an appeal upon pure questions of law and mixed questions of law and fact to the Supreme Court, according to that general policy of the law which leaves questions of fact to be conclusively settled by the Court which hears the testimony and refers only questions of law to the appellate tribunal. All those mixed questions which lie upon the border line of law and fact would gradually be relegated to the former class upon which the decision of the Commission, as a Federal Court, would be final. Much of the disfavor with which the courts now regard the findings and decisions of the Commission originate in a natural feeling of jealousy and of hostility to the usurpation of judicial powers. The effect of the system above outlined would be to produce a uniform and consistent body of interstate commerce law, judicially expounded and efficiently enforced.

THE RECIPROCITY ACTS OF 1890—ARE THEY CONSTITUTIONAL?

BY EDWARD B. WHITNEY, ESQ.

"Whenever the President shall be satisfied that unjust discriminations are made" by a foreign State against American products, "he may direct that *such products* of such foreign State, . . . *as he may deem proper*, shall be excluded from the United States," and may "revoke, modify, terminate or renew any such direction *as in his opinion the public interest may require.*"[1]

"With a view to securing reciprocal trade with countries producing the following articles, . . . 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, raw and uncured, or any of such articles, imposing 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 issue a proclamation levying, instead, certain fixed taxes upon "such sugar, molasses, coffee, tea and hides, the production of such country, *for such time as he shall deem just.*"[2]

[1] Food Act of August 19, 1890, § 5.

[2] McKinley Tariff Act of October 1, 1890, § 3.

These two clauses comprise the famous reciprocity legislation of the Fifty-first Congress. Both have been questioned as unconstitutional. The latter has been challenged in the courts, and at the hour of this writing is awaiting the decision of the Supreme Court of the United States.[1]

Reciprocity, however, is not the feature that is challenged. Reciprocity laws and retaliation laws have come down to us from time immemorial. Their validity is unquestioned and unquestionable. They will last as long as protective tariffs and commercial restrictions. They exist not only between nations, but between the different States of our Union,[2] and even in the latter case their constitutionality has years since been sustained by the supreme tribunal.[3]

Nor may the legislation be brought in question before the courts as a possible violation of treaty rights. Such an opposition was made in Congress, and with grave reason. Many or most of our treaties contain the well-known "most-favored nation" clause, or something stronger. With such a clause the levying of special import duties may be difficult to reconcile. But the Constitution is not violated when a statute expressly or impliedly repeals a treaty.[4] One is as much the law of the land as the other. Nobody can complain but the foreign nation whose treaty rights are broken, and that complaint must be made to the executive, not to the judicial branch of our government. It is a question of diplomacy and not of law.

The Reciprocity Acts of 1890 are met with the charge that they are not complete laws in themselves; with the charge that they are a delegation of the legislative power and duty of Congress to an individual, the President of the United States. The laying of a tax is a legislative act.[5] So is the regulation of commerce in times of peace. The

[1] Boyd, Sutton & Co. *v.* U. S.; H. Herrman Sternbach & Co. *v.* U. S., argued November, 1891. [Since decided, February 29, 1892.]

[2] "Commercial Retaliation between the States," Am. Law Review, Feb., 1885.

[3] Fire Association *v.* New York, 119 U. S., 110.

[4] Chinese Exclusion Case, 130 U. S., 581; Whitney *v.* Robertson, 124 U. S., 190; Head Money Cases, 112 U. S., 580, 599.

[5] New Orleans Water Works *v.* Louisiana Sugar Co., 125 U. S., 18, 31.

discretion of the Legislature is exercised upon two main problems in the consideration of a proposed statute. One is, whether there is a mischief calling for a remedy. The other is the nature and extent of the remedy to be applied. In the McKinley Act the former problem especially, in the Food Act the latter, is left entirely to the President for solution. Of the two distinctively legislative functions, each statute delegates one. If this is constitutional, then both functions may be delegated in the same statute. Then it will be constitutional for Congress to say to the President: "If you think foreign tariffs are unreasonable, you may exclude at your discretion any or all foreign products, or you may tax them." For the power to exclude involves the power to impose license fees,[1] and that is the power to tax.

The discussion thus reopened is one of the oldest and most fundamental, while one of the most difficult and obscure and most unsettled, in all our jurisprudence. The first provision of the Federal Constitution is, that "All legislative powers herein granted shall be vested in a Congress of the United States." State constitutions contain similar provisions. In Federal and State courts alike the general principle has always been laid down and never been disputed, that the legislative power cannot be delegated.[2] Some State courts have gone so far as to deny the right of the Legislature to consult its principal, the people themselves, by a *referendum*;[3] others have allowed this, while still denying the right to delegate to a subagent.[4] All courts have allowed certain exceptions to the rule, such as a power to grant local self-government to municipalities, by immemorial usage,[5] and a power to leave mere questions of detail to be worked out by the judiciary

[1] See Hamilton *v.* Dillin, 21 Wall, 73.

[2] Wayman *v.* Southard, 10 Wheat., 1, 42–3; Bank of U. S. *v.* Halstead, *id.* 51, 61; *In re* Rahrer, 140 U. S., 545, 560; People's R. R. *v.* Memphis R. R., 10 Wall, 38, 50.

[3] Barto *v.* Himrod, 8 N. Y., 483.

[4] Locke's Appeal, 72 Pa. St., 491; Cooley Const. Lim., 6th ed., pp. 140–46.

[5] Paul *v.* Gloucester County, 50 N. J. Law, 585

or executive.[1] Moreover, as most statutes must be conditional, waiting for some given state of facts to exist to call them into operation, the power to decide whether or not that time has arrived must be delegated to the judiciary or to the executive.

This latter is, in fact, the judicial or executive province; but, like the exceptions above mentioned, it necessarily involves a really wide limit of quasi-legislative discretion. Still, if our courts have not been for a century in error, "there is a boundary somewhere between those great essential acts of legislative judgment, the power to perform which cannot be delegated, and those discretionary powers which may be. The Legislature could not, under the guise of enacting a conditional law, provide that whatever the President might thereafter enact or proclaim should have the force of law."[2] "It will not be contended that Congress can delegate to the courts, or to any tribunal, powers which are strictly and exclusively legislative."[3] "The general proposition," says Solicitor-General TAFT, in his able brief for the government upon the McKinley Act, "that Congress has no power to delegate its legislative power to the Executive is conceded."

The Solicitor-General defends the act, first, upon authority of the brig *Aurora*, 7 Cranch, 362; second, by the claim that it follows a line of statutes, extending over a century of time, so unbroken and unquestioned as to constitute a practical construction of the Constitution which it is now too late to re-examine. We believe that neither of these defences is well founded, and that in fact the present question comes before us unaffected by precedent and to be decided simply upon its merits.

The brig *Aurora* came before the Court in 1813, under the Non-importation Laws of 1809 and 1810. We had become embroiled with both England and France, then hotly engaged in the greatest war of modern history. We claimed certain commercial rights as a neutral party. Eng-

[1] Wayman *v.* Southard, 10 Wheat., 1, 42–3; *In re* Griner, 16 Wis., 423.
[2] Paine, J., *In re* Oliver, 17 Wis., 681.
[3] Chief Justice Marshall in Wayman *v.* Southard, 10 Wheat., 1, 42.

land and France denied the claim. The former by her Orders in Council, Napoleon by his Berlin and Milan Decrees, violated, as we claimed, our neutral commerce. It may have been true in international law that our claims were excessive and our rights doubtful. But as a matter of American law the case was clear. For the claims of the administration were well known, and in matters of international dispute it has been regarded as conceded that the courts must follow the lead of the political branch of the government.[1] When Congress and the President have spoken, it would ill become the judiciary to take the side of the foreigner. Under these circumstances the non-importation acts[2] were passed, closing our ports to the trade of our commercial enemies.

But these acts authorized the President, "In case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation," upon which trade should be renewed. That is, the President was simply made the judge, to find the fact and apply the well-recognized and then familiar rules of law. His proclamation, like the finding of a lunacy commission, was but the official evidence of the fact. It was not the less a judicial or executive, rather than a legislative act, because there could be no review of his decision by any other tribunal. He was no more a despot in this respect than was, until last year, the Federal Circuit Judge in a case involving a sum less than the $5,000 necessary to warrant an appeal. It is common to leave such a question to an executive officer to decide, his decision being final.[3] For this

[1] Chief Justice Marshall in U. S. *v.* Palmer, 3 Wheat., 610, 635; Gelston *v.* Hoyt, 3 Wheat., 246, 324 (recognition of Haytian insurgents); Williams *v.* Suffolk Ins. Co., 13 Pet., 414, 420 (ownership of Falkland Islands); Foster *v.* Neilson, 2 Pet., 253, 307 (boundaries of Louisiana purchase); Garcia *v.* Lee, 12 Pet., 511 (do.); Phillips *v.* Payne, 92 U. S., 130 (cession of Alexandria from District of Columbia to Virginia); Jones *v.* U. S., 137 U. S., 202 (ownership of Guano Islands).

[2] Acts of March 1, 1809; May 1, 1810.

[3] Martin *v.* Mott, 12 Wheat., 19; Murray's Lessee *v.* Hoboken Land and Improvement Co., 18 How., 272, 280.

reason, in the brig *Aurora*, the statute was sustained, as appears both by the briefs of counsel and by the opinion of the Court.

The distinction from the present statute is apparent. The President is now directed to impose duties upon the imports of any nation whose "exactions" on our products, "in view of" our rather modest free list, "he may deem to be reciprocally unequal and unreasonable." There is, and can be, no standard of comparison. It is impossible to formulate a rule, or anything nearer than a guess, as to the definition or the measurement of reciprocal unreasonableness. No court could pass upon such a question. The whole labored structure amounts but to saying that the President may impose the duties in his discretion as against any nation but one absolutely under the dominion of free trade. The discretion does not concern details alone, but the broadest principles of action. Its exercise is in every sense a legislative act.

Is there, then, such a uniform course of legislation as to justify so clear a departure from fundamental principles of government? Usage is indeed a powerful, sometimes a controlling, factor in constitutional discussions. But in the construction of statutes and constitutions, as of contracts, the usage given such effect has been long, continuous and generally acquiesced in.[1] Our history, on the contrary, shows four stages in the progress of retaliatory legislation; first, a form loose like the present, and for the time unquestioned; then a great debate over the right to delegate legislative power; then eighty years of precedents, beginning with the act of 1809 just quoted, in which correct rules were more or less strictly followed; finally, and with the past five years, a relapse into the first condition.

On June 4, 1794, Congress replied to the British Orders in Council by an act authorizing President WASHINGTON to lay a general embargo, "whenever in his opinion the public safety shall so require, ... under such

[1] See Cooley *v.* Board of Wardens, 315; Prigg *v.* Pennsylvania, 16 Pet., 621; Lithographic Co. *v.* Sarony, 111 U. S., 53, 57; The Lama, 114 U. S., 411.

regulations as the circumstances of the case may require;" to be laid, however, only during the recess, and to last only fifteen days after the next meeting of Congress. The act was passed unanimously, without discussion.[1] On February 9, 1799, and February 26, 1800, Congress passed, again without discussion upon this point,[2] acts giving like power to President JOHN ADAMS. On February 28 and December 10, 1806, acts were similarly passed, giving to President JEFFERSON temporary power to suspend the embargo in his discretion. All of these statutes were enacted hurriedly, in expectation of foreign war, and in times when Congress could not be called in extra session without two months' delay.[3]

The constitutional question was first raised, apparently, upon a bill enacted April 22, 1808, again authorizing the suspension of the embargo. A debate ensued in each house of Congress. The speeches in the Senate are not reported, but the bill seems to have been stoutly resisted as a delegation of legislative power.[4] The discussion in the lower House is reported at great length. JOHN RANDOLPH, of Roanoke, led the opposition to the bill, but the legal arguments were supplied by the then famous lawyer, PHILIP BARTON KEY, of Maryland. Mr. KEY took the position of the present opponents of the McKinley law: "Let us say that when such events (designating them) happen, the law shall be suspended, and let the President give them publicity by proclamation." The contrary is "the most anti-republican doctrine ever advocated upon the floor of this House." "I do not say that we cannot give the President, upon certain predicated events, a power by which the embargo may be taken off. Such may be done." But if the President be left to "exercise his judgment" as to what events shall be sufficient, "it is the exercise of a legislative power."[5] Mr. JOSIAH QUINCY, of Massachusetts, and others

[1] Annals of Congress, April 19, 1808, p. 2,230.

[2] Annals of Congress, April 14, 1808, p. 2,144.

[3] *Id.*, Dec. 21, 1808, p. 295; April 19, 1808, p. 2,216.

[4] *Id.*, Dec. 21, 1808, p. 259; Jan. 7, 1809, p. 315.

[5] Annals of Congress, April 13, 1808, pp. 2,124-5; April 18, 1808, p. 2,212.

on both sides, argued that the question was not constitutional, but of expediency merely.[1] Mr. CAMPBELL, of Tennessee, who had charge of the bill, took a middle course, agreeing with the distinction taken by Mr. KEY, but claiming a wider range of discretion for the President.[2] The bill finally passed in a transitional form.[3] The debate, however, called public attention to the danger of the earlier forms and future bills, beginning with that of 1809, conformed to the theory of Mr. KEY. A debate in the Senate the following winter[4] seems to have ended the discussion, except in the case of the brig *Aurora*, until it was revived by Senator EVARTS over the bill of 1890.[5]

The Tonnage Act of March 3, 1815, may be taken as a type of those passed in this intermediate period. It first repeals every "discriminating duty on tonnage between foreign vessels and vessels of the United States." It then provides that the repeal shall "take effect in favor of any foreign nation, whenever the President of the United States *shall be satisfied* that the *discriminating or countervailing* duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished." For the phrase, "shall be satisfied," such expression as "upon satisfactory evidence being given to the President"[6] is often substituted. This does not impart an untrammelled or quasi-legislative act of discretion, but is a term commonly used in relation to judicial proceedings. Illustrations of this will probably occur to all practising lawyers. "Satisfactory evidence" means "sufficient evidence."[7] An applicant for a warrant of attachment in New

[1] Annals of Congress, April 14, 1808, pp. 2,129–30; April 19, 1808, pp. 2,200–2.

[2] *Id.*, April 13, 1808, pp. 2141–4.

[3] "In the event of such peace or suspension of hostilities between the belligerent powers of Europe, or of such changes in their measures affecting neutral commerce as may render that of the United States sufficiently safe, in the judgment of the President of the United States, he is hereby authorized" to suspend the embargo till twenty days after the next meeting of Congress.

[4] Annals of Congress, Dec., 1808; Jan., 1809, pp. 245–319.

[5] Congr. Record, September 8, 1890, p. 9,882.

[6] Act of January 7, 1824. [7] 1 Greenleaf on Evidence, § 2.

York must "make affidavit to the satisfaction of the judge granting the same,"[1] yet the decisions of the judges are reviewable, and in fact are constantly under review, upon appeal. So when one contracts to do a job to the satisfaction of another, the latter's decision must be reasonable; and it is subject to the regulation of a jury, except the job be such as the painting of a portrait or fitting of a suit of clothes, dependent entirely upon personal taste.[2] The question of disadvantage to the United States, within the meaning of the statute in discriminating or countervailing duties, is one that can be judicially solved. It is merely the question whether American vessels and their cargoes are treated as well by the foreign government as are those of its own citizens.[3]

The last of this series of constitutional acts was passed in 1886.[4] The first of the present doubtful series was the Canadian Retaliation Act of March 3, 1887. This law is very objectionable in form,[5] although supposed by its framers to follow the precedent of its predecessors, but is too recent to be valuable as a precedent, and has already been referred to with doubt by the courts.[6] The constitu-

[1] N. Y. Code of Civil Procedure, § 636.

[2] Duplex Safety Boiler Co. *v.* Garden, 101 N. Y., 387.

[3] See also the following acts for various forms: Acts of March 3, 1817; March 1, 1823; January 7, 1824; April 20, 1826; May 24, 1828; May 21, 1830; May 19 and July 13, 1832; March 3, 1845; June 26, 1884. Special Acts of June 30, 1834, and March 2, 1839, relating to Cuba, Porto Rico and Belgium, are more objectionable in form; but the variation seems to have been unnoticed, and they never came up for judicial review.

[4] Act of June 19, 1886.

[5] "Whenever the President of the United States shall be satisfied" that American fishermen in Canadian waters "are or then lately have been denied or abridged in the enjoyment of any rights secured to them by treaty or law, or are or then lately have been unjustly vexed or harassed in the enjoyment of such rights, or subjected to unreasonable restrictions, regulations or requirements in respect of such rights or otherwise unjustly vexed or harassed," he may (with certain discretionary exceptions), by proclamation, close American ports to Canadian craft and forbid the importation of Canadian goods, and "may in his discretion apply such proclamation to any or to all of the foregoing-named subjects," with power to revoke, etc.

[6] Paul *v.* Gloucester Co., 50 N. J. Law, 585, 600.

tional objection was not pressed before Congress in 1887, but was raised at last over the McKinley Bill in 1890. Senator EVARTS, his instinct as a lawyer overcoming his allegiance as a party man, followed in the footsteps of RANDOLPH and KEY, showing that no authority had given the President the right "to enact arrangements of our revenue system upon his deliberation of what are fair and proper equivalents between nations in that regard," to make treaties without the Senate and pass revenue bills without the House. His amendment, however, that the President, instead of acting on his own discretion, should communicate the facts to Congress, was defeated by 34 votes to 30.[1]

The question thus faces us unhampered by authority: Can Congress invest the President with its own full powers in the field of legislation, with no exception in favor of the exports of a country enjoying absolutely free trade? "There is perhaps no class of questions ever presented for judicial consideration which involve more real difficulty or leave greater room for the mind to remain in doubt than those which involve the boundaries between that legislative power which cannot be delegated, and those discretionary powers which the legislature may intrust to other departments or persons in the execution of the laws."[2] In the words of Chief Justice MARSHALL, "The line has not been exactly drawn. . . . The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate inquiry into which a court will not enter unnecessarily.[3]

Analogies favoring a practically boundless range of discretion may be drawn from the powers given to the President in times of war or of rumors of war. At such a time the nation's safety demands that the courts shall not interfere, nor will they do so, whether the war be with a

[1] Congr. Record, Sept. 8-9, 1890, pp. 9,882, 9,906.

[2] Paine, J., *In re* Oliver, 17 Wis., 681.

[3] Chief Justice Marshall, in Wayman *v.* Southard, 10 Wheat., 1.

foreign enemy or with insurrectionary forces.[1] If a request is made of the President to call out the militia, the courts will not review the question whether the call came from the proper source,[2] or whether his acts as Commander-in-Chief were legal. His decision is judicial and final, as "necessarily results from the nature of the power itself; . . . a prompt unhesitating obedience to orders is indispensable."[3] Some acts have gone very far in authorizing him in his discretion after war is begun, to regulate intercourse with hostile territory,[4] or suspend the writ of *habeas corpus*.[5] It may be doubted, however, whether these statutes are really operative at all; whether, as in the case of amnesty,[6] it would not be held that he could do the same things without them. His commission as Commander-in-Chief comes direct from the Constitution, and has the widest scope in the realm of war and over conquered territory, while it is powerless to invade the rights of the citizen, except where necessities of war demand. Thus, by his own authority, he can establish provisional courts,[7] or even organize governments and levy taxes[8] in conquered districts, while away from the field of conflict Congress itself cannot give him the right to suspend the writ of *habeas corpus* as against suspected citizens.[9]

Analogous to war, however, in its sudden dangers and necessarily violent remedies, is the invasion of a contagious disease. It is not possible to guard against such a disaster except by giving to the Executive the fullest and quickest right of action. In this field the Constitution gives no direct commission to the President. His powers and those of the departments, given by acts of Congress, are legis-

[1] U. S. *v.* Lee, 106 U. S., 196, 209; Prize Cases, 2 Black, 635, 668–70, and cases *infra*.

[2] Luther *v.* Borden, 7 How., 1, 43.

[3] Mr. Justice Story, in Martin *v.* Mott, 12 Wheat., 19.

[4] Act of July 13, 1861; Hamilton *v.* Dillin, 21 Wall, 73.

[5] Act of March 3, 1863. [6] U. S. *v.* Klein, 13 Wall, 128.

[7] The Bark *Grapeshot*, 9 Wall, 129.

[8] Cross *v.* Harrison, 16 How., 164; Leitensderfer *v.* Webb, 20 How., 176.

[9] *Ex parte* Milligan, 4 Wall, 1.

lative in their range of discretion as to diseases of men or animals. "In his judgment," he may allow importation of neat-cattle when there is no danger of disease.[1] When "satisfied that there is good reason to believe" that adulterated food, drink or drugs, "to any extent dangerous to the health or welfare of the people of the United States or any of them," are about to be imported, he may proclaim non-importation "for such period of time as he may think necessary."[2] We are not aware that those enactments have yet been brought to the bar to plead their constitutionality. It may, however, be that these powers will be sustained as being valid only so far as they impose upon him the duty to do what it is every man's right to do; that is, to abate a public nuisance.[3]

If, in other departments of legislation, Congress may delegate its legislative discretion as freely as in the department of public health, then Chief Justice MARSHALL was wrong, and JOSIAH QUINCY was right. Congress will consider merely the question of expediency. It should, indeed, exercise its greater latitude of constitutional interpretation to "avoid a measure because it approaches the confines of the Constitution;"[4] but if it fails in caution, there will be no remedy from the courts. The principle of the division between the three branches of the government will, in this respect, be regarded merely as a theory unworkable in practice, a visionary project into which our forefathers were led by their devotion to MONTESQUIEU, the political prophet of the eighteenth century.

But if Chief Justice MARSHALL was right—and there is a line beyond which the Legislature cannot go—still the question is one of expediency; only in extreme cases will the Court as well as Congress have a right of judgment. The question will always arise whether, as in the case of the health laws, it is absolutely necessary to the public welfare that legislative discretion be delegated to executive officers.

[1] Act of March 3, 1866, R. S., § 2,494.
[2] Food Act of August 19, 1890, § 4.
[3] Compare Wood on Nuisances, §§ 66–7.
[4] Chief Justice Marshall, in Cohens *v.* Virginia, 6 Wheat., 264.

Of the general rules, so far as rules will be found which may regulate the decisions upon these questions, it is, of course, impossible to treat. Each statute will be judged by its own provisions and by the circumstances which call it forth; if it is impossible to carry on a safe and effective government without the delegation of power, then the delegation will be sustained.

But if the courts overrule the opinion of Chief Justice MARSHALL, and leave the question of expediency entirely to the legislature, then we are in a condition of theoretical, and, perhaps, soon may be in a condition of practical, danger. The tendency of the present time is toward the extension of executive power. This is fostered by the fact that in the nation, as in many of the States, the varying rates of growth between different portions of the country tend to increase the likelihood of the legislature remaining for long terms of years in the control of a minority party. Not only has the law tended toward a concentration of power in the hands of a single individual, but leaders in both the political parties, within a very short time, have shown a willingness and determination to grasp at authority without respect to the ancient traditions of our commonwealths. It is no idle speculation, therefore, to consider what may be done if Congress has the power to hand over its functions to a political leader of our new school of statesmen. Such speculations may easily be made, but are not practicable within the bounds of this article. A bill, actually introduced a few weeks since[1] in the United States Senate, by Senator TELLER, of Colorado, gives us a single instance. This bill, if enacted, will authorize the President to call together the nations of the world in conference upon the silver question, inviting the so-called "Latin Union" and such other nations as shall please him. If any three of these nations shall then agree with him as to the ratio between the silver and the gold dollar, he will have the authority to issue a proclamation fixing that value with the same conclusiveness as if it had been deliberately

[1] January 11, 1892.

enacted by act of Congress. If he shall conclude it to be advisable for national or party purposes that the ratio of silver to gold should be twelve to one instead of sixteen to one, he need but invite Hayti, Costa Rica and the Transvaal Republic to his conference, and, by securing their adhesion, obtain the power to upset the financial standards of the United States. Many cases could be put in which the ruling party could, for a considerable time, perpetuate its power in a situation like that of the second session of the Fifty-first Congress. President, Senate and House of Representatives then belonged to the same political party, and had it in their power to make the laws. They knew that on the fourth day of March then next ensuing the opposition would obtain control of one branch of Congress, so that for two years party legislation would be impossible. If a Congress has an unlimited right of delegation, a series of acts could easily, and might in the future, perhaps, not improbably, be passed, which should secure to the President the right of legislation during those two years; while the ensuing Congress would simply and easily, by the ordinary parliamentary processes, be stifled in a deadlock.

Thus the power to delegate involves the power to create a limited dictatorship. Such considerations are of grave importance in passing upon a constitutional question. They are not, however, entirely conclusive. "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse."[1]

It is possible, indeed probable, that the question will not be settled upon the present consideration of the McKinley Act. The President has as yet issued no proclamation under his retaliatory powers. The point has been taken in the Federal Supreme Court by importers of wearing apparel, whose claim is that the whole tariff legislation is void on account of the alleged invalidity of this one clause. It may, perhaps, be that the bill would not have passed the Senate if it had not been for this concession to

[1] Mr. Justice Story, in Martin *v.* Mott, 12 Wheat., 19.

the principles of free trade. It was charged by an influential leader and by a section of the followers of the party which advocated the measure that without this clause the bill would not have found a new market for a single bushel of American wheat or a single pound of pork. Whether or not, however, the bill was carried through by this provision will never be known; nor, could it be known, would the court consider such an argument for the purpose of overthrowing the bill's constitutionality. The question whether the reciprocity clause is separable from the rest of the act is one of law, not of history. To decide the question in the affirmative might be judicially to accomplish a fraud upon the Senators and their constituents; but many frauds go unpunished in this world and even (if the instigator duly repent) in the next.

If the President proclaims a tax upon the exports of any foreign country, under the provisions of this measure, its constitutionality will doubtless be disputed, and the question at last come before the Supreme Court for decision. If our arguments are well founded, that court will not be able to sustain the measure without overthrowing all vestiges of the ancient principle that legislative power cannot be delegated, unless the position be taken in analogy to the decisions of the courts in the boundary cases and others which we have cited, that for the credit of the Federal Government in its dealings with foreign countries, no act will be pronounced unconstitutional upon whose constitutionality the President has based diplomatic negotiations. There would be analogy for such a decision in the cases cited. But even in foreign relations the scope allowed him has not been unlimited. When President JOHN ADAMS assumed, in excess of the powers granted him by the Non-intercourse Act of 1799, to stop importations in foreign vessels, Chief Justice MARSHALL, and the Supreme Court, after grave hesitancy, decided that his orders were void and afforded no protection to the naval officers who acted under them.[1]

[1] Little *v.* Barreme, 2 Cranch, 170.