the amendment becomes a law I feel that it will result in a more general view being taken of the necessities of the tariff, perhaps bringing the East and West, the North and the South, nearer together in viewpoint; and the President of the United States having certain power, representing all sections of the country, those powers qualified by carefully defined amendments, in my judgment would help in providing a still more scientific tariff than could possibly be prepared in the ordinary and usual manner with all the labors and earnestness of any committee of the Senate.

Mr. President, this is the only suggestion of a provision which would be at all practicable and would permit of some elasticity, enabling us to meet the changed conditions which we know must frequently arise; and I think it is most important that it be included in the bill. We have attempted to write a bill with the knowledge that American valuations and foreign valuations are far apart because of the difference in value of the currencies of the various countries of the world.

I am perfectly well aware of the fact that they could be equalized by computing them in terms of the American valuation, but with countries like Germany, with the mark only in the last week depreciating several hundredths of a cent, and with all these changes coming almost overnight, for us to pass a hard and fast tariff bill, as we must necessarily do in the ordinary way, with no opportunity whatever to change it until it is brought back to Congress, would simply keep the industrial world of this country in a condition of unrest which would put further and further away the natural desire of the Members of both parties, on both sides of the Chamber, to encourage industry, and to bring employment to millions of men still looking for work. Senators, we well know a duty imposed to-day may be inadequate to-morrow. Must Congress continue giving consideration to the tariff to correct such admitted inequalities or shall we proceed as business men and remove the question, to some extent at least, from sectional or partisan debate? We provide the policy, certainly the President will not depart from it only to meet such inequalities.

So I feel that it is our duty to either adopt this or some other plan—and I have heard of no other plan—in order that the President of the United States, the only authority to whom the power could be delegated, can use his best judgment, under qualified restrictions, in meeting and helping solve this great problem.

Why should we fear to trust the President of the United States, a man elected by the direct votes of all the electors of the country? I do not like the disposition which seems to more or less prevail in these days of suspicion that we can not trust our public servants. If the time has arrived when we can not trust the President of the United States to use his very best judgment in a matter of such extreme importance to the happiness and contentment of every class of citizens of the country, then God help the future of the Republic.

If we have made an error in adopting this plan of legislation, and thus delegating some of our responsibilities, we have the power to repeal at any time Congress is in session, and if no other plan is suggested, even if this is of doubtful constitutionality, then we will not perform our full duty, we will not give to the business men of this country the help, the assistance, the real cooperation demanded, in order that we can take advantage of the markets of the world which are awaiting American enterprise and American ingenuity.

Mr. NICHOLSON. Mr. President, as to many of the items to which the Senator has called attention, relating to our foreign commerce, could we not be fully protected if we re-

sorted to the American valuation instead of the foreign valuation? Would not that accomplish all the Senator desires to secure by this change?

Mr. EDGE. It would accomplish all we could desire so far as the conditions existing at the time this bill became a law were concerned, but the design to provide elastic administration of the tariff law is in order to afford a means of meeting conditions which may and undoubtedly will arise after we are through with the tariff bill and it becomes necessary to meet those conditions.

Mr. NICHOLSON. The American valuation would meet the conditions, because that follows prices up and down, so that the country would be amply protected if we adopted the American valuation instead of the provision proposed here.

Mr. EDGE. If the Senator will read the language of the proposed amendment, I think he will change his view on that. I assume, although I am not a member of the committee, that it was designed to meet many other conditions, in addition to the actual difference in the cost of the product, when the committee used the language "conditions of competition." In other words, there are many conditions in competition besides the cost of the articles, which would have to be considered by the President, which the Finance Committee can not consider beyond the facts produced at the time the bill was before the committee. So that that language, I assume, has been used for the specific purpose of enabling the President to meet a sudden condition developed on the other side, where American valuation would not solve the problem at all.

Mr. NICHOLSON. I can not conceive of any situation which would arise where the American valuation would not solve the problem.

Mr. EDGE. The American valuation is simply computed upon the cost of the article.

Mr. NICHOLSON. Certainly.

Mr. EDGE. Many other conditions arise in trade between countries besides the fluctuation in the cost of articles, for instance, transportation costs.

Mr. POMERENE. Mr. President, I feel that little can be added to what has been said by the very able Senator from Montana [Mr. WALSH] on the subject of the constitutionality of the pending amendment. At the same time it has been insisted on the other side of the Chamber that this provision is constitutional, and that opinion is based very largely upon the opinion of the Supreme Court in the case of Field against Clark in One hundred and forty-third United States Supreme Court Reports.

My own study of this question has convinced me that if the constitutionality of this amendment can be sustained, it must be based upon some other authority than Field against Clark. I want to discuss this opinion very briefly and then try in a few minutes to apply its principles to the pending amendment. The Supreme Court in the consideration of that case laid down this principle:

> That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.

I think no one will question that principle. The difficulties come, if at all, in the application of the principle to a given state of facts. What were the facts in that case?

The Congress of the United States sought to place upon the free list sugar, molasses, coffee, tea, and hides, and the President was authorized, when he found that other nations imposed exactions and duties on the agricultural and other products of the United States, and found that those duties were reciprocally unequal and unreasonable, to suspend the privilege of free importations. But if he did it, what was the result?

It was not left to the discretion of the President to determine what duty should be levied against those imports in the future, but the Congress of the United States specifically defined what those duties should be. In other words, there was nothing left to the discretion of the President of the United States. The only thing that he was empowered to do was to ascertain whether in fact other nations had imposed exactions and duties on the agricultural and other products of the United States. When he found that to be so and issued his proclamation, by that very fact the duties which were prescribed by the Congress went into effect.

Now, let us see what the Supreme Court said a little further on. It quotes from Judge Ranney, of the Supreme Court of the State of Ohio, than whom no greater or better judge ever lived in Ohio. He lays down the distinction between a legislative power and an Executive power in these words:

> The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.

Now, what is the Congress doing when it enacts a tariff law? At present the Underwood-Simmons law is in operation. The pending bill proposes to change the rates of duty. The Congress of the United States is exercising legislative discretion when it changes or seeks to change those duties or determines to leave them where they are.

Shall the duty be 25 per cent or 50 per cent? Shall it be a specific duty or an ad valorem duty? Shall we adopt the foreign valuation or the American valuation? Are not those legislative problems? Do they not appeal to the legislative discretion of the Congress of the United States? When we leave it in their power to determine whether it shall be a specific duty or an ad valorem duty, whether it shall be levied according to the American valuation or the foreign valuation, is not that an exercise of a discretion? Why, Mr. President, I can not think that any serious question could be entertained about it.

Now, let us see what the pending amendment provides. It declares that if the duties which we are fixing do not equalize the differences in conditions of competition and this fact is ascertained by the President, then there is conferred upon him certain powers, and what are they? First, he can change the classification; that is, he can take a given item out of one paragraph where one duty is levied and transfer it to another paragraph where a different duty is levied. Is not that an exercise of legislative discretion? Is not that just as much an exercise of legislative discretion as it is when we here on the floor of the Senate change an item from one paragraph to another?

Let me go further. We provide in the pending bill in certain instances a specific duty, in certain other instances an ad valorem duty, and in certain other instances a combination of both the ad valorem and the specific duties. When we determine whether we are going to adopt the one or the other or the combination of the two, are we not exercising our legislative discretion? When we say to the President, "If you find that competitive conditions are such as to interfere with our industrial development, you shall have the right to change from a specific to an ad valorem or from an ad valorem to a specific," is that a power different from that which we are here exercising?

Let me go a step further. The House, exercising its legislative discretion, declared in favor of the American-valuation plan in the levying of duties. Never, I think, in my legislative life have I heard of a greater propaganda than has been exercised in favor of that plan. The Republican members of the Finance Committee, after a very careful investigation of the subject, declared against the American-valuation plan. Were they not exercising a legislative discretion when they so declared? When the Republican members of the Finance Committee, by a vote of 7 to 3, turned down the American-valuation plan for the foreign-valuation plan, was not that an exercise of legislative discretion? They came to that conclusion because they found, in their judgment, that plan would be utterly impracticable and unworkable. Now, after the majority members of the Finance Committee had declared that the plan was unworkable, they come in by the pending amendment and seek to confer upon the President of the United States the power to change the bill from a foreign-valuation plan, which is practicable and which is workable, to a plan which they say is impracticable and unworkable. Is not that an exercise of legislative discretion? What else can it be?

Why, Mr. President, suppose we had the question before us in our legislative capacity and we concluded to-day that we were going to change from a specific to an ad valorem duty or from an ad valorem to a specific duty or from the foreign valuation to the American valuation, or seek in certain instances to extend an embargo; what is that but an exercise of a legislative power? And yet the Senate of the United States is now, instead of exercising that power itself, seeking to confer it upon the President. Mr. President, I have the greatest confidence in the personal integrity of the President of the United States. I am sure that if the power were conferred upon him he would seek to exercise it in accordance with his best ability. Let us go a step further.

We say after months of investigation that we are going to levy certain duties. The distinguished Senator from North Carolina [Mr. SIMMONS] made the statement on the floor of the Senate a few weeks ago that in his judgment the average duties under the Senate committee bill would be about 45 per cent or perhaps higher. The duties under the Dingley law I believe were, on an average, about 40 per cent. I may not be quite accurate about the rate, but that is approximately correct. What is it that is sought to be done here? Assuming for the sake of the argument that the average duties here are 45 per cent, it is proposed to put it in the power of the President to add 22½ per cent to those duties or to take 22½ per cent from them. In

other words, he would have the discretion to go up 50 per cent or down 50 per cent. He would have the right to fix those duties at any point between the present duties and 50 per cent higher or between the present duties and 50 per cent lower.

The Congress of the United States, presumably, when it passes the bill expects to secure from its operation a certain amount of revenue by taxation at the customhouses, and yet we confer upon the President of the United States the power to say, "No; I want more duty collected at the customhouses," or "I want less duty collected at the customhouses." Is not that the exercise of a discretionary power? If the Congress of the United States were seeking to enact a law which would bring $400,000,000 annually into the Treasury, and sought so to change the bill that it would bring in $600,000,000 annually, would not that be the exercise of a legislative discretion? How, then, can it be less if it is exercised by the President himself?

Again, let me discuss for a few moments the policy of the legislation. I mean no offense when I say that certain interests have been here in season and out of season laboring, I will not say improperly, with members of the Finance Committee and other Members of the Senate seeking a change in this rate and a change in that rate. We know the difficulties that have confronted us all the way in the exercise of discretion. Duties in the bill have been changed from time to time. Was not that the exercise of legislative discretion? Think of the difference in the situation. Here in the Senate are two Members from each State and in the other House there is one Member from each congressional district. Presumably the two Senators and the one Representative can keep their respective legislative bodies informed as to conditions in their respective States or districts, but here we are seeking to impose upon the President himself the necessity of taking action in accordance with all the knowledge that is supposed to be in the possession of 96 Senators and 435 Representatives.

More than that, think of the situation. It is true that under the provisions of the pending amendment before a change is made notice is supposed to be given to interested parties. Who are the interested parties?

Mr. WALSH of Montana. I will say to the Senator from Ohio that that provision has been changed.

Mr. POMERENE. The provision as originally framed was as I have stated it. Has that been changed?

Mr. WALSH of Montana. That has been changed.

Mr. POMERENE. Does the Senator have the change in mind, so that he can advise me concerning it?

Mr. WALSH of Montana. That is important in considering the question. As it is now proposed to be amended, the provision reads:

> In any investigation under the provisions of this section hearings shall be held and a reasonable opportunity to be heard shall be afforded.

Mr. POMERENE. Without giving notice?

Mr. WALSH of Montana. That is what it provides.

Mr. POMERENE. Very well. Who are the people who are interested?

Mr. WALSH of Montana. Will the Senator suffer another interruption?

Mr. POMERENE. Yes.

Mr. WALSH of Montana. The wool schedule has been the subject of particularly vicious attack; the newspapers of the country have been making that industry particularly the target of their attacks. I should like to inquire of the Senator from Ohio whether he thinks those newspapers will desist or will they carry on their campaign before the President of the United States, should this proposed legislation be enacted?

Mr. POMERENE. Oh, Mr. President, that was just what I was leading up to. Campaigns for changes in tariff rates are going to be continued, so that, instead of having 16 months consumed by the Congress of the United States in enacting tariff legislation, we are going to have continuous assaults made by one interest or another upon the tariff law before the President of the United States.

Mr. WALSH of Montana. May I ask the Senator if he thinks the dye interests will cease their effort to secure an embargo?

Mr. POMERENE. No, Mr. President, the dye interests will never cease their efforts in that direction.

Mr. WALSH of Montana. Likewise let me ask the Senator if he thinks it will be possible for the President to discharge the duties proposed to be conferred upon him, and whether, as a matter of fact, he will not be obliged to assign them to subordinates who will be subject to the importunities of interested parties?

Mr. POMERENE. There can be no doubt about that. No one for a moment dreams that the Chief Executive of the United States, I care not who he may be, can have the time or the ability to sit down and hear and determine all these questions. He must depend upon some board to perform that duty, and he must ultimately take their advice and their judgment, not his own.

Mr. President, let me go a step further. Often manufacturers contract to sell their manufactured products many months in advance of their fabrication. Perhaps those who are dealing with a particular manufacturing plant might want to buy; they may be making their contracts for the material, and necessarily the producers will make their contracts dependent upon other elements, such as the tariff rate which is levied upon that product. What is to happen? Is the producer going to base his price upon one schedule of tariff rates or upon another schedule of tariff rates?

I come from a great industrial State. I know what the manufacturers say every time a tariff bill is up for consideration. A number of them who are engaged in protected industries have said to me from time to time, "We are not particularly interested in the rate of duty, but we are interested in having the duty settled, in having it fixed, and when it is fixed we shall adjust our business to the rates thus determined."

How are they going to adjust their business to the tariff rates when they may be changed, not by Congress but by the President of the United States, every 30 or 60 days? I do not, of course, mean to say that they would be changed that frequently, but I do mean to say that the President has the power to change them.

Then again, suppose that we are approaching a presidential election and some people may be interested in the tariff one way or the other. We have not been able to keep the tariff out of politics when Congress has been legislating concerning the matter. How could we keep the tariff out of politics when the President is in fact legislating?

Let me make another suggestion. The stocks and bonds of many great industrial corporations are listed on the stock exchange. Every once in a while we have a bull market, and again a bear market. Assume, for the sake of the argument, that there is an attempted combination of a number of very large interests, which perhaps bond their plants and issue preferred stock equal in amount to the value of the plant, and then they issue a large amount of watered stock and it becomes necessary for some of the speculators or promoters to manipulate the market. Before we are aware of it, if it is a dye interest or a steel interest or a pottery interest or a chemical interest, or any other kind of an interest, we will have a delegation of distinguished gentlemen coming to Washington and insisting that certain duties be raised because the working men in their employ can not get proper wages unless those duties are raised. So we shall have somebody here as the adviser of the President attempting to make an investigation. If the investigations which they make are not more thorough than some investigations about which we know, there will probably be a recommendation for an increase in duties relating to the products of that plant. Likewise we may have a reduction in the duties which affect the price of their raw material. This amendment, if it becomes a law, will give a splendid opportunity to assist the manipulators of the stock market. No; that should not be.

Then, after the President has before him the findings of his assistants, the question arises in his mind, Shall I change from a specific duty to an ad valorem duty, or from an ad valorem duty to a specific duty? Shall I raise the duties 50 per cent or any part thereof, or lower them 50 per cent or any part thereof? Shall I change the classification, or shall I change from the foreign valuation to the American valuation? Who will say, who dares say that is not an exercise of discretion—legislative discretion, if you please?

Then I recur to what the great Judge Ranney said:

> The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.

If we change the rate of duty on cotton goods under the Underwood law from 35 per cent ad valorem to 45 per cent, as proposed under the pending bill, is that not a legislative act? Admitting that, who can say, who dares to say, that when the President changes it from 35 per cent ad valorem to 45 per cent he is not exercising a legislative power or discretion? To put the question, it seems to me, is to answer it.

The PRESIDENT pro tempore. The question is upon the amendment proposed by the Senator from Wisconsin [Mr. LENROOT] to the amendment of the Senator from North Dakota [Mr. McCUMBER].

Mr. LENROOT. Mr. President, I do not propose to enter into any extended discussion of the constitutional question which

exists in this amendment and which to my mind is a very grave one. It has been ably argued upon the one side by the Senator from North Dakota [Mr. McCUMBER], and upon the other by the Senator from Montana [Mr. WALSH]. I only venture to express my own judgment for whatever it may be worth after having read the authorities which have been so well collected by the Senator from Montana upon this question, that it is my judgment that the phrase "conditions in competition" is so vague and so indefinite as to invalidate the entire section if it should become a part of the law.

I do not agree with the Senator from Montana, if I understood him correctly, that Congress can not delegate to the President the power to ascertain facts upon which he may proclaim a duty. Congress itself, as in the McKinley Act, might fix the duties definitely, to take effect upon the happening of an event to be found by the President.

Mr. WALSH of Montana. Mr. President——

The PRESIDENT pro tempore. Does the Senator from Wisconsin yield to the Senator from Montana?

Mr. LENROOT. I yield.

Mr. WALSH of Montana. I do not want to enter into any controversy with the Senator about that matter; but, having expressed the opinion that the phrase "differences in conditions of competition" is so vague as to invalidate the provision under consideration, would the Senator care to express an opinion as to whether, if these amendments should be incorporated in the bill and should be found to be invalid, the whole bill would fall?

Mr. LENROOT. I think not under the doctrine of Field against Clark.

Mr. WALSH of Montana. But the Senator will observe that in the case of Field against Clark no provisions were affected except those involved, which constituted only six articles; but every article in this bill is subject to the provisions of section 315. Every rate in the bill is subject to that section.

Mr. LENROOT. It is as to the changing of the rate.

Mr. WALSH of Montana. Exactly.

Mr. LENROOT. Of course until the power is exercised the rates fixed by Congress stand.

Mr. WALSH of Montana. In Field against Clark there were only six commodities involved—only six. The court held that the grant of power to change the rate as to those six articles could not be held to invalidate the entire bill. In that case the proceedings were brought against Marshall Field & Co. The commodities involved in the case were not of the six classes of commodities referred to; they were ordinary dry goods, I suppose. The court held that the six commodities only being affected by the provision, the bill as a whole did not fall; but here is a provision which affects every rate in the bill, every commodity in the bill.

Mr. LENROOT. My own view upon that subject, for whatever it may be worth, is this: Congress definitely fixes the rates. It provides, or attempts to provide, a method by which those rates may be changed. We will assume that the method so provided is invalid, as beyond the power of Congress; but it is not so intertwined with the other portions of the bill that it can not be separated. In fact, it is separate, and it seems to me the test would then be applied by the court: "Can it fairly be said that this invalid section was an inducement to the enactment of the remaining portions of the bill, and that but for this section which is invalid the rest of the bill would not have been enacted?"

Mr. WALSH of Montana. The Senator has quite accurately stated the rule. Now let us see what the facts are: The House has adopted the American valuation plan. The Senate has refused to adopt the American valuation plan and proposes the foreign valuation plan, with these elastic provisions intended to accomplish the same result that the House expects to accomplish by the American valuation plan. In other words, the Senate substitutes the foreign valuation plan, modified in this way, for the House American valuation plan; so that it seems to me necessarily to follow that the Senate would not have adopted these rates based upon the foreign valuation plan but for the provision here according to which they might be changed to meet the changing conditions which were provided for by the House valuation plan.

Mr. LENROOT. If the Senator be correct, it merely adds weight to my objection to the amendment in its present form, and simply adds further reason why, if it be possible, amendments should be made to this section that will bring it clearly within the constitutional powers of Congress; and that is what I have endeavored to do, Mr. President, in the amendment that I have proposed, striking out the phrase "conditions of competition" wherever it occurs in the amendment, and substituting therefore the phrase "cost of production," so that the rate which the President will be empowered to proclaim will be the difference in the cost of production.

I think the Senator from Montana will concede that that at least is a very much more definite standard or rule than is the term "conditions of competition," because the determination of differences in cost of production clearly involves the ascertainment of facts, and in the ascertainment of those facts whoever does investigate the subject must take into consideration the same factors; and here is my primary objection to the term "conditions of competition":

The Senator from Montana truly stated in his address that two men might arrive at different conclusions as to what constituted a difference in conditions of competition. It is likewise true that two men might arrive at different conclusions as to what constituted difference in cost of production; but that would be merely a difference in judgment upon the facts, both men taking the same factors into consideration, while if the rule is to be differences in conditions of competition two men might investigate that subject and arrive at different conclusions because they had not taken the same factors into consideration in investigating the subject.

To illustrate that, power is here given to the President under this phrase "conditions of competition." He might in one case consider and add to a difference in cost of production a freight rate from San Francisco to the city of New York. He might or might not take that into consideration. That is optional with the President under this amendment. That is a matter of legislative policy that to my mind can not be delegated.

Another factor that he may or may not take into consideration under this amendment is this: The President might resolve that to equalize differences in competition he would allow to the American manufacturer a profit of 25 per cent, or he might not allow it. That is discretionary with him. That is a matter of public policy to be declared by the legislative body, and one that in my judgment can not be delegated to the Executive.

So, I might go on and give many illustrations as to this delegation of discretion that Congress has not laid down the rule. Under this phrase Congress has not said to the President what factors he shall take into consideration in arriving at his conclusion.

The chairman of the committee says, however, that that is taken care of in paragraph (c), which provides:

> That in ascertaining the differences in conditions of competition, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration—(1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar merchandise in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign merchandise in the principal markets of the United States, but in considering prices as factors in ascertaining differences in conditions of competition, only reasonable profits shall be allowed; and (3) any other advantages or disadvantages in competition.

Can it be said that that restricts the President in any way to any rule or lays down the factors that shall be considered by him in arriving at his decision? It merely says that among other things he shall, if he finds it practicable, take certain things into consideration; but he may or may not do it, as he sees fit.

Mr. STERLING. Mr. President——

The PRESIDENT pro tempore. Does the Senator from Wisconsin yield to the Senator from South Dakota?

Mr. LENROOT. I yield.

Mr. STERLING. Suppose the bill provided that in considering the differences in competition he should take into consideration certain factors. Would that cure it?

Mr. LENROOT. Certainly not; because he might then take other factors into consideration, using his judgment and his discretion, that Congress has not prescribed.

Mr. STERLING. Could not the bill limit him in the consideration of the matter to certain factors?

Mr. LENROOT. It certainly could; and that is merely another way of reaching what I have attempted to reach in my amendment. Of course it could. For instance, Congress could prescribe that he should take into consideration freight rates or that he should not take into consideration freight rates. That would settle that one way or the other as a factor to be taken into consideration. Congress could in this amendment prescribe that he should take into consideration profits or should not take into consideration profits. That would settle that one way or the other; but as the amendment stands now Congress makes no order upon the subject, prescribes no rule; and the President is at liberty to exercise any policy he sees fit to adopt with reference to the subject. So much for that.

Then, with reference to the American-valuation clause, the Senator from North Dakota argues that this is not an objectionable alternative which can in any wise invalidate the amendment, because the President can exercise his power under paragraph (b) only if he first finds that the equalizing of conditions

of competition can not be arrived at through the exercise of the power delegated in (a), and the chairman of the committee gave us an illustration of the difficulty of arriving at foreign valuation, in which case the President would be at liberty to exercise the authority under (b).

That would be a good argument but for the limitation provided in paragraph (a). With this limitation it will not be the difficulty in arriving at the foreign valuation which would induce the President to exercise the power under (b), but because of the prohibition we find in (a) to exercising the power beyond a certain point. In other words, it makes necessary an examination into the differences in conditions of competition if that phrase shall remain, or costs of production if my amendment shall prevail, and if he finds the difference in cost of production to be 60 per cent in excess of the existing rate in the bill, he can only increase the rate 50 per cent.

Under the bill, the President can not apply that. He can not go higher than 50 per cent. So, in the face of the declaration of Congress to the President that he shall not do this thing, we give him authority, in the next paragraph, to do the thing we have forbidden him to do in the previous paragraph.

I very seriously question whether we can delegate power to the President to do either one of two things, his power to do the thing in the second instance depending upon the prohibition upon the part of Congress for him to exercise it in the first, if that be the reason for his not being able to do so. So there again is raised a very serious question.

Mr. WALSH of Montana. Mr. President, does the Senator agree that a case might easily arise in which the differences in the conditions of competition might be equally well met by increasing an ad valorem rate or by substituting a specific rate?

Mr. LENROOT. Yes.

Mr. WALSH of Montana. Or by increasing a specific rate and substituting an ad valorem rate?

Mr. LENROOT. Yes.

Mr. WALSH of Montana. Then the President would be entitled to choose which of the two courses he would pursue, either of which would accomplish the end sought.

Mr. LENROOT. That is true.

Mr. WALSH of Montana. And in either case the ad valorem rate would act differently from the specific rate.

Mr. LENROOT. That is also true. Of course, the ad valorem rate might be equivalent to a given specific rate the next day after it was put into effect, and a month later it might be a very different specific rate. Of course, that is true.

The term "cost of production" has been used time and time again in the debate upon this bill, and wherever costs of production have been ascertained, or have come anywhere near being ascertained, the chairman of the committee has relied upon differences in cost of production to measure the rate the committee has proposed. But now the committee abandons cost of production and substitutes for it this very vague and indefinite term "conditions of competition."

For myself, I can see only one possible purpose in that, and that is to give to the President practically unlimited authority to change these rates within the minimums and maximums provided for in the amendment.

Mr. SIMMONS. Mr. President, the Senator has stated that the President probably could not invoke the power to proclaim the American valuation unless the addition of 50 per cent to the specific rate provided in the bill should fail to bring about equality in conditions of competition.

Mr. LENROOT. Hardly that. I stated that as one of the conditions. Of course, it might be that he could not, or found that he could not, ascertain the foreign costs, in which case he might immediately go to the American valuation, without reference to the 50 per cent.

Mr. SIMMONS. After he has exhausted the 50 per cent, if he has not equalized conditions of competition, he can then proclaim the American valuation for the purpose of further increasing the effective protection.

I wanted to ask the Senator if he did not think, under those two authorities to increase, that the rates might be increased, not 50 per cent, but, possibly, 75 or 100 per cent?

Mr. LENROOT. Oh, yes; and the chairman of the committee very frankly stated, as I understood him, that that was one of the purposes of paragraph (b). I do not think very highly of a proposition which, on the face of it, in the first paragraph limits the increase or decrease to 50 per cent upon foreign valuation, but if the President shall find that a rate should be higher, in order to equalize conditions, than Congress has authorized in the first instance, he shall then be permitted to turn to another section and do in an indirect way that which is prohibited in another part of the bill. It does not seem to me that that is very frank with the American people, to accomplish an increase of, perhaps, 100 per cent when, on the face of the legislation, it would seem to be limited to 50 per cent.

If the object of the committee was only to have American valuation imposed in cases where the foreign valuation could not be ascertained, why was this 50 per cent limitation put in in the first instance at all? Why was it not made higher than 50 per cent, when the committee very frankly confesses that when the President turns to the American valuation, the 50 per cent upon the American valuation will be a very much greater imposition than the 50 per cent upon foreign valuation?

Mr. McCUMBER. Would the Senator be willing to so amend the provision that the President, without respect to what the percentage may be, shall add a duty which will, in all cases, measure the difference in the cost of production?

Mr. LENROOT. No; I would not.

Mr. McCUMBER. Giving him unlimited authority?

Mr. LENROOT. No; I would not.

Mr. McCUMBER. By what would the Senator limit it, then?

Mr. LENROOT. I would limit it by some figure. If it is to be 50 per cent upon foreign valuation, I would make the same limitation if American valuation is to be applied to get at the basis of value; but I would not have two different limitations, one perhaps twice as great as the other.

Mr. McCUMBER. But in neither instance would the rate more than measure the difference between the cost of production, if we want to take the Senator's amendment. Is he willing that in every instance which may arise, without any further limitation, the President might increase a rate to equalize the difference in the cost of production?

Mr. LENROOT. I am not.

Mr. McCUMBER. Very well. That is exactly the conclusion the committee arrived at, and they determined that the President should not go beyond a certain figure, but we believed that there might be a few instances, very few, indeed, which could not be sufficiently guarded by the foreign valuation basis; that there might be some few in which the increase of 50 per cent on the foreign valuation would not measure the difference, and we were willing in those few cases to give the President a different standard.

Mr. LENROOT. Why, then, did not the committee do it directly?

Mr. McCUMBER. Because in the great majority of cases we did not want to give him the full power to increase in every instance a sufficient amount to measure the difference.

Mr. LENROOT. Mr. President, what have we here? We have in one paragraph a prohibition against increasing the rate more than 50 per cent upon the foreign valuation, and then we have a provision that if the difference in cost of production is greater than that 50 per cent, so that he can not apply it because of the prohibition enacted by the law itself, he may turn to another provision of the law and do that which is prohibited in one other provision of the law.

Mr. McCUMBER. He may do that simply to arrive at a certain equalization scheme. All we seek is equalization, and the Senator wants to limit the equalizing to that of cost of production at home and abroad. We want to take other things into consideration than merely that single element as applied to the foreign and to the domestic markets.

Mr. LENROOT. I know the Senator does, and when I said I was not willing to agree to a general proposition which would direct the President to impose rates, without limitation, equal to the difference in the costs of production at home and abroad, I, of course, had in mind, as the Senator must have had in mind, that we have many articles in this country where we would not think, as a matter of public policy, of imposing tariff rates equal to the difference in the costs of production at home and abroad.

They have tried to grow tea in the State of North Carolina. That happens to be upon the free list, so that it does not exactly apply; but should I be asked to stand for a proposition, when I am pleading for a provision based on the difference in the cost of production, which has no limit? Of course not. My criticism is that this is a limitation on the face of an amendment which is not a limitation in fact, a limitation of 50 per cent upon foreign valuation, which would lead the American people to believe that these rates can not be increased more than 50 per cent; but if the duty is more than 50 per cent, then the committee say that through another plan and another scheme the rates may be increased 100 per cent, 50 per cent on another plan, which is equal to 100 per cent on the plan covered by the first paragraph, which is limited to 50 per cent.

Again, Mr. President, on the matter of policy, there are many rates in the bill where the specific rate has been applied and where the members of the committee have frankly stated that

they did not believe the rate proposed by the committee and adopted by the Senate was sufficient to cover the difference in the cost of production at home and abroad. Congress, as a matter of policy, refused to go any higher because, Republicans and Democrats alike will admit, I think, we had reached a point, from the standpoint of protection, if you please, where we were not justified in imposing a rate of duty so high as to cover the difference in cost of production at home and abroad, when the American people would be better off to take the importations of that particular article and not continue the industry in this country.

One illustration, and a very good one, is barytes ore, that we had up in the very beginning of the debate, where it was shown that it would require 100 per cent ad valorem on the raw crude ore to cover the difference in the cost of production and transportation from the mines in Georgia and the mines in Missouri to the point of consumption.

I then took the position that the American people ought not to be called upon to pay any such tax upon a material upon which the hand of man had not devoted any labor except that of mining the raw material. And yet, Mr. President—the Senate has not yet acted upon the amendment—even though the House rate shall be adopted instead of the increase which the Senate committee proposes, it will be possible under this provision as the committee have it, with the President taking into consideration and adding the freight rate from Missouri to the Atlantic coast, to have more than 100 per cent ad valorem duty upon barytes ore. That is merely typical of many items in the bill.

I want frankly to say that at some time before the amendment is voted on I propose to offer an amendment providing that in no case shall any duty be imposed under the provisions of this amendment that shall exceed a given percentage ad valorem on the foreign valuation. It may be 75 per cent. I shall be willing to discuss what it should be, but there ought to be some limitation somewhere so that the President of the United States shall not have the right to destroy a policy adopted by the Congress of the United States in the framing of the bill.

Mr. McCUMBER. Mr. President——

Mr. LENROOT. I yield to the Senator from North Dakota.

Mr. McCUMBER. In order that I may understand the position of the Senator, does he desire to strike out subdivision (b) entirely—that is, that provision which allows the President to go to the American valuation? It seems to me if that is what he wants and is arguing for it can be accomplished very simply by cutting that out entirely and relying upon the foreign valuation basis, increasing beyond 50 per cent if we think best or decreasing beyond that, but it can be met by cutting that out entirely.

Mr. LENROOT. It might be met that way.

Mr. McCUMBER. Does the Senator prefer that plan?

Mr. LENROOT. I will say very frankly that the Senator very well knows that the American valuation would just about double the rates, I think, generally speaking. I should be glad to have the Senator's opinion about it.

Mr. McCUMBER. I want to say to the Senator that this method of meeting certain specified cases—not specified in the bill, but well understood by the committee—was in the first instance to prevent the necessity of continuing an embargo, and that it was intended to cover some of the chemicals and dyestuffs that might require a greater expansion of the duties than would be provided in paragraph 315, subdivision (a). Of course, we have voted out the embargo proposition entirely and we have left the bill in such shape that as to some of the chemicals it would be impossible to maintain an industry that we regard as essential under the general rule which is provided in subdivision (a). That was the real purpose. It may be that the President might abuse that purpose. I do not think that he will. I do not think anyone else will. But if the Senator is fearful of that and that injury might be worked, I do not know that I would have any serious objection to striking out the subdivision relating to American valuation.

Mr. LENROOT. I did not have in mind going so far as to strike out the subdivision with reference to American valuation. What I did have in mind was merely that the President ought not to exercise the power under subdivision (b) because he was prohibited from exercising it to the full extent under subdivision (a) when there would be no difficulty in doing it except for the prohibition. I have no objection to having the second paragraph in force, for the reason that the chairman stated, where it is difficult or impossible to arrive at the foreign valuation; but I do say it ought not to be resorted to simply because the prohibition of 50 per cent exists in the first paragraph. I think it very seriously endangers the constitutionality of the amendment itself when the prohibition is given in one paragraph and then, because of the prohibition, the President is permitted to exercise the power in another paragraph.

Mr. McCUMBER. The Senator, of course, will admit that we must consider both paragraphs together. The provision is that the President shall apply one rule. The provision is if that rule will not effectuate the purpose, namely, equality of competition, then he shall apply another rule. It may be open to the criticism the Senator has stated, that he might go directly and apply the later rule or increase the rate under subdivision (a), but in any event the only purpose is to effectuate equality of competition or trade. Other things being equal, I myself would prefer to strike out subdivision (b) and give a little more elasticity in subdivision (a).

Mr. LENROOT. Would the Senator then be willing, too, to fix a maximum ad valorem that would apply in all cases?

Mr. McCUMBER. We have it. If we strike out subdivision (b), we have then a maximum that shall not exceed 50 per cent above what is already fixed in the bill.

Mr. LENROOT. I do not mean that kind of a maximum. I mean a maximum that where the Senate has adopted the highest rate which it thought it should adopt as a matter of public policy, such rate ought not to be increased by the President. The committee has taken care of it in the case of ad valorem.

Mr. SMOOT. Yes; that is taken care of.

Mr. LENROOT. It is taken care of in the case of ad valorem, but not in the case of specific.

Mr. McCUMBER. I do not think there is a single instance in the specific rates where we have stated that the specific rate shall not be higher than this. In every instance we have used the words "ad valorem."

Mr. LENROOT. But in cutlery enormous increases were made in specific rates. In some of them I know I would not want to go any higher, as a matter of public policy, irrespective of the differences in cost of production as to some of those goods.

Mr. McCUMBER. Let me first state to the Senator that we have declared in the bill that where the bill has fixed a maximum ad valorem rate—of course that is the only maximum rate we fix——

Mr. LENROOT. That would not, of course, take care of the specific rates.

Mr. McCUMBER. Then the President shall have no power to increase that rate.

Mr. LENROOT. I understand that takes care of those cases—and there are not many of them—where we have fixed a maximum ad valorem. We have done it in the case of cotton cloth and in the case of cotton gloves; but I do know, and I am sure the Senator from Utah [Mr. SMOOT] will corroborate me, that there are many other items in the bill where the Senator himself stated that the rate did not equal the difference in cost of production but that it was as high as should be adopted as a matter of public policy.

Mr. SMOOT. I think I can name three products in the bill as to which I believe with all my heart the rate named will perhaps be needed under circumstances existing to-day, and not more than that rate. Not more than one that we really know of is absolutely necessary, and that is as to certain chemicals which are used in time of warfare which we can not produce in this country against Germany. I do not believe that the President will exercise this power in any other case.

I frankly state now that the rates which were written in the bill in paragraphs 25 and 26—namely, 7 cents a pound and 60 per cent ad valorem—were put in there with the avowed purpose of effecting an embargo upon certain of those goods. That is the reason why I voted against the embargo. In fact, I am opposed to any kind of an embargo anyhow, but I believed that the rate itself there was an embargo and there was no need of putting in an embargo provision. It was put in there deliberately for that purpose.

As to not exceeding 5 per cent of the production in this country, the products of chemicals are amply protected by the rates we have agreed to in paragraphs 25 and 26. There are, I will admit, perhaps 5 per cent of the production of the items in paragraph 26 of the bill as to which the rate of 7 cents a pound and 60 per cent ad valorem will not protect the industry in the United States. Therefore I wanted the President to have the power to transfer them from the foreign valuation to the American valuation. That is the only way in which we can do it unless we have an embargo.

Mr. LENROOT. I am not objecting in that kind of case.

Mr. SMOOT. I think the only one other case, and it would be so small and so limited that it is hardly worth considering, is the toy industry. The only question to decide is whether we want the toy industry in the United States. I will say to the Senator that some of the toys can not be protected with the rates that are given here. It is a question of policy for the

President to decide whether that line of toys, which was established here during the war, shall be maintained in the future. If it is to be maintained he would have to exercise that power. I do not know of anything else of that character in the bill, not a paragraph nor a schedule nor an item outside of those that I have mentioned.

Mr. UNDERWOOD. Will the Senator from Wisconsin allow me, merely for information, to ask the Senator from Utah [Mr. SMOOT] a question?

The PRESIDENT pro tempore. Does the Senator from Wisconsin yield to the Senator from Alabama?

Mr. LENROOT. I yield.

Mr. UNDERWOOD. I have been very much interested in what the Senator from Utah has said. I understood him to say that, in his opinion, the rates provided in the pending bill now are up to the standard which is contemplated if the President should fix the rates?

Mr. SMOOT. That is, on all of the items with the exception of those that I have mentioned.

Mr. UNDERWOOD. Those on the free list, and except the three items that the Senator has mentioned?

Mr. SMOOT. Yes.

Mr. UNDERWOOD. And the Senator thinks that the rates on the other items are up to that standard?

Mr. SMOOT. I think so.

Mr. UNDERWOOD. Therefore, taking the basis of the bill as it now stands, the Senator from Utah is not only protecting the difference in cost between production here and abroad but he is, in addition, protecting the profits?

Mr. SMOOT. Oh, no; I did not say that.

Mr. UNDERWOOD. That is the standard which is fixed in the proposed amendment.

Mr. SMOOT. I assume that if the President should exercise the power, in most instances that would be the case, but the President is not going to do that.

Mr. UNDERWOOD. We can not assume that the President will not exercise his power.

Mr. SMOOT. I think we may do so.

Mr. UNDERWOOD. We shall have given him the power and we shall practically have given him instructions to exercise it. I do not want to interrupt the debate, but I think this is very vital. The Senator from Wisconsin charged that if this amendment were adopted as it now stands we should be conferring upon the President the power and the duty to increase these rates, and the Senator from Utah, as I understood him—and I want to understand the situation—replied to the Senator from Wisconsin that he knew of but three rates which were now in the bill as to which this power which it is proposed to give to the President could function. Of course, the power proposed to be given to the President is not only to fix the rates to cover the difference in the cost of production here and abroad but, in addition to that, to protect the profit of the manufacturer.

Mr. SMOOT. No, Mr. President.

Mr. UNDERWOOD. That is what I understood the Senator to say.

Mr. SMOOT. I wish now to say frankly to the Senator from Alabama, if he wishes to know my attitude, that if the difference between the cost of production in this country and the foreign country, and nothing more, were to be made the rule for fixing tariff duties, the United States would be the dumping ground of the world. I will tell the Senator from Alabama why, if the Senator from Wisconsin does not object to my doing so; or, if he does, I will do it in my own time. It will take but a few moments.

Mr. UNDERWOOD. Of course, the Senator from Utah and I differ very much on that material question; but as to this question of fact, I am very much interested. The Senator from Wisconsin has challenged this amendment on the ground that it would confer upon the President the right to increase a large number of the rates in the bill higher than they already are; and the Senator from Utah reacted on that by saying that he knew of but three such rates.

Mr. SMOOT. I previously stated that on the floor of the Senate.

Mr. UNDERWOOD. Now, when I ask the Senator from Utah if he means to say that the standard of the bill is up to the maximum standard of the amendment he seems to retract. I do not know exactly where he stands.

Mr. SMOOT. I think that the rates generally in the bill are protective rates and that the President would never at any time use the power of transferring the basis of fixing rates from the foreign valuation to the American valuation in order to raise the rate more than 50 per cent.

Mr. UNDERWOOD. I do not say the President would do that, but what I am talking about is raising the rates 50 per cent without changing the basis of valuation.

Mr. SMOOT. There may be, on a foreign valuation, some few items as to which no one could tell, because the conditions in the world are so unsettled to-day that there is not a living soul who can forecast what is going to happen three months from now.

Mr. TOWNSEND. Mr. President, there is one consideration to which I think the Senator from Alabama [Mr. UNDERWOOD] has not referred, but which constitutes one of the reasons why I have favored some such provision as the pending amendment, namely, that conditions are likely so to change to-morrow or it may six months from now that the rates that have been agreed to here may be altogether too high, or it is possible that in some instances they may be too low. So without regard to what we may think about the rates which are now fixed in the bill the pending amendment or some other such provision is desirable in order to meet the changed conditions of to-morrow.

Mr. UNDERWOOD. I was not discussing that question. Of course I have my own views on that subject, but the question that I was discussing and was interested in discussing was what I understood to be the assertion of the Senator from Utah [Mr. SMOOT] that the rates as fixed at present in the bill had reached the maximum at which they could be fixed under the pending amendment.

Mr. SMOOT. I was speaking of the question as to whether or not the basis of laying duties was to be transferred to the American valuation. That was the subject we were discussing.

Mr. President, I made the statement that if the cost of production alone is taken into consideration, America will be the dumping ground of the world. I wish to state why in that case it will be the dumping ground of the world. Any manufacturing concern that runs full time, for 12 months in the year, can make goods at least 10 per cent cheaper than it can if it runs only part time.

I know in the manufacture of woolen goods I have figured it out time and time again that if I ran a mill full time, for 12 months in the year, the cost of producing the goods was 18 per cent less than if I ran the mill but 7 or 8 months in the year. That grew out of the fact that in either event the same rate of taxation, the same overhead charges of every name and nature, and other expenses had to be met; so that running 7 months in the year as compared to 12 months made a difference of 18 per cent in the cost of producing the goods.

If it is only a question of the cost of goods, all the foreign countries will see that their plants run 12 months in the year; and they can sell to us for 5 per cent, yes, for 10 per cent, less than the regular price at which they sell to the world, and yet make money out of all of their goods because of the decrease in the cost of production by reason of running full time.

It is a business proposition. If I were a foreign manufacturer rather than to see my help scattered, rather than to close up my mill, or rather than to let the overhead expenses pile up on the cost of the goods which I was making, I would enter the American market and I would see that my mill ran 12 months in the year, thereby making the cost of the goods which I sold to the balance of the world cheaper. I would sell my goods in the American market; and that is what will happen unless some safeguard is provided against it. It is therefore not a question merely of the difference in cost of production here and abroad.

Mr. LENROOT. Mr. President, with reference to the cost of production, the Senator must remember that the difference in the cost of production does not take into account the landing charge and the ocean freight rate, and those are all to the advantage of the American manufacturer. The difference in cost of production had, I supposed, been accepted as the Republican doctrine for a good many years. There was one Republican convention, which was well remembered by us all, where there was added in the Republican platform the words "plus a reasonable profit," and that phrase met with condemnation by Republicans all over the United States.

Mr. SMOOT. That was in the Republican platform of 1908.

Mr. LENROOT. Mr. President, this is the third tariff revision in which I have participated. The first one was the Payne-Aldrich law. In that law it was agreed that the difference in the cost of production, wherever it could be ascertained, should be the test. It is only now when we are beginning to hear Republicans say they are not satisfied with a tariff which does equalize the difference in the cost of production. I wish to say that Republicans had better be satisfied with a tariff that does equalize the difference in the cost of production or the American people may not be willing to give them that much.

Mr. SMOOT. Mr. President——

Mr. LENROOT. I yield.

Mr. SMOOT. I think the Senator has heard me make the statement before on the floor of the Senate that if the President is given this power I think there will be many, many more occa-

sions when he will exercise it in lowering rates than in increasing them; in fact, if the conditions become normal, I expect the President of the United States to lower, I was going to say, the majority of rates.

Mr. LENROOT. Mr. President, he is very much more likely to do so if the phrase "cost of production" is embodied in the law than if the phrase "conditions of competition" shall remain, where every interested man who wants a rate kept up or increased can go before the President and demand protection for his profits and protection for his freight rates.

Mr. SMOOT. Of course, the Senator from Wisconsin knows the Senator from Utah does not want that.

Mr. LENROOT. I am sure he does not.

Mr. SMOOT. If I thought anything of that kind would grow out of the wording of the amendment, or that that would be the result, I would vote against it. So far as I am personally concerned, I am perfectly willing to accept the phrase "cost of production" and then let the question be determined in the investigation as to every item entering into the cost of production.

Mr. LENROOT. It surely will. It will cover overhead, as the Senator well knows.

Mr. SMOOT. Certainly; and if an article is selling in the American market, of course, then, in determining the cost of producing it so as to sell at wholesale in the American market, there would be taken into account the amount of freight that would be paid on the foreign article landed in the United States.

Mr. LENROOT. Mr. President, I am very glad, indeed, to have the statement of the Senator that he is willing to accept the amendment. I wish to say that I am not opposed—in fact, I am very much in favor of some power being given to the President to adjust the tariff rates, not upon the theory that he would immediately change any of the rates which are provided in the bill, although I personally should hope that he might lower some of them, but I would not expect that. However, conditions are changing from day to day. It has been impossible, Mr. President, as everyone knows, to debate this bill upon accurate information or to ascertain what will be proper protective duties, because information which we may have that is six months old is valueless to-day because of changed conditions.

Until the world becomes stabilized conditions will remain abnormal and will change from time to time. So I do want the President to have power under proper restrictions and under a rule laid down which will stand the test of the courts to change the rates within reasonable limitations so that they may be adjusted to changed conditions; but, Mr. President, though I have great confidence in the President, I do not believe that the power should be delegated to him to change a rate without a previous finding and recommendation of some competent, expert authority. So, at the proper time I shall propose an amendment providing that before the President shall proclaim a rate there shall be an investigation and finding by the Tariff Commission. He may or may not accept that finding; he may reject it if he chooses; but there should be a record of an investigation. There should be an opportunity for interested parties to be heard, and there ought not to be in a matter so important as this the slightest suspicion, however unfounded it may be, as I am sure it would be in the case of the present President of the United States, that secret influences had been brought to bear upon him to increase the tariff rates or change them because of political influence. I believe the Tariff Commission should first make the investigation, should make the report to the President, and then let the President act upon that report, because if that is done the country will know, and the country is entitled to know, the facts upon which an increase or a decrease, if you please, of a rate shall be based.

Mr. FLETCHER. Mr. President——

The PRESIDENT pro tempore. Does the Senator from Wisconsin yield to the Senator from Florida?

Mr. LENROOT. I yield.

Mr. FLETCHER. The Senator from Utah suggested that very likely the exercise of power on the part of the President would be toward reducing rates rather than raising them. I am wondering if the Senator from Utah will be satisfied with an amendment, or if the Senator from Wisconsin would favor one, limiting the power of the President under this proposed amendment to reduction of rates?

Mr. SMOOT. It is limited to 50 per cent.

Mr. FLETCHER. To reduction?

Mr. SMOOT. Why, certainly.

Mr. FLETCHER. But no power to raise them?

Mr. SMOOT. Yes; a power to raise them, too.

Mr. FLETCHER. But, I say, would the Senator be willing to limit the power of the President to a reduction of rates, without having any power to raise them?

Mr. SMOOT. No; I would not, Mr. President.

Mr. LENROOT. Mr. President, I am not going to take further time of the Senate.

Mr. CURTIS. Mr. President, I should like to ask the Senator if he does not know that it is the intention that the President shall use the Tariff Commission in securing the information and reports suggested in his amendment? While it is not specifically mentioned in the pending amendment, yet, of course, that was his intention.

Mr. LENROOT. I think that is the President's intention; I am very frank to say that; but I think it ought to be in the law.

Mr. SMOOT. I will say to the Senator that the reason why it was not put in the law was this: The President also intends to get information from the Department of Commerce. He also intends to get information from the State Department. We make appropriations by the millions of dollars to the State Department and the Commerce Department to have representatives, commercial attachés, visit all the principal markets of the world. They collect that information, and it is here in the departments.

Mr. LENROOT. My amendment does not interfere with that.

Mr. SMOOT. I am aware of that; but the committee thought that there was no need of mentioning any particular agency from which the President could get the information. I know, however, that the President of course would go immediately to the Tariff Commission for it, in connection with the other two departments.

Mr. LENROOT. Then there ought not to be any objection to providing that there should be this investigation by this body of experts, and a public report. If their report is not followed, the President, of course, will be called upon to give and will give to the country some reason for not following it; but it will be a very great safeguard to the public, and a protection to the President himself, if such a provision as this is put into the law.

I am not going to offer this amendment now, Mr. President, because the exact phraseology of it will depend upon whether the term "cost of production" or the term "conditions of competition" is used.

Mr. STERLING. Mr. President, may I ask the Senator from Wisconsin a question?

The PRESIDENT pro tempore. Does the Senator from Wisconsin yield to the Senator from South Dakota?

Mr. LENROOT. I do.

Mr. STERLING. Will the Senator's amendment, yet to be offered, as he states, contemplate an investigation by the Tariff Commission in any particular case?

Mr. LENROOT. It will, in every case, before the President can proclaim a rate.

Mr. STERLING. And the President is not to be bound, as I understand the Senator now, according to the rate fixed by the Tariff Commission?

Mr. LENROOT. He is not.

Mr. STERLING. Does the Senator from Wisconsin deem it inadvisable to require that the rate proclaimed by the President shall be the rate fixed by the Tariff Commission, or according to the opinion of the Tariff Commission?

Mr. LENROOT. Mr. President, I would rather not enter that field of controversy. I know where we would get on that kind of a proposition, and I do have hope that this proposition of mine, which, it seems to me, everyone ought to be willing to agree to, will be accepted; but I would have very grave doubts of the fate of my amendment if I did adopt the suggestion of my friend from South Dakota.

Mr. STERLING. I do not offer it quite as a suggestion, I will say to the Senator; I was simply asking a question.

Mr. LENROOT. I am not a member of the Finance Committee, and I am very frank to say that if I could write this amendment I would write it differently, as I suppose every other Senator would if he could have his own way about it. I realize that no Senator can have his own way about these things. We have to compromise these differences, and do the best we can. I have offered what seemed to me to be a reasonable and fair compromise upon this matter. I do want to urge, in conclusion, that from the standpoint of the validity of this provision I do feel it absolutely necessary that this definite term "cost of production" be adopted, or else that the phrase "conditions of competition" be so defined and prescribed as to furnish the rule and standard for the President, and that he will not have the discretion to determine the factors upon which the conclusion shall be based.

Mr. McCUMBER. Mr. President, just for a few moments I desire to direct my remarks to the Senator from Wisconsin [Mr. LENROOT].

It may appear to those Members of the Senate who have known nothing about the work of the committee that this question of whether the committee should adopt the phrase "differences in conditions of competition" or the phrase "differences in cost of production" had not received careful consideration. Mr. President it has had very careful consideration, not only from the legal standpoint but from the practical standpoint; and while I could not go very far into the question of the discussion of the legal aspect of the case, I did present sufficient authorities to indicate the view of the Supreme Court on the question of delegation of authority of this character, and then, in addition, I had printed in the RECORD many pages with numerous authorities meeting, and meeting squarely, every objection that is made.

Ever since I have been in the Senate I have had to listen to the arguments of great constitutional lawyers declaring that this and that was unconstitutional, and never could stand before any court in the United States; and in every instance the Supreme Court has overruled the constitutional lawyers and held that the matter was constitutional; so I take with a great deal of salt this everlasting argument that practically everything that is presented is unconstitutional.

Mr. WALSH of Montana. Mr. President——

The PRESIDENT pro tempore. Does the Senator from North Dakota yield to the Senator from Montana?

Mr. McCUMBER. I yield to the Senator.

Mr. WALSH of Montana. I sympathize with the remarks now made by the Senator, because I have myself listened to these repeated declarations of unconstitutionality in connection with measures that do not meet our approval on the grounds of policy; but——

Mr. McCUMBER. The Senator has not heard from me very many instances when I have declared that this thing or that was unconstitutional.

Mr. WALSH of Montana. No; the Senator has not heard many from me, either.

Mr. McCUMBER. No.

Mr. WALSH of Montana. My arguments have generally been on the side of sustaining the action of Congress, rather than otherwise.

Mr. McCUMBER. I will admit that.

Mr. WALSH of Montana. But we ought not to allow the statement of the Senator to go unchallenged when within the last two years the Supreme Court of the United States has held three separate acts of the Congress unconstitutional—the first child labor act, the second child labor act, and the futures trading act.

Mr. McCUMBER. When that law was discussed, a long time ago, some of us thought it was unconstitutional. I will admit that I declared some time ago that I regarded it as unconstitutional; but there was such a demand for it that we took our chances, and the court did declare that it was unconstitutional. The vast number of cases that have been fought upon the ground of unconstitutionality, however, that being the basis of the principal objection, have been held by the Supreme Court to be constitutional.

Mr. WALSH of Montana. Mr. President, I should add another one. The Lever Act was also held unconstitutional.

Mr. McCUMBER. Yes. I think the Senator probably will find two or three, maybe four, in the last quarter of a century where the question of constitutionality was raised and debated in the Senate; but if the Senators will take the trouble—and I will admit that it is more trouble than most of them would feel like taking—to read over the many cases that are cited in the brief I have had inserted in the RECORD, I think they will be satisfied that the phrase "conditions of competition" or "equalizing conditions of competition in the principal markets of the United States" is sufficiently definite as a rule which the Executive is required to use in applying the rates. It is just as definite and certain as the question of the differences in production. One is just as easy to ascertain as the other.

Are there any reasons, Mr. President, why we should hold to the proposition that the rule should be equality in conditions of competition rather than equality in the matter of production? What is the purpose of the whole bill? It is to give the American at least equal opportunity in his own markets—equal, not superior; but we want, in heaven's name, to give him an equal opportunity. Your cost of production does not give him an equal opportunity; but suppose it did? I should like to look at the smokestacks of our factories in the United States after you have had one year of operation of equality in cost of production. What does it mean? The very most you can claim for it is that it gives a 50-50 opportunity in the American market.

Are you satisfied as Americans with red American blood in your veins to divide the industries of the United States 50-50 with the foreigner? If you are, then take this confounded proposition and ram it down the throats of the American people. How are you going to apply your proposition of equality of production? What does it mean? You purchase a product in a foreign country to convert into a manufactured article. You purchase the same kind of an article in this country. Suppose the raw product is the same, and that the cost of conversion in this country is a certain amount more than the cost of conversion in the other country. Or suppose, with the cost of the raw material, plus cost of conversion—which makes your cost of production—that the cost is 50 per cent more in this country, then you stop right there. The foreign country may give a bounty of 50 per cent. That is not a part of the cost of production, is it? Not a bit of it. Under this cost-of-production scheme you can not use anything but the cost of raw material, plus cost of conversion, and you are at the mercy of the thousands of laws which might be passed by the foreign country, putting the American at a disadvantage, laws which the foreigner can change in council in a night, and which you can not change in four years; and you have your American industry subservient and subject to whatever legislation a foreign country imposes to meet conditions.

Mr. LENROOT. Mr. President, is it the Senator's opinion that the rates of this bill are higher than the differences in the cost of production?

Mr. McCUMBER. I believe that in many instances they are higher, and in many instances they are lower. I take the position that it is the duty of the American Congress to look after American interests. There may be certain products on which we want to impose a duty that is more than the difference in the cost of production, where we want to give an advantage to the American producer over and above the mere matter of the difference in the cost of production, which will insure the development of the industry in the United States.

Again, it may be that it costs as much to produce a bushel of wheat across the Canadian border line from my State as it costs in my State. Am I therefore to say that if the Canadian can live and is willing to live in a state or condition where his expenses are one-half what the American has to pay for living that I must get down to his level? Must I put myself in the position, under this difference-in-the-cost-of-production scheme, where I say to the Canadian, "Though you do not pay half the taxes I do, do not support the schools I do, get your clothing for half what I pay, or for much less than I pay; though your whole standard of living is below that to which I have been accustomed, I will have no protection against you, and you can flood the American market and drive down the cost of production and put me down to your own condition of living?" That is a matter of policy. I will vote to give the American a better standard of living and a higher price for his products in order that he may have more with which to maintain the schools and the thousands of things which are necessary in a civilized life. Those things were considered, and they were considered carefully.

Mr. WALSH of Montana. Mr. President, if that is the proper view to take—that is to say, if we should take into consideration that the Canadian does not pay as much taxes as the American, that his clothes do not cost as much, and so on—those are not conditions of competition, and would it not be necessary to expand the rule so as to give the President power to go beyond the conditions of competition?

Mr. McCUMBER. I want Congress to go beyond that. I would not limit that power to the Congress itself. I would be willing to limit it so far as the President is concerned. I would say that he might not be granted that power. I am answering the suggestion of the Senator from Wisconsin, that the Republican doctrine should be to have a fast rule that no one could avoid, a rule that our tariff should always be measured by the difference in the cost of production at home and abroad.

There are a great many things which enter into the question of what is a political necessity. Agriculture, as we know, has been at the very lowest stage in this country for the last two years, and we built it up. We protect our steers as against Canadian steers, and we do not care a continental what it costs the Canadian. What we want is a good price for our steers, whether the Canuck is getting a good price or not. That is his lookout, not ours.

Mr. WALSH of Montana. Mr. President, I desire to remind the Senator that a good many of us believe that the trouble

is that we have restricted our foreign markets by these oppressive tariff rates.

Mr. McCUMBER. That is one of the things which must be taken into consideration in all these matters. We take a little different view from that of the Senator from Montana. I have never followed the doctrine that we must buy of a particular country just as much as we sell to that country. Our whole course of commerce in the entire life of the country has shown that no such rule has ever prevailed. For half a century under protection we sold twice as much to Great Britain as we bought from her. She sold to some other country with which she was in closer communication, or where she had an advantage, more than she bought from that country, and in that way she was able to buy more from us; and just so long as the old earth continues with its mountains and its glens, its rivers and its deserts, its oceans, its rainfall and lack of rainfall, with the yellow man and the black man and the brown man, there will be conditions of commerce between the countries whereby we can trade and sell the things which we produce and buy the things which we do not produce, and that is the most healthy commerce on the face of the earth.

Mr. LENROOT. Mr. President, I would like to ask the Senator what England paid us with when she bought more from us than she sold to us.

Mr. McCUMBER. The Senator has said before that we have all the gold in the world, and therefore England can not pay us unless she can sell us something and get our gold. But I would a little prefer that England should sell to some other country than us, even if she sells for credits, and that we buy from that other country and put our gold into that particular country for the things which we do not produce, and let Great Britain get her gold from that other country in selling them things she produces and desires to sell to them.

Mr. LENROOT. Does the raw material which we buy for our own use anywhere equal our surplus agricultural products and our surplus manufactured products, which we must export?

Mr. McCUMBER. Mr. President, people buy our agricultural exports because they can get them here cheaper than anywhere else, and not because they love us. There is no question of brotherly affection in commerce. They buy them because they have to have them and can not get them anywhere else so cheaply as they can get them in the United States. But I am being diverted somewhat by these questions from the question I wanted to argue.

Mr. SIMMONS. Mr. President, if it be true that the manufacturing countries buy their food supplies and their agricultural requirements from this country because they can buy them cheaper here than in any other country in the world, why are we afraid of the competition of other agricultural countries with the agricultural products of this country?

Mr. McCUMBER. It so happens that Canada does not buy our wheat, and that is the country which produces wheat and that is the country which can flood our market. I am not afraid of a country which produces that which we do not produce. We can buy what we want of them, and we can trade what we produce and what that country does not produce. In that way we have our home market for the things which we do produce, and we have the foreign market for our surplus of the things which we do produce, in exchange for other things which we buy that do not come in competition with our products.

Mr. JONES of New Mexico. Mr. President——

The PRESIDING OFFICER (Mr. WILLIS in the chair). Does the Senator from North Dakota yield to the Senator from New Mexico?

Mr. McCUMBER. I yield for a question.

Mr. JONES of New Mexico. I am very much interested in the statement which the Senator has just been making, and I should like to know whether or not the Senator from North Dakota understands that if the amendment which he is offering, to enable the President of the United States to fix duties upon the rates specified, is agreed to it will operate to keep in the United States any articles which are used in the United States; in other words, what does the Senator understand the language of his amendment to mean when he says that the duty shall be fixed so as to equalize the conditions of competition? Does he understand that language to mean that it will create an embargo upon everything which is produced in this country; that it will prohibit the importation of comparable articles?

Mr. McCUMBER. Why, Mr. President, I am surprised that the Senator asked that question. He knows that equality in conditions of trade in a given market means that the American shall at least have an equal chance with his competitor. Now, it really is not giving him any more, but where we say equality shall consist in equalizing the cost of production, then we leave out certain elements which would give the foreigner a great advantage. I want to give an equality, if I am going upon that basis, which protects the American in his home market and which will protect him against any exigency in the matter of bonuses, in the matter of duties, or other conditions which affect the value of the product and its competitive opportunity in the United States market.

Mr. JONES of New Mexico. Mr. President——

The PRESIDING OFFICER. Does the Senator from North Dakota yield further to the Senator from New Mexico?

Mr. McCUMBER. I yield.

Mr. JONES of New Mexico. I must confess that I had put a different construction on it from that which I understand the Senator from North Dakota now to put upon it. The Senator from North Dakota is arguing that we should not have the foreign article sold in this country.

Mr. McCUMBER. No; I am not arguing that at all, Mr. President. I have stated that as a rule it would be better for this country if it produced within its own borders everything that was necessary for its people, and that it even should have the exclusive sale of products in the country, provided—I did not say it previously in this argument, but I say it now—that there would be no danger of combination. I believe in competition. I believe we have to have foreign competition, even in the products which we produce in this country, to equalize, to bring down, to stabilize prices upon a reasonably profitable basis. So I do not want to exclude the foreign importations. But I want the American to have a little the best of it.

Mr. JONES of New Mexico. Will the language used in the Senator's amendment give the American the best of it, and if so, under what construction?

Mr. McCUMBER. It will give him the best of it in this respect. He is right here at home. He can fill his orders quickly. He knows his own country better than any foreigner can know it. He can respond more quickly to conditions. Now, that is an advantage in itself, and even though other conditions were absolutely equalized by a system of duties, the American would have a little advantage, and I want him to have it.

Mr. JONES of New Mexico. If we equalize the conditions of competition, will we not have to take into consideration all the additional factors to which the Senator has just referred?

Mr. McCUMBER. No. We will not take into consideration the question of the intelligence of the American in obtaining his own market as compared with the intellectuality of the foreigner in securing foothold. We will make the conditions equal, and then if the American can gain in the race by reason of his superior knowledge of his own country and its conditions and his ability to respond more quickly to an order, we will give him that condition; but that is not taken into consideration in the matter of merely equalizing conditions of competition.

Mr. JONES of New Mexico. Does not the Senator believe that the question of organization and capacity and a number of similar elements are necessarily taken into consideration when we undertake to equalize the conditions of competition?

Mr. McCUMBER. No, Mr. President, I do not. If a majority of Senators think that we ought to have the Senator's amendment I shall not object seriously, but there are some weaknesses in it that ought to be pointed out. I will point out two of them, the first of which is that the foreign country may grant a bounty, and that could not be taken into consideration in the matter of the cost of production. It might, on the other hand, impose an export duty. That could not be taken into consideration, because it would be no part of the real cost of production at home and abroad.

Now, Mr. President, there is another weakness. As we have drawn the amendment, in arriving at equality in conditions of competition we seek to avoid what I believe to be more or less a real danger to-day, and that is an excessive cost of production in the United States. Here is a business producing a certain product. It may pay unreasonable salaries to its officers. It may be run extravagantly. It may pay an unreasonable wage scale. It my wish to uphold that cost of production and say that it shall uphold it in comparison with the cost of production of the foreign article, where the same salaries are not paid and where the same profits are not obtainable. Therefore we have put in the element of reasonableness of profit, which must be considered by the President in determining what should be a reasonable equalization of the rates and conditions.

So, Mr. President, I do not think that it is a better phrase to use, but I want the matter to go through the Senate. I think it is important that we have this provision. If there are a number of Senators who believe that it is better to use the term "difference in cost of production," I am willing to yield the point to get a united party upon that proposition.

Mr. WALSH of Montana. Mr. President, before the Senator takes his seat I should like to address a question to him. Is it the Senator's opinion that the Congress might pass a valid act which constituted practically all this situation? Assume that no tariff bill at all is passed, but just an act to this effect: "The President is hereby authorized to impose duties upon all commodities introduced into this country in such an amount as shall equalize the differences in competition in the markets of the United States."

Mr. McCUMBER. I would not want to go just exactly that far. The courts sustain the proposition that in many cases the Congress can not ascertain just what ought to be done in this case and that case, with a thousand conditions, and pass a general law that will meet them all. Therefore it may prescribe a rule and impose upon an officer the duty of ascertaining the facts in a given case, or possibly 100 or 100,000 cases—I do not know that that would necessarily make the difference—and then applying a rate that will meet the rule.

Mr. WALSH of Montana. Let me ask the Senator if that is not what we are really doing here when we say to the President, "We fix these rates, but you can change them all just as you see fit, following this rule"? What is the difference, from the standpoint of the constitutionality of the proposition, between that and our prescribing no rates at all but saying "Fix the rates"?

Mr. McCUMBER. I wish to just mark the line of demaracation between a law which might be regarded by the court as a delegation or a surrender of all authority over a subject and a law that would fix a rule to govern in those cases in which there may be such a change of conditions as would justify the laying down of a rule to be measured up to by the executive officer. It is difficult to draw the line.

But, Mr. President, suppose in the State of Ohio we had 500 cities, each of which may have an electric street railway. Now, we may have a commission—and possibly could have a State commission if it did not interfere with the rights of the cities—to find reasonable rates for passengers on the trolley lines. They might be authorized to find a different rate for each different city according to the conditions of that city. We would not have to lay down a rule that the rate should be the same in every case any more than we would be compelled to lay down the rule that the rate of duty should be the same in every case.

Mr. JONES of New Mexico. Mr. President, using the illustration which the Senator from North Dakota has just given, I wish to suggest that we have manufacturing establishments in this country whose costs vary as much as 100 per cent.

Mr. McCUMBER. Yes.

Mr. JONES of New Mexico. There can be only one duty fixed on a given article. I do not understand that the Senator from North Dakota proposes to have one duty fixed on foreign articles that come in competition with A's products and another duty with respect to B's products which are of a similar kind. The Senator certainly does not mean that. We have got to take one duty to cover all of these different costs in the United States. I will ask the Senator under this proposal which costs is to determine? How he is going to meet that proposition? To my mind, it is just as unsolvable as it would be to try to fix one reasonable rate for 500 public utilities of the same kind in different cities.

Mr. McCUMBER. Mr. President, in the various factories in the different cities in England, where a given commodity is produced and exported, undoubtedly the cost of production varies; but I would not say, because there were so many different prices and different costs of production in different mills in England, that the rule as sought to be fixed by the Senator from Wisconsin [Mr. LENROOT] to ascertain the difference in the cost of production is an impossible rule, for it is not.

Now, Mr. President, I wish to read—and I desire to read it really for the benefit of the Senator from Ohio [Mr. POMERENE]—section 804 of the law of 1916:

> That whenever any country, dependency, or colony shall prohibit the importation of any article the product of the soil or industry of the United States and not injurious to health or morals, the President shall have power to prohibit, during the period such prohibition is in force, the importation into the United States of similar articles—

The Senator from Ohio would say, "If the President must ascertain what are 'similar articles,' that is a legislative function." But the act goes even further and provides—

> or in case the United States does not import similar articles from that country, then other articles, the products of such country, dependency, or colony.

Who is to determine what those other articles shall be? Of course it is a legislative function to determine upon what articles the retaliation shall take effect. I will agree with the Senator from Ohio that that is purely a legislative matter. The foreign country may prohibit the importation into its domain of live stock from the United States. We in turn may retaliate and say, "We will entirely prohibit the importation of their woolen goods," or "We will entirely prohibit the importation of their cotton goods." Of course, Congress could determine whether or not we would say the prohibition should apply to woolen goods or to cotton goods; but under the law I have cited authority is given to the President to use his discretion. He may pick out anything which the offending country produces and exports to this country and prohibit its importation here; he may use his judgment as to how many articles and the kind and character of articles whose importation may be prohibited; yet the Supreme Court of the United States has sustained that provision.

Mr. President, the Senator from Wisconsin stated his objection to this provision to be that we have provided that the President shall, if practicable, ascertain the difference in the cost of production at home and abroad; that, if practicable, he shall ascertain the difference in the selling price at home and abroad. The Senator from Wisconsin thinks the provision is objectionable because of that fact. Well, let us see. Suppose the President can ascertain the difference in the cost of production at home and abroad—that is one of the things which he is given power to ascertain—but that he can not ascertain the difference in the conversion, here and abroad, or selling prices in the principal markets of the United States. We say "Get all if it is practicable to do so, but, if it is not practicable to get all, get what you can." It is a proper limitation, and without it the law would be absolutely defective, because, in most instances, the President could not get every one of these facts, but he could get a sufficient number of them upon which to base a computation of the difference in competitive conditions. Mr. President, so far as I am concerned, in accordance with the statement made by the Senator from Utah [Mr. SMOOT], I am willing to modify the amendment in order to meet the desire of what seems to be a large number of Republicans on this side of the Chamber that we substitute the words "cost of production" for "conditions of competition," although, I will say most frankly, that I think the policy indicated in the committee amendment is the preferable one to pursue.

Mr. TOWNSEND. Mr. President, I had intended to say something upon this subject. I shall content myself, however, with expressing my views on the general proposition later, when the Frelinghuysen amendment shall be under consideration. I am, however, so deeply interested in this particular feature of the bill that I am anxious to have it speedily adopted; and, inasmuch as the Senator from North Dakota [Mr. McCUMBER], having charge of the bill, has consented to the proposition which I favor, I shall not detain the Senate with any further remarks at this time.

The PRESIDENT pro tempore. The question is upon the amendment proposed by the Senator from Wisconsin [Mr. LENROOT] to the amendment reported by the committee.

Mr. WALSH of Montana. Mr. President, before the vote is taken I desire to ask unanimous consent to have printed in the RECORD in the ordinary 8-point type two articles discussing the feature of the bill which is now under consideration. One is from The Manufacturer, which is the official mouthpiece of the Manufacturers' Club of Philadelphia, an organization which I understand is stoutly in favor of the principle of a protective tariff. The other is from the Baltimore Sun and is entitled "Taxation by Executive Fiat."

The PRESIDENT pro tempore. Without objection, the request of the Senator from Montana is granted.

The matter referred to is as follows:

PREDICT RISE IN MEDIUM-PRICED CLOTHING AS RESULT OF 33-CENT RATE IN PROPOSED TARIFF—PHILADELPHIA MANUFACTURERS EXPRESS DISSATISFACTION WITH PHRASEOLOGY CHANGES, DYE SCHEDULE, AND PRESIDENT'S POWER TO INCREASE OR LOWER RATES.

[Philadelphia Bureau, Daily News Record.]

PHILADELPHIA, May 8.—"The basic wool duty of 33 cents a pound clean content is likely to invite the bitterest sort of criticism of that schedule, and, therefore, of the entire tariff bill," observes a recent edition of The Manufacturer, official mouthpiece of the Manufacturers' Club of Philadelphia, in discussing the Fordney bill as rewritten by the Senate Finance Committee. Dissatisfaction with the change in general phraseology, with the dye schedule, and with the power invested in the President of increasing or lowering the rates 50 per cent is also expressed.

It predicts a material increase in the price of medium and lower grades of clothing will result from the 33-cent clean-content rate and makes the following comment on the wool schedule:

* * * * * * *

OPPOSE PRESIDENT'S POWER.

Objection to the power vested in the President to increase or lower the rates is more definitely expressed as follows:

"If it is the idea of the majority members of the Finance Committee that the tariff bill ought to be adopted as they have submitted it, based upon foreign valuation, with a presidential prerogative of altering these rates to any point within a 50 per cent increase or decrease, and then, if that does not meet the presidential views of the existing necessity, to establish any rate to apply to the American value, provided only that such rate shall not be increased or decreased more than 50 per cent of the rate specified in the bill, we believe the majority members of the committee will find their views in marked conflict with prevailing opinion in Congress and throughout the country.

"In the first place, there is no valid or logical justification for creating the permanent cloud of uncertainty that would hang over and menace American business as a result of such—as the President has been pleased to term it—flexibility of the tariff. We regarded this recommendation by the President as extremely ill advised at the time it was made, and we did not hesitate to frankly say so.

"It may be accepted as almost a foregone conclusion that no Republican President would employ this prerogative to increase rates, except after prolonged investigation and hearings by the Tariff Commission. It is even doubtful if he would do so then. Permissive powers are seldom employed by the Executive; and this shifting of legislative authority from the Congress to the President simply serves to impose upon the latter a responsibility which, if properly met, would occupy practically his entire time, to the exclusion of all other duties. Upon the other hand, it gives to a Democratic President the full authority to wipe out every protective rate in a tariff bill with a single sweep of the pen.

DOUBT TRANSFER CONSTITUTIONALITY.

"We seriously doubt the constitutionality of such a transfer of legislative authority to the executive branch of the Government. Of course, the Senate Finance Committee in offering the proposal evidently regards it as constitutional. But there has never been a law that has been declared unconstitutional by the courts that was not passed by Congress in the firm conviction that it was constitutional.

"These functions can not be properly carried out by a Chief Executive. Nor should they be put in the hands of any one individual. Tariff legislation is something for Congress to determine. The putting into law of the propositions made in the Finance Committee bill would create permanent uncertainty as to rates of duty, disorganize business, and be hurtful alike to the American manufacturer and the foreign importer. The producers of the United States demand stability in tariff protection. That is why they demand the American valuation for ad valorem duties; it is based on the most stable of all things in the financial world—the American dollar. Adoption of the proposal offered by the Finance Committee would only add to the instability of tariff matters, so that no one, manufacturer or importer, could tell what was directly before him in the way of tariff duty."

* * * * * * *

[Editorial from the Baltimore Sun of July 9, 1922.]

TAXATION BY EXECUTIVE FIAT.

"Sections 315, 316, and 317 of the pending tariff bill should be eliminated. These sections propose to give power to the President of the United States, after certain findings of fact by executive bureaus, (1) to change tariff classifications, (2) to change the method of assessing ad valorem duty, and (3) to raise or lower the rate of taxation as far as he considers necessary up to 50 per cent.

"The indefinite propositions which are supposed to move him to action relate to so-called unfair trade affecting a domestic industry, to unequal costs of production, to restraint of trade, and other indefinite causes.

"This is not protection. This is not a tariff policy. This is nothing short of taxation of the citizen by Executive discretion.

"This presidential power will be capable of making or breaking particular industries. It sets up a political machine under which no business affected, directly or indirectly, by tariff rates will dare to be out of the favor of the administration. Compared to this new power, political power through patronage distribution is a trifle, a bagatelle.

"There are those who claim it is constitutional. There are others who claim, perhaps not without reason, that the courts will not hold illegal a transfer of legislative power to the Executive, if utilitarian or social reasons can be urged in its support.

"This scheme is presented on the plausible claim of scientific tariff making by so-called experts. It is pressed as promoting efficiency in government. Whether technically legal or not, it is in fact a grant of legislative power to the executive department of a character unknown to our history. It plainly violates the historical division of powers supposed to be a necessary safeguard of our liberty. In the hands of an unscrupulous, partisan, or narrow-minded Executive, or of unscrupulous or theoretical or loose-minded subordinates it is capable of grave abuse. It is bureaucracy run mad.

"In its very nature this power must be delegated. The President himself with his multitudinous duties could never in fact act himself or do more than glance at the claimed results of the investigations. Yet the action taken would always speak with the sanction of his name and high office.

"If we are to have the highest tariff in our history, let us have it with certainty. Let us know where we stand. Let business adjust itself to the new rates until such time as the people reverse their policy at the polls.

"To have the tariff subject to change at the will of the executive department, speaking in the name of the President, will create and perpetuate business unrest and uncertainty—will keep us on a hot griddle sweating under a perpetual agitation for tariff change. Any certain rates made as a result of logrolling or protected combinations are better than this danger.

"This is especially so at a time when the business of the country needs, more than ever before, to know with certainty the conditions it has to face in order to get back to normal.

"It is to be hoped, indeed, that the sober second thought of the statesmen in the Senate, irrespective of party, will save us from this scheme to leave the tariff problem unsettled and to perpetuate uncertainty in the business world."

Mr. LENROOT. Mr. President, I send to the desk a proposed amendment to the pending amendment, and ask unanimous consent that it may be printed and lie on the table.

The PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. JONES of Washington submitted an amendment intended to be proposed by him to the pending bill, which was ordered to lie on the table and to be printed.

Mr. DIAL. Mr. President——

Mr. McCUMBER. Mr. President, I rise to a point of order to ascertain the right which may exist under the unanimous-consent agreement to bring up other measures. The Senator from Georgia [Mr. HARRIS] informs me that he must leave tomorrow and he desires to have a measure considered. I know that he can not do so except by unanimous consent, and I am not certain that it can be done even by unanimous consent, but I would be willing to grant unanimous consent, if it can be done. The Senator from Georgia may make his request, and the Chair can pass on it.

COTTON STATISTICS.

Mr. DIAL. Mr. President——

The PRESIDENT pro tempore. The Senator from South Carolina.

Mr. DIAL. I ask unanimous consent, from the Committee on Commerce, to report back favorably, with amendments, the bill (S. 3757) authorizing the Department of Commerce to collect and publish additional cotton statistics and information.

The PRESIDENT pro tempore. The Senator from South Carolina asks unanimous consent, out of order, to submit a report from the Committee on Commerce. Is there objection? The Chair hears none, and the report is received.

Mr. DIAL. I now ask unanimous consent for the immediate consideration of the bill. I presume that it will create no discussion.

The PRESIDENT pro tempore. The Senator from South Carolina asks unanimous consent for the present consideration of the bill which has just been reported by him. Is there objection?

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill.

Mr. HARRIS. Mr. President, I wish to say that the bill has the approval of Secretary Hoover, of all Senators from the cotton-growing section, and has likewise been recommended by all the cotton organizations of the South. It has also been unanimously reported by the committee. It merely provides for securing statistics of cotton on hand in the world on July 31 of each year.

It is believed by many who are in a position to know that the supply on hand is not as great as has been published. The publication of such erroneous estimates has a tendency to depress the market, and I believe that when accurate informa-

tion is given it will show a much smaller stock on hand and thereby increase the price.

The PRESIDENT pro tempore. The Secretary will state the amendments which have been reported by the committee.

The amendments were, on page 1, line 10, after the word "ginneries," to insert "compresses"; on page 2, line 1, after the words "on hand on," to strike out "September 1, December 1, and March 1" and to insert "July 31"; in line 3, after the word "after," to strike out "each of these" and to insert "this"; in the same line, before the word "and," to strike out "dates" and to insert "date"; in line 10, after the word "on," to strike out "September 1, December 1, and March 1" and to insert "July 31"; at the beginning of line 15 to strike out "each of these" and to insert "this"; in the same line, before the word "and," to strike out "dates" and to insert "date"; in line 16, after the word "law," to insert "exclusive of linters"; on page 3, line 16, after the word "on," to strike out "September 1, December 1, and March 1" and insert "July 31"; and on page 4, after line 2, to strike out section 5, as follows:

SEC. 5. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $25,000, or so much thereof as may be necessary, for carrying out the provisions of this act for the fiscal year ending June 30, 1923.

So as to make the bill read:

Be it enacted, etc., That, in addition to the cotton statistics now required by law to be collected and published, the Secretary of Commerce is authorized and directed to have collected and published cotton statistics and information in the following manner:

(1) The Director of the Census shall collect information showing the quantities and grades of baled cotton on hand at cotton ginneries, compresses, manufacturing establishments, warehouses, and other places where cotton is ginned, manufactured, stored, or held. Such information shall show the number of bales of cotton of the grades tenderable under the law on hand on July 31 of each year, and shall be published as soon as possible after this date and be distributed in the same manner as other cotton statistics are now required by law to be distributed.

(2) The Director of Foreign and Domestic Commerce shall cause periodic surveys of the cotton situation in foreign countries, to be made through representatives in such countries, for the purpose of summarizing the world cotton situation on July 31 of each year. These statistics and information obtained from such surveys shall be published as soon as possible after this date, and the statistics shall include available facts and careful estimates of cotton production, cotton consumption, and of the quantities, kinds, and grades of cotton tenderable under the law, exclusive of linters.

SEC. 2. That the information furnished by any person under the provisions of this act shall be considered strictly confidential and shall be used only for the statistical purpose for which it is supplied. Any employee of the Bureau of the Census who, without the written authority of the Director of the Census, or any employee of the Bureau of Foreign and Domestic Commerce who, without the written authority of the Director of Foreign and Domestic Commerce, shall publish or communicate any information given him under the provisions of this act shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than $300 nor more than $1,000, or by imprisonment for a period of not exceeding one year, or both such fine and imprisonment.

SEC. 3. That it shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any cotton ginnery, manufacturing establishment, warehouse, or other place where cotton is ginned, manufactured, stored, or held, whether conducted as a corporation, firm, limited partnership, or by individuals, when requested by the Director of the Census or by any employee of the Bureau of the Census acting under the instructions of such director, to furnish completely and correctly, to the best of his knowledge, all of the information concerning the quantities and grades of baled cotton held on July 31 of each year.

SEC. 4. That any owner, president, treasurer, secretary, director, or other officer or agent of any cotton ginnery, manufacturing establishment, warehouse, or other place where cotton is ginned, manufactured, stored, or held, who refuses or neglects to furnish the information requested under the provisions of this act, or who intentionally gives answers that are false shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $300 nor more than $1,000, or by both such fine and imprisonment.

The amendments were agreed to.

The bill was reported to the Senate as amended and the amendments were concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

ORDER FOR RECESS.

Mr. McCUMBER. I ask unanimous consent that when the Senate closes its session on this calendar day it recess until to-morrow at 11 o'clock a. m.

The PRESIDENT pro tempore. Is there objection? The Chair hears none, and it is so ordered.

PETITIONS AND MEMORIALS.

Mr. WILLIS presented resolutions unanimously adopted by the Council of Auxiliaries of the American Legion, of Cleveland, Ohio, protesting against the recognition of the soviet government of Russia or the establishment of trade relations with such government, which were referred to the Committee on Foreign Relations.

Mr. CAPPER presented resolutions adopted by the biennial convention of the General Federation of Women's Clubs, favoring the passage of the so-called truth in fabric bill, which were referred to the Committee on Interstate Commerce.

REPORTS OF THE COMMITTEE ON CLAIMS.

Mr. CAPPER, from the Committee on Claims, to which were referred the following bills, reported them each without amendment and submitted reports thereon:

A bill (H. R. 4145) for the relief of Leonidas Sawyer (Rept. No. 848); and

A bill (H. R. 7662) for the relief of F. R. Messenger (Rept. No. 849).

Mr. CAPPER, from the Committee on Claims, to which was referred the bill (H. R. 7912) to provide a method for the settlement of claims arising against the Government of the United States in sums not exceeding $1,000 in any one case, reported it with amendments and submitted a report (No. 850) thereon.

BILLS INTRODUCED.

Bills were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. JONES of Washington:

A bill (S. 3901) to abolish the inspection districts of Apalachicola, Fla., and Burlington, Vt., and the office of one supervising inspector, Steamboat-Inspection Service; to the Committee on Commerce.

By Mr. CALDER:

A bill (S. 3902) for the relief of the Riverside Contracting Co.; to the Committee on Claims.

EXCESSIVE INTEREST RATES OF FEDERAL RESERVE BANKS.

Mr. HEFLIN submitted the following resolution (S. Res. 335), which was referred to the Committee on Agriculture and Forestry:

Whereas it has been charged on the floor of the Senate that the amendment to the Federal reserve act authorizing the charging of progressive interest rates had been obtained largely as a result of express and definite assurances given to Members of Congress by W. P. G. Harding, governor of the Federal Reserve Board, that the object and purpose of said legislation was to secure a fairer and more equitable distribution of the funds of the Federal reserve system and was expressly designed to prevent the undue absorption of Federal reserve funds in certain large cities at the expense of the great farming interests in the West and South, and at the expense of the smaller business man throughout the country; and

Whereas the official records show that the said "progressive rates" after the passage of the law were put into effect only in the agricultural sections of the West, South, and Southwest, including the four Federal reserve districts of Atlanta, St. Louis, Kansas City, and Dallas, and were not put into effect in New York and other big money centers, where the funds of the Federal reserve system were principally loaned; and

Whereas the official records show that its country banks were charged unconscionable and wholly indefensible interest rates, and that these inhuman rates were exacted from many banks in the States of Alabama, Colorado, Nebraska, Kansas, Oklahoma, Texas, Louisiana, Mississippi, and others; and

Whereas the reserve board defeated two resolutions offered by the former Comptroller of the Currency, one designed to limit interest rates to 6 per cent per annum, and when that was defeated another limiting interest rates charged by Federal reserve banks to 10 per cent per annum; and

Whereas the undue concentration of Federal reserve funds to the big cities is illustrated in the fact that in the autumn of 1920 the official records show that the national banks in New York City, in proportion to their total loans and discounts, were being accommodated with three times as large an amount of Federal reserve funds as were the 7,600 "country" national banks throughout the entire United States: Therefore be it

Resolved, That the Federal Reserve Board be requested to obtain from the Federal Reserve Banks of Atlanta, St. Louis, Dallas, and Kansas City statements showing all cases where interest ranging between 10 per cent and 87½ per cent per annum, both inclusive, was exacted from member banks, giving names of the banks, their capital and surplus, and location, where 10 per cent per annum or more was charged on loans and rediscounts, the rate and amount of interest charged in each instance as expressed in dollars and cents; also let the statement show whether the Federal reserve banks have refunded to each member bank from which such exactions were made the amount of such interest collected in excess of 10 per cent per annum upon each loan upon which such interest was charged.

THE COTTON INDUSTRY.

Mr. SMITH submitted the following resolution (S. Res. 336), which was referred to the Committee on Agriculture and Forestry:

Whereas the carry over or present stock of American cotton as given by official statistics is less than the normal carry over; and

Whereas the present condition of the growing crop indicates a yield far below the world's demand for American cotton; and

Whereas the entire carry over plus the indicated yield would not meet the world's demand; and

Whereas the ravages of the boll weevil are more extensive and severe than ever before in the history of the ravages of this pest, making the yield entirely problematical; and

Whereas the cost of producing cotton under these adverse conditions has been enormously increased; and

Whereas the price of cotton in the markets has failed utterly to respond to these conditions; and

Whereas the consumption of American cotton, both at home and abroad, has shown a progressive increase: Therefore be it

Resolved, That the Agricultural Committee of the Senate be authorized and empowered to investigate all matters pertaining to the subject of supply and demand and marketing of cotton, with a view of determining whether any undue methods or practices are being employed by the trade in restraining the natural operation of the law of supply and demand. Be it further

Resolved, That the committee be empowered to use such methods as in its judgment are necessary to obtain the information desired.

EXECUTIVE SESSION.

Mr. McCUMBER. Mr. President, I move that the Senate proceed to the consideration of executive business.

The motion was agreed to; and the Senate proceeded to the consideration of executive business. After five minutes spent in executive session the doors were reopened, and (at 5 o'clock and 35 minutes p. m.) the Senate, under the order previously made, took a recess until to-morrow, Friday, August 11, 1922, at 11 o'clock a. m.

NOMINATIONS.

Executive nominations received by the Senate August 10 (legislative day of August 3), 1922.

PROMOTIONS IN THE REGULAR ARMY.

CHAPLAINS.

To be chaplains with the rank of captain.

Chaplain James Lemuel Blakeney from August 5, 1922.
Chaplain John Joseph Byrne from August 6, 1922.
Chaplain Francis Forbes Donnelly from August 7, 1922.

APPOINTMENT IN THE REGULAR ARMY.

ADJUTANT GENERAL.

To be major general.

Col. Robert Courtney Davis, Adjutant General's Department (Infantry), Acting The Adjutant General, to be The Adjutant General for a period of four years from date of acceptance, with the rank of major general from September 1, 1922, vice Maj. Gen. Peter Charles Harris, who retires from active service August 31, 1922.

CONFIRMATIONS.

Executive nominations confirmed by the Senate August 10 (legislative day of August 3), 1922.

MEMBER OF THE FEDERAL FARM LOAN BOARD.

John H. Guill, jr., to be a member of the Federal Farm Loan Board.

UNITED STATES ATTORNEY.

D. Q. Morrow to be United States attorney, southern district of Ohio.

POSTMASTERS.

ALABAMA.

Jacob J. Matson, Sylacauga.

ARIZONA.

Catherine T. Dupen, Warren.

CALIFORNIA.

Hazel B. Hough, Arrowhead Springs.
Otto B. Liersch, Corning.
Thomas D. Walker, Walnut Creek.

MASSACHUSETTS.

Molly A. Gilman, Allerton.
Grace G. Kempton, Farnumsville.
Annie F. Corcoran, North Oxford.

NORTH CAROLINA.

Thomas R. Hundley, Draper.
Forney L. Abernethy, Mount Holly.
Simon S. Strother, Stantonsburg.

NORTH DAKOTA.

Anfin Qualey, Aneta.

OREGON.

Drusilla M. Crance, Cornelius.

SOUTH DAKOTA.

Hoyt S. Gartley, Nisland.

TEXAS.

Eddie C. Slaughter, Goose Creek.
John E. Carson, San Saba.
John R. Ratcliff, Wallis.

WEST VIRGINIA.

Claude W. Harris, Kimball.

WYOMING.

Thomas B. Wright, Riverton.

SENATE.

FRIDAY, *August 11, 1922.*

(Legislative day of Thursday, August 3, 1922.)

The Senate met at 11 o'clock a. m., on the expiration of the recess.

THE TARIFF.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 7456) to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes, the pending question being the amendment of Mr. LENROOT to the amendment submitted by Mr. McCUMBER on behalf of the Committee on Finance as a substitute for section 315 reported from the committee.

Mr. McCUMBER. Mr. President, I suggest the absence of a quorum.

The PRESIDENT pro tempore. The Secretary will call the roll.

The reading clerk called the roll, and the following Senators answered to their names:

Borah	Gerry	McNary	Smith
Brandegee	Gooding	Myers	Smoot
Bursum	Hale	New	Spencer
Calder	Harreld	Newberry	Stanfield
Cameron	Harris	Nicholson	Sterling
Capper	Heflin	Norbeck	Sutherland
Colt	Jones, N. Mex.	Oddie	Townsend
Culberson	Jones, Wash.	Overman	Trammell
Cummins	Keyes	Pepper	Underwood
Curtis	Ladd	Phipps	Wadsworth
Dial	Lenroot	Pomerene	Walsh, Mont.
Dillingham	Lodge	Ransdell	Watson, Ga.
Edge	McCumber	Rawson	Watson, Ind.
Ernst	McKellar	Sheppard	Willis
Fletcher	McKinley	Shortridge	
Frelinghuysen	McLean	Simmons	

Mr. UNDERWOOD. I wish to announce that the Senator from Nevada [Mr. PITTMAN] is absent on account of illness in his family.

Mr. CURTIS. I desire to announce that the senior Senator from Minnesota [Mr. NELSON] is necessarily absent on account of a death in his family.

The PRESIDENT pro tempore. Sixty-two Senators have answered to their names. There is a quorum present.

Mr. TOWNSEND. Mr. President, I desire to be heard briefly upon the amendment which is now pending before the Senate. I am very much in favor of it and have favored such legislation since the consideration of the Payne-Aldrich law, when I presented my views on this subject but my efforts received very scant consideration at that time. I then believed and still believe that the methods employed in amending tariff bills are not calculated to accomplish the good which any party having charge of the bills desires. Certainly they are clumsy, unscientific, and always unsatisfactory to the country. There must be some better way and it should be our duty to find that way.

I realize that so long as there are strong differences of opinion as to whether we should have a tariff for protection, with revenue incidental, or a tariff for revenue with protection incidental, this question may be involved in politics. Tariff revision is so important, it so seriously affects business and industrial life it should be divorced from politics as much as possible. I believe that we have reached that point in the history of our country when the great mass of the people believe in a tariff for protection. That fact has been demonstrated over and over again on the floors of Congress during the consideration of the pending bill. Many Senators of the minority party have voted for protective duties on articles competing with similar products of their States. They did this either because they thought such duties were necessary and desirable or because they knew that their constituents were favorable to such protection. I have no doubt a great majority of the people of the United States to-day believe in a protective tariff. The question, therefore, which should be honestly considered and determined is what should the rates be in order to afford adequate protection to American industries and to American labor. I have always believed that those rates should, as near as could be, be measured by the difference in the cost of production at home and abroad. That to me is an entirely just rule, and I can not conceive how any patriotic American can contest it.

This, however, forces upon my consideration the fact of the difficulties which always arise when we attempt to revise a tariff law. It stands to reason that the Members of Congress, with their multiplied responsibilities and duties, their limited