TREASURY DEPARTMENT

INTER OFFICE COMMUNICATION

DATE October 23, 1944

TO Mr. Arnold

FROM Jean Lewis

You and Mr. Brenner suggested that it might be helpful if an examination were made of the legislative history of the Tariff Acts of 1921 and 1930 and of the Reciprocal Trade Agreements Acts of 1934, 1937 and 1940 to determine whether Congress had discussed the question whether the provisions of international agreements negotiated by the President were self-executing or whether legislative action was required to give them effect.

The proponents of the Tariff Acts gave as one of the advantage of the measures that the President had authority to negotiate trade agreements with foreign countries and to reduce the tariff duties within certain prescribed limits. The opponents to the measure did not devote any real objection to the question of the delegation of power, but argued primarily on the merits of a tariff requirement.

Although the discussions of the Reciprocal Trade Agreements Acts were generally in broad terms of the constitutionality, or unconstitutionality, of the delegation of legislative powers to the President, the opposition at times explicitly discussed the usurpation of the prerogatives of the House. The proponents of the measure were not so direct in their discussions, with the exception of the rather detailed summary given by Mr. Cooper during the 1940 debates (see pages 20 to 25 herein).

Attached are various excerpts from the Congressional Records discussing the matters here under consideration. I have included primarily the arguments opposing the delegation of authority so that you would have before you some record of the type of opposition which may be directed against the proposed Joint Resolution.

Jean Lewis

Jean Lewis

A cursory examination of the legislative history of the Tariff Acts of 1921 and 1930 and of the Reciprocal Trade Agreements Act of 1934 and extensions of 1937 and 40 indicate that both Houses of Congress have given consideration to and recognized the authority of and the necessity for the Executive to effect agreements with foreign nations concerning matters which could be considered under the Constitution as being within the sole and exclusive powers of the Congress or requiring confirmation.

Mr. Longworth, urging the passage of the Tariff Act of 1921 said:

> "There is, however, a provision in this bill under which trade agreements may be made which will inure both to our advantage and to the advantage of certain other nations, primarily, I hope, those which are largely indebted to us. I refer to the provision which authorizes the President to reduce the conventional duties in this bill by 20% in the case of foreign nations with whom he may negotiate trade agreements in return for our receiving the benefits of their minimum tariffs on certain of our commodities. I can conceive of nothing which will have a more beneficial effect upon the enlargement and retention of our export trade than the inclusion in this bill of Section 303 of Title 3 which makes of this tariff a bargaining tariff * * * if, * * * not flexibility were allowed in the administration of those duties which might be that some countries would initiate measures of retaliation and in such cases, in my judgment, a maximum on tariff is of little avail. But if other nations know that the President of the United States has it in his power to give them certain special advantages in our market in return for certain special advantages in theirs I have every confidence that instead of discrimination against our exports there will be encouragement of them by many countries and that an era of good feeling in our international commerce will be inaugurated unexampled in our history". [underscoring supplied]
> (Cong. Record Vol. 61 Part 4, pp. 3616-3617).

No opposition was directed against or question raised with respect to the provision under discussion.

In 1934 the Reciprocal Trade Agreements Act was proposed under the terms of which broad discretion was given the Executive in negotiating agreements with foreign Governments and to modify existing duties. Those proposing the measure contended that the delegation of the tariff taxation and treaty-making authority to the Executive under the Act followed many precedents. This position was most emphatically denied by the opposition who summarized its position that the Constitution specifically provided that Congress should be

the exclusive law making body, that it could not delegate such function to the Executive. It was stated:

> "There is a vital distinction between permitting the Executive to put into effect, under certain conditions, rates of duty which Congress has specified in advance, and giving him blanket authority, as provided in the Trade Agreements Act, to determine both the items with respect to which tariff reduction shall be made and the amount of such reductions".

Mr. Treadway on the floor of the House in opposition to the legislation quoted a statement purportedly made by Mr. Hull in May 1932 when he was a member of the Senate as follows:

> "I am alterably opposed to Section 315 of the Tariff Act and demand its speedy repeal. I strongly condemn the proposed course of the Republican Party which contemplates the enlargement and retention of this provision, with such additional authority to the President as would practically vest in him the supreme taxing power of the nation contrary to the plainest and most fundamental provisions of the Constitution - and vest an uncontrolled power larger than had been surrendered by one great coordinate department of government to another since the British House of Commons wrenched the taxing power from an autocratic king".

Mr. Treadway then continued:

> "How are these distinguished gentlemen going to square themselves in supporting or voting for this bill?
>
> "Mr. Chairman, so far as the constitutionality of the bill is concerned, the report of the committee asserts that it 'goes no further than many previous enactments', and in fact 'follows a current of legislation' enacted from the earliest times. With this statement I cannot agree. Anyone carefully analyzing the precedents will at once see that there is a marked and fundamental difference between those prior acts to which reference is made and what is proposed by the bill.
>
> "The Supreme Court has many times held that under the division of governmental powers outlined by the Constitution, it is a breach of that instrument for Congress to delegate its legislative powers to the Executive. The question, then, in every case is whether legislative powers are conferred.

"What does the bill provide? It authorizes the President, whenever he finds that any existing duties or other import restrictions are unduly burdening and restricting the foreign trade of the United States, to enter into reciprocal trade agreements with foreign governments and to proclaim such modifications of existing duties, and so forth, as are required or appropriate to carry out any such agreement entered into by him. It is further provided that no proclamation shall be made increasing or decreasing an existing duty by more than 50 percent or transferring any article between the dutiable and free lists.

"The proponents of the bill allege that this language lays down a yardstick governing the President in carrying out the declared purpose of Congress to expand the export trade of the United States, and that therefore his power is administrative and not legislative. It is said that this supposed rule is similar to that provided in section 336 of the present tariff law, commonly known as 'the flexible tariff provision.' But let us compare the two.

"Under the flexible tariff provisions it is provided that, in order to put into force and effect the policy of Congress set forth in the tariff act, the Tariff Commission, upon request of the President, upon resolution of either or both Houses of Congress, upon its own motion, or upon the request of any interested party when there is good and sufficient reason therefore, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article and shall report its findings to the President. If the Commission finds that the duties expressly fixed by statute do not equal the differences in such costs of production, it is required to specify in its report such increases or decreases in rates as it finds to be necessary for that purpose. Upon receipt of the report of the Commission the President is required to approve the rates of duty specified therein if in his judgment such rates of duty are shown by the investigation of the Commission to be necessary to equalize the differences in the costs of production.

"Thus, in effect, Congress declares in section 336 that the tariff rates shall be x minus y, with x equaling the domestic cost of goods and y the foreign cost. Under these circumstances Congress writes the law when it lays down this legislative rule, and the President merely carries it into execution. Such was the finding of the Supreme Court in the case of J.W. Hampton, Jr. & Co. v. the United States (276 U.S. 394), in which the Court said:

'The same principle that permits Congress to exercise its rate-making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of

rates and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.'

"The above language was quoted by the committee in its report, but it is significant that the report omitted the language which immediately followed. The Court continued:

'If Congress shall lay down by legislative act an intelligible principle to which the person, or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.'

"It becomes necessary, therefore, to inquire whether under the present bill any intelligible principle is laid down to which the President, in fixing tariff rates, is directed to conform. The bill provides that the President shall first find that existing duties are unduly burdening and restricting the foreign trade of the United States. But when does a duty unduly burden foreign trade? Does Congress lay down any formula to govern the President in determining this question? Is it even such a matter as can be determined as a fact, and might not opinions differ as to what constituted an undue burden? In other words, does not the President have complete discretion in determining this matter? And in any event is not his determination of this question merely a condition precedent to the exercise of his real powers under the bill, namely, to enter into reciprocal trade agreements and to modify existing rates to conform to such agreements?

"Now, what rule does Congress lay down in the bill to guide the President in fixing rates? Does it provide that such rates shall be computed according to a definite legislative formula, similar to that laid down in the flexible-tariff provisions? No. It merely authorizes him to proclaim such modifications in existing duties as are required or appropriate to carry out the agreements which he has entered into with foreign countries. We may ask, then, what legislative rule governs the President in his negotiation of those agreements? Again we find no policy laid down. In making concessions to foreign countries, and in selecting the article to be used as a basis for bargaining, the President is governed only by his own discretion. The finding he must make that the existing tariff rates are unduly burdening our foreign trade is only a condition precedent to the exercise of that discretion. Similarly, the provision that he may not change an existing rate by more than 50 percent is only a limit to his discretion.

"It is noteworthy that the advocates of the bill do not rest their argument in favor of its constitutionality wholly upon its alleged analogy to the flexible provisions. They also cite as alleged precedents many previous acts of Congress running back as far as 1794. It so happens that the act of 1794 authorized President Washington to lay an embargo on all ships and vessels in the ports of the United States whenever in his opinion the public safety required. However, that act is no precedent for the pending bill. The distinction between such a delegation of authority and that contained in the bill has been well stated by Judge Ranney, of the Ohio Supreme Court, in a case which has often been cited with approval by the United States Supreme Court (C.W. & Z.R.R. Co. v. Clinton County Commissioners, 1 Ohio State, 88). In that case, in explaining the difference between delegating legislative authority and administrative authority, 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.'

"Applying this holding to the act of 1794, the President's discretion there was only as to the execution of the law, and was not, therefore, a prohibited delegation of legislative authority. But in applying the holding to the present bill, we find that the President's discretion goes both to the making of the law and its execution. This difference the proponents of the bill either ignore or fail to perceive.

"The reciprocity provisions of the McKinley Tariff Act of 1890 are also cited as an alleged precedent for the delegation of authority contained in the present bill. However, there is absolutely no analogy between the two measures. Under the 1890 act, Congress placed sugar, molasses, coffee, tea, and hides upon the free list, but authorized the President, if he found that any country producing and exporting any such articles to the United States imposed unequal or unreasonable duties on the products of this country, to suspend the free entry of such articles and impose thereon certain rates of duty which were fixed by Congress in the act.

"In upholding the constitutionality of this law in the case of Field v. Clark (143 U.S.649), the Supreme Court pointed out that the legislative authority of Congress was exercised when it declared that the free entry of the articles was to be suspended, and certain specified duties imposed upon a certain-named contingency.

'What the President was required to do—

"Said the Court—

'was simply in the 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 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 suspension certain duties should be imposed'.

"Applying this decision to the present bill, it must be evident to anyone that the 1890 act is not to be compared with the delegation of authority which is here proposed. In that act Congress fixed in advance the rates of duty which were to be put into effect upon the happening of a certain contingency. Under the bill, the President himself fixes the rates.

"Similar provisions in the act of 1897 are also cited as a precedent for the bill, but the same distinction may be made as in the case of the act of 1890. The act of 1897 also authorized the President to negotiate reciprocal tariff treaties with foreign countries by granting reductions of duty of not more than 20 percent in return for equivalent concessions by such countries, but it was provided in the act that before becoming operative any such treaties must first have been approved by both the House and Senate. Hence this provision of the act cannot be cited as a precedent for delegating tariff-making authority to the President.

"The Tariff Act of 1909 was also referred to in the committee's report as a precedent for the present bill. Under that act Congress set up two schedules of duties, a maximum and a minimum, and made the maximum schedule of general application. At the same time it gave the President authority to put the minimum schedule in effect with respect to any country which he found did not discriminate against the products of this country. Here, again, the President had no power to fix rates of duty such as he is given under the pending bill.

"So far as the reciprocity provisions of the Tariff Act of 1913 are concerned, they gave the President no legislative authority since any agreements he might have negotiated thereunder were required to be submitted to both the House and Senate for approval before becoming operative.

"Now, as to sections 337 and 338 of the present tariff law, which have been mentioned as delegations of tariff-making authority to the President. What are the facts? Under section 337 the President is authorized, whenever the existence of unfair methods of competition or unfair acts in the importation of articles into the United States shall be established to his satisfaction by the Tariff Commission, to direct that the articles concerned in such unfair methods or acts shall be excluded from entry. To assist the President in making his finding the Tariff Commission is authorized and directed to investigate any alleged unfair methods or acts and to conduct public hearings. Provision is also made for judicial appeal to the United States Court of Customs and Patent Appeals. It will be noted, however, that the President exercises no legislative power under these provisions since he is simply authorized to put into effect the declared legislative policy of Congress that certain articles shall be excluded from entry upon the finding by him that a certain state of facts exists.

"Under section 338 it is provided that the President shall by proclamation specify and declare, 'new or additional' rates of duty, as thereinfater provided, upon foreign articles when he finds as a fact that the country of exportation imposes certain discriminations against the commerce of the United States. It is also provided that the President may exclude foreign articles from entry upon the finding by him of certain other foreign discriminations. In fixing the amounts of the new or additional duties which are provided for, the President is bound by the rule therein laid down by Congress that such duties shall offset the burden or disadvantage to our commerce in the foreign country, or the benefit to a third country. In other words, he does not merely exercise his discretion but applies a definite yardstick laid down by Congress. Under the bill no yardstick for fixing rates is provided.

"So far as the precedents are concerned, then, it may be said that Congress has never granted a President such complete authority and discretion over the tariff as does the present bill. In no case has Congress given the President the authority to enter into executive agreements with foreign relations relative to the tariff without first laying down in advance the precise concessions or retaliations which he might use as a basis for bargaining, or else requiring that any agreement before becoming operative must be ratified by both the House and Senate. In no case has Congress given the President discretionary authority in rate making.

"The present bill does not grant authority to the President merely to put into effect a policy of Congress under a rule of conduct laid down by it in advance. On the contrary, it grants him the authority to make his own rule by which tariff rates are to be fixed and commerce with foreign countries carried on—a rule determined by private agreement with foreign countries, and which may be put into effect at the will of the Executive, transformed into a lawmaker. No European dictator has greater power to affect the future life of his subjects than is thus given to the President of the United States." (Cong. Record Vol. 78 - Part 5 pp. 5270-5272).

In subsequent discussions of the measure Mr. Jenkins of Ohio said:

"In determining whether one should support the measure, he can ask himself two questions?

"First, Is it constitutional?

"Second, Is it right as a policy?

"A negative answer to either of these queries will be sufficient to call for a rejection of the bill. To favor this bill one must answer affirmatively both of these queries.

"Is the bill constitutional? Does it provide for a surrender by Congress of its power 'to lay and collect duties and imports' and 'to regulate commerce with foreign nations', as provided in section 8 of article I of the Constitution?

"As with probably every provision of the Constitution, courts through judicial decisions have run out every possible implication, so the courts have been called upon frequently to interpret the language above referred to. There is no question but that Congress can designate an agency to carry into execution its enactments. It can lay down the rule by which something is to be done, and this rule is thereby a part of the law. When such agencies perform according to that rule they are not enacting legislation but are executing legislation. The Congress is in effect authorizing and instructing such agency to perform in a certain way. But if such agency attempted to use its own discretion in making or changing such rule it would be exceeding its authority, and even if Congress would attempt to give such agency the authority to change such rule its efforts would be null and void, for before such agency can have a right to legislate it must get it from a higher source than Congress. It must receive it from the Constitution, which is the same source from which Congress received its authority to legislate.

"Before the President can legislate he must get the authority from some source. As yet the Constitution has not given him that authority, 'the right to lay duties' and 'to regulate commerce with foreign nations' is exclusively the power of Congress. Congress has no right to pass this authority on to someone else. If the makers of the Constitution wished that to be done, it is safe to assume that they would have said so.

"Witnesses in behalf of the administration---for this is the administration's bill---at the hearings before the Ways and Means Committee set out in great detail their views as to the constitutionality of this bill, but through it all they have failed to draw the distinction between provisions granting the Executive the power to find facts, then apply them according to a prescribed rule, and provisions giving the Executive the power to enter into secret negotiations without any prescribed rule except the rule of his own arbitrary discretion. This bill seeks to give the Executive power which the Congress cannot give away and which the Executive has no right to receive. Of all State court decisions dealing with this subject probably the decision of Judge Ranney, of Ohio, is the most quoted. Judge Ranney is by many considered the John Marshall of the Ohio Supreme Court. In the case of Railroad V. Commissioners (1 Ohio Stat.88) he says:

> '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 law. The first cannot be done; to the latter no valid objection can be made.'

* * * * * * * * *

"I make this positive statement--and I think I have read all the leading decisions on this proposition---that in no decision anywhere has any court ever stated that the Congress of the United States has any right to delegate its power of legislation to any President or anyone else, and that the President of the United States has no right to fix tariff duties.

"That runs through every decision from the first case under Washington. In that case the President was given no power to levy a tax or to levy a duty.

"His powers were strictly powers of administration, and this is the case on down to the great case of Field V. Clark (143 U.S.649) cited by the distinguished gentleman from Texas. Let me read to you what that decision is. Just as Mr. Sumners said, it is difficult to discuss these dry questions, because they involve intricate propositions of law, but here is some language in this decision that

I think anybody can understand. He need not be a lawyer or a Congressman, because it is written out clearly. I quote:

> 'Congress itself prescribed in advance the duties to be levied. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President'.

"The gentleman will note that it provides specifically in that case that nothing was left to the President to do except to follow the law laid down by Congress. Again I quote:

> 'The words "he may deem" in the third section implied that the President would examine the commercial regulations of other countries producing sugar, and when he ascertained the fact that duties and exactions reciprocally unequal and uneven were imposed on the agricultural or other products of the United States by a country exporting sugar, it became his duty to issue a proclamation declaring suspension as to that country.'

"His duty is laid down specifically as to what he must do when somebody else has made certain findings.

"He had no discretion in the premises except with respect to the duration and suspension so ordered.

"That is one thing that I should like to impress upon you. The president had no discretion with respect to anything except the time limit. That related only to the enforcement of a policy established by Congress.

"Again I quote:

> 'As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation in obedience to legislative will, he exercised the functions of making laws.'

"There is no case--and I defy anybody to produce a decision from any court--upholding the constitutionality of any law that gives to the President the right to levy a tax. If he is given the right to levy a tax in this bill, what is he going to do about it? When he sits around the table with Japan, as my friend from Tennessee says, what is he going to do if he is not going to agree on a tax? And I say to you that that is the very thing that he has no right to do".
(Cong. Record Vol. 78 - Part 5 pp. 5444-5445).

Despite the strong opposition on the question of a delegation of power, the measure passed the House.

When the measure came up for consideration in the Senate its defeat was urged on the ground that it would delegate to the President full power to negotiate tariff treaties without the Senate being advised of the provisions of such treaties and without their submission for ratification. Mr. Patterson opposing the measure stated:

"It is difficult to believe that any such proposal would be seriously considered by anyone having due regard for our constitutional form of government; yet this measure has already passed the House of Representatives * * * *".

"This proposed Act would ratify in advance any treaty the President may negotiate under its provisions; it would put into his hands the power of life and death over every industry needing tariff protection; * * * it represents the limit of constitutional surrender by Congress.

"There is no provision in this bill for review or, or appeal from, the President's decision. His action would be final * * *". (Cong. Record Vol. 78 - Part 9 page 9559).

It was also urged by Mr. Walcott:

"Mr. President, Connecticut is not willing to yield the power of economic life and death to theorists or to the executive branch of the Government. It cannot be justified as an emergency measure; it cannot be demanded of the Congress as necessary for the general welfare of the country if we are to rely upon the expressions of Democratic leaders in such matters who have complained that the flexible tariff itself is an invasion of State rights; it is perhaps then merely to appease the vanity of a Chief Executive and his advisers that each plank in their party platform had been dealt with and the promise of action redeemed.

* * * * * *

"The tariff is a revenue measure; it is a tax measure; and, as such, originates in the Other House. From the early days of our existence as an independent nation the House of Representatives has originated tariff proposals and has set forth specifically the amount of tax which must be levied on goods coming into our ports from foreign countries. We may well doubt the constitutionality of the pending measure. It has not been successfully contended here that the President is not being given power which is exclusively reserved by the Constitution to Congress.

"We must not, in our deliberations, compare the pending proposal with the flexible provisions contained in our present tariff act. Under the present act, whenever a change in a duty is contemplated, the Tariff Commission makes thorough and impartial investi-

gations in this country and abroad, and after full public hearings, at which may appear those who are specifically interested, makes recommendations to the President. The bill now under discussion, on the other hand, permits the President, after a hearing which bids fair to amount to little more than an advance warning of doom, to change any duty. Of course, it cannot be conceived that he proposes to revise these duties upward. There is no provision for consideration by Congress, whose prerogative it is under the Constitution to levy taxes. * * * (Cong. Record. Vol. 78 - Part 9 pp. 9567-9568).

and Mr. Steiwer said:

"Mr. President, the opponents of the pending legislation have charged that it constitutes an unconstitutional delegation to the Executive of the powers of Congress. Specifically, the charge is that the bill would delegate to the Executive certain of the treaty-making powers and certain phases of the taxing powers which by the Constitution are lodged in the Congress and which cannot be delegated.

"Against this serious charge the proponents of the measure were almost silent for a period of approximately 2 weeks. In the last 2 or 3 days, however, a number of the proponents of the measure have sought to justify the bill against the criticism that it constitutes an unconstitutional delegation to the Executive of the legislative power. I have in mind particularly the argument made by the Senator from Kentucky (Mr. Logan) and the argument made yesterday by the Senator from Illinois (Mr. Lewis).

"I am grateful to those Senators and to other Senators for presenting the proponents' side of the controversy. They have not only joined issue upon an important constitutional question which is involved but they have also done another thing in that they have avoided the appearance of contemptuous disregard of views expressed thoughtfully and earnestly by the minority. I believe it will be a relief to the country when the Nation knows that the overwhelming Democratic majority is not so contemptuous of the opinion of the minority and of the people of the Nation that they would pass the bill without making due reference to fundamental constitutional objections which have been raised against it.

"What is the argument these Senators present in behalf of the bill? Summarized in a few words, it is that the bill, after all, is not a revenue measure; that in the main it is merely the exercise by the Congress of the powers under the commerce clause of the Constitution to regulate our trade with foreign nations.

"In connection with that argument they offer the contention that the taxing provisions of the bill are purely incidental, and that because they are incidental they come within certain precedents established by the courts, and therefore that the making of revenue rates by the Executive constitutes proper Executive action; that the power delegated to the President to make the rates contemplated under the bill and under the treaties authorized to be made by the bill is a power exercised properly by the Executive; and that there is therefore no sound criticism against the delegation.

"In this behalf, the Senator from Illinois (Mr. Lewis) cited two cases--one, the case of the United States against Norton and, the other, a certain banking case. If time permits, I shall refer to both of them as I proceed. Before I attempt to do that, I want to deal with the bill itself and to show, if I may, in the plainest language which I am capable of using, whether or not the bill falls in the category of commercial regulation and whether or not the revenue features of the bill are purely incidental to the dominant purpose of the legislation.

"The bill before us, Mr. President, does not present a case of the collection of fees incidental to the performance of a service. The bill by its terms, in its form and in substance, is a bill not only to make treaties but also to levy taxes. Let us examine first the form of the bill.

"It is provided in the title that it is 'An act to amend the Tariff Act of 1930.' To know what that means requires only a reference to the Tariff Act of 1930. There we find that act, as stated in its title, is 'an act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes.'

"Not only is the form of the bill a revenue measure, but let me call attention to certain provisions contained in it which I feel justify the assertion just made that the bill is, in its substance, a revenue bill.

"I omit some language as I proceed, in order clearly to state the summarized purpose of the measure.

"It provides, in substance, that--

> 'For the purpose of expanding foreign markets for the products of the United States * * * by regulating the admission of foreign goods into the United States * * * the President * * * is authorized from time to time --

"To do two things. The first is:

> 'To enter into foreign trade agreements.'

"The second is:

> 'To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign-trade agreements as are required or appropriate to carry out any foreign-trade agreement that the President has entered into hereunder.'

"I wonder if Senators catch the full significance of these two great powers. The revenue features are not of the character of fees collected for the performance of a service. They are the two great authorities which are written into this bill to enable the President to perform acts which he cannot perform under existing law; to do things pursuant to this measure which heretofore have never been done by the Chief Executive of our country, and on what terms. In terms, first, of making foreign-trade agreements with foreign powers and, second, in terms of adjusting tariff duties and in making such additional import restrictions as he may think are necessary or appropriate to carry out the trade agreements.

"Analysis of these propositions discloses that the power delegated is far more than the power merely to scale down tariff duties. The President has that power almost without limit, as has been pointed out heretofore in this debate. He may first exercise the power under the flexible provision of the Tariff Act of 1930, and upon the recommendation of the Tariff Commission he may reduce any duty 50 percent. After he shall have done so, he may then enter into a foreign-trade agreement, and under that agreement he may cut the duty upon that article another 50 percent. So that, disregarding the powers that are given to him under subsection (c), found at page 4 of the bill--powers to change the form of a duty and powers to change the classification, both of which will enable him to reduce the duty below the amount it otherwise would have been---there exists plainly in the act of 1930 as amended by this bill the power to make a total reduction of

75 percent; and I say, Mr. President, that the exercise of the further power to change the classification and the form of the duty enables the President to reduce a duty substantially more than 75 percent of the amount provided by the Tariff Act of 1930. Whether the ultimate maximum reduction be in the aggregate 80 percent or 85 percent or 90 percent, the plain fact remains that the great powers conferred upon the President by this bill are in reality powers to reduce the duties to some amount in excess of 75 percent of the existing rates.

"Duty decreases constitute only the beginning. Not only may the President wipe out substantially all the duty in amount but he may also do another thing: In furtherance of the treaty he may establish such additional import restrictions as he may think appropriate.

"To comprehend the possibilities of the bill, let us measure the extent of that power.

"Is it assumed by anyone that the President is to make bilateral agreements between the United States and some other nation of the world, one at a time? If that assumption has been indulged in here, let me say that it is wholly unwarranted.

"The language is that the President may—

> 'Enter into foreign trade agreements with foreign governments.'

"Therefore, he may, if he chooses, enter into one agreement with one government; he may enter into two agreements with two governments; he may enter into one agreement with many governments; he may enter into a number of agreements with governments in combination. There is no restraint upon the President with respect to that matter; and when he exercises the authority conferred upon him by this bill, and enters into the various kinds of agreements that he is permitted to enter into, is it assumed by anyone that the restrictions under which our commerce is to flow thereafter are restrictions that are applicable only to the trade of this Government and of the government with which the President deals? That assumption is not justified by the language, for the President, in making these restrictions, may make such additional restrictions as he thinks appropriate for the purpose of carrying out the foreign-trade treaty. He may enter into an agreement with one nation; he may reduce the duties existing between this country and that nation in furtherance of that agreement; and then, to make the treaty effective, or possibly to induce other nations to enter into a treaty, he may, if he desires, set up trade barriers against other nations of the world."
(Cong. Record Vol. 78 Part 9 pp. 10200 to 10201).

Mr. Austin attempted to give a thorough history of executive agreements not submitted to the Senate for ratification to emphasize his point that executive agreements and trade agreements made by the President under authority previously given in advance by Congress indicated that they were all limited in scope. He stated:

> "Never before in the entire history of the United States has a single agreement been made or authorized which had the effect of giving the President the power to create duty, to create the form of the import duty, to write the classification of the article, to fix the charges and other exactions for imports, and to apply the rates determined upon to articles produced in all foreign countries. Never before in the history of this country was such a thing attempted. Heretofore * * * there has been a rule more definite than the rule contained in the pending bill which would guide the President or the other officer who executed the duties in applying the law * * * that was the sole principle which supported these laws against the attack that they were unconstitutional when they reached the Supreme Court for consideration".
> (Cong. Record Vol.78 Part 9 p. 10212).

He continued:

> "Mr. Cyrus King, who at one time was a Member of the House of Representatives, said,in the course of a debate in that body on the subject of treaty-making (par. 301):
>
> > 'The result of my investigation on this subject is that whenever a treaty or convention does, by any of its provisions, encroach upon any of the enumerated powers vested by the Constitution in the Congress of the United States, or any of the laws by them enacted in execution of those powers, such treaty or convention, after being ratified, must be laid before Congress, and such provisions cannot be carried into effect without an act of Congress. For instance, whenever a treaty affected duties on imposts, enlarging or diminishing them, as the present one did to diminish; whenever a treaty went to regulate commerce with foreign nations, as that expressly did with one, as the power to lay duties and the power to regulate commerce are expressly given to Congress, such provisions of such treaty must receive the sanction of Congress before they can be considered as obligatory and as part of the municipal law of this country. And this construction is strengthened by a part of the general power given to Congress, following the enumerated powers, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof."'

"President Jackson in 1834 had under consideration the French Treaty of 1831. In a message to Congress he said, in effect, that a treaty involving commercial regulations had to be submitted to Congress in order to be carried into full execution.

"I have quoted from these authors at some length in order that we may have clearly in mind the extent of the meaning of the word 'treaty,' and to show, as I think those authorities show, that any agreement with a foreign nation entered into by the Government of the United States, whether in relation to tariff duties or in relation to commercial transactions of any kind, is in all essentials a treaty within the meaning of international law, and is subject to ratification by the Senate.

"Of course, there is a limitation of the powers of the Chief Executive in tariff laws heretofore enacted, including that enacted in 1930; and, as the authorities point out, the power conferred upon the Chief Executive in those laws is purely ministerial. In other words, the law fixes a limitation upon the power which the Executive may exercise. The law goes on to say, 'If, under such and such conditions, the government of the country of A or of B or of C extends some liberal treatment to the nationals of our country, then to the same extent, but within the limits of the rates of duty fixed in the law, the Executive is hereby directed or empowered to grant to those nationals the same treatment that is granted to our nationals.'

"The bill now before us, however, is nothing of that kind. There is no limitation upon the action which may be taken by the Executive in pursuance of its provisions. We find on page 2, paragraph (1), that the President under this bill would be authorized--

> 'To enter into foreign-trade agreements with foreign governments or instrumentalities thereof.'

"What is the meaning of that? There is no limitation there. He is not bound by any tariff duties that may be fixed by law. He may change the existing law as it affects the nationals of other countries. He may grant special privileges to tradesmen in other countries exporting their goods to the United States. It seems to me that is about as broad as the Congress could make a piece of legislation.

"There is no limitation in that provision. It can be read separately, because it is not contingent upon any other part of the bill. It does provide that if the President finds as a fact that existing duties or restrictions imposed upon our country are disadvantageous, and so forth, then what can he do? He can enter into foreign-trade agreements with foreign governments or instrumentalities thereof. Does that mean that he is limited in the scope of the agreements into which he may enter? There is no limitation fixed in the bill. * * *
(Cong. Record Vol. 78 Part 9 pp. 10216 to 10217).

But the measure passed the Senate and was subsequently signed by the President.

In 1937 the Reciprocal Trade Agreements Act came up for extension. Again the opposition to the measure urged that it was an improper delegation of legislative authority and recommended on that ground, as well as on the ground that the Reciprocal Trade Agreements should be subject to ratification, that the measure be defeated. Mr. Lemke, speaking before the House, stated that he opposed the bill in 1934 and opposed the resolution extending the provisions of the bill for an additional 3 year period. He stated that:

"The so-called Reciprocal Trade Agreements Act under the provisions of this Act would never have been entered into if the advice and the consent of the Senators had been required * * * a trade agreement is a treaty and any attempt to deprive the Senate of the power to advise and consent to such an agreement is in violation of the plain English language of the Constitution".
(Cong. Record Vol. 81 Part 1 p. 1017).

Mr. Borah vigorously opposed the measure in the Senate and said:

"So far as I am concerned, I am not preaching any new doctrine. I think the last tariff act which we passed was a clear delegation of legislative power; and we are constantly, step by step, moving along that line. I opposed that delegation of power. I oppose this delegation of power because, in my opinion, it is wholly outside of any authority which may exercise in regard to it.

"But, Mr. President, I do not wish to get away from this particular matter, and I do not wish to detain the Senate more than a moment longer, because I am satisfied the Senate is anxious to vote. My contention is that we must either treat this as an Executive agreement, in which case the Congress has nothing to do with it—it is a matter solely within the power of the President—or we must treat it as a legislative act, in which case we must lay down the rule and fix the standard by which the

President is to be guided, or we must consider it as a treaty, in which case it must come back to the Senate for ratification.

"I do not know of any category under which a trade agreement can fall if it does not fall in one of those three; and I do not know of any authority we have to control the President in making executive agreements. Does anybody know of such authority? Does Congress have to legislate in order that the President may discharge his executive duties with reference to making executive agreements? If we should do so, and we should undertake to limit his power in any respect whatever, he would pay no attention to our action. He has such power as the Constitution gives him to make certain classes of agreements which are executive agreements; but when we make a contract with a nation which binds that nation and binds us, which is a contract between sovereign powers, which is the law of the land so far as the United States is concerned, it measures up in every respect to the dignity of a treaty, and we must either regard it as such or else we must deal with it in a legislative way. I see no excuse from the conclusion that these agreements are legislation or treaties. I feel confident they fall within the legislative domain.

"My reason for insisting that we should deal with this matter in a legislative way is that there can be no doubt but that we are dealing here with a question of revenue. There can be no doubt but that we are dealing here with a question of taxes and of revenue. Senators know, one king lost his head and another lost his crown because of trying to take away from Parliament the power to control the revenues of the country. If there was anything which the fathers understood and which they undertook to do, it was to see that the whole power to deal with revenue, with taxes, was in the Congress of the United States, and exclusively in the Congress. The fathers even went so far as to provide that bills touching this subject must originate in that body which is elected every 2 years, in order to keep the entire subject close to the taxpayers of the United States. I would deal with it upon that basis rather than upon the basis of a matter in the form of a treaty because, in my opinion, in some way Congress, or part of it, ought to be heard upon this question. But it is not the proper and constitutional way. And it is not the way to best protect the interests of the producers of this country."

(Cong. Record Vol. 81 Part 2 pp. 1596 to 1597).

Mr. George continued the opposition and said:

"Mr. President, I rise merely because of one question that has been injected into the discussion, and that is whether the act which is sought to be extended falls within the category of a treaty or an Executive agreement.

"I think that in the case of Field against Clark, to which reference has been made, the distinction between a treaty and an Executive agreement is very well drawn. Indeed, it is not merely drawn in that case, but it is very well restated in that case.

"A treaty can change existing law. In fact, a treaty, when ratified by two-thirds vote of the Senate, becomes a part of the supreme law of the land. A treaty, therefore, can supersede, can override, can change an existing congressional act.

"An Executive agreement cannot change statutory law. In other words, the President, within the field in which he is authorized to negotiate an Executive agreement with a foreign government is bound by existing law. He cannot override it; he cannot supersede it; he cannot contradict it by anything he puts into his Executive agreement.

"That, as I understand, is the fundamental difference between an Executive agreement, in the field in which the Executive may act for the General Government, and a treaty, which, of course, must be ratified by the Senate."
(Cong. Record Vol. 81 Part 2 p. 1597).

Despite the opposition the measure passed both Houses.

Again in 1940 the Trade Agreements Act was extended. The opponents of the measure summarized the issue of the constitutionality of the Act and Mr. Cooper said:

"There is neither the time nor is there any necessity for my attempting to review in detail the constitutional question. There is not the necessity for such a review because I am confident that all those who are willing to be convinced have been entirely satisfied that there is in fact no real question concerning the constitutionality of the trade-agreements act. And as for the shortness of the time available to me, I doubt if that really makes very much difference because I am sure that even if I had 10 days to speak on this subject rather than 10 minutes, I could not make any progress with those Members who would vote against this act even if it had been written by the Supreme Court itself.

"For the benefit of all members, however, I want to say that the constitutional question has been given the most attentive consideration by the Committee on Ways and Means each time the act has been before us. I speak from personal knowledge when I assure you that this question received our best attention. Our concern in this question is necessarily deeper than that of persons who, while voicing constitutional objections, are in fact opposed to the legislation regardless of its constitutionality. Moreover, recognizing that this is a matter which involves our contractual obligations with many other nations as well as our domestic law, we have felt an especial concern that there should be no reasonable doubt on this question. I do not claim to possess the same superhuman qualities as an infallible prophet on constitutional questions, as some Members have done from time to time--frequently, however, they subsequently found themselves in disagreement with the Supreme Court on the same matter. I do say emphatically, however, that the majority members of the committee were entirely convinced that this act stands squarely within the bounds of the Constitution as laid down both by court decisions and the long-established and unquestioned practices of the Congress from the earliest days of the Nation.

"Only two constitutional issues have been raised: First, that the act involves an unconstitutional delegation of legislative power, and secondly, that trade agreements are 'treaties' which must be ratified by two-thirds of the Senate. I think it is very important for us in considering the precedents to keep in mind that these two issues are separate and distinct. A great deal of confusion has been caused, whether intentionally or not I am not sure, by scrambling up the issues and the precedents. On the one hand, some minority members at the hearings would attempt to distinguish direct decisions and precedents on the delegation issue by stating that those cases did not involve international agreements, while other members who asserted that there were no precedents for not submitting trade agreements to the Senate as 'treaties' attempted to avoid the square application of precedents such as the reciprocity agreements made under section 3 of the Dingley Tariff Act of 1897 without Senate ratification. I repeat, they tried to avoid and distinguish such square Republican precedents on the treaty issue by offering the utterly irrelevant distinction that section 3 of the Dingley Act specified the items and rates to be covered in the agreements.

"The question of specifying particular items and rates may have a bearing on the delegation issue, but it has absolutely no bearing on the treaty issue. And, converseley, when we are

talking about the delegation issue, it is worse than ridiculous to attempt to distinguish pertinent cases by saying that they did not involve international agreements. I hope I have made this fundamental point clear. It is really a very simple one, but it is also an essential one if we are to understand the force of the authorities and precedents which support the Trade Agreements Act on these two separate constitutional issues.

"I cannot attempt to review the many decisions and precedents which were carefully considered in 1934 when this act was originally enacted, nor shall I attempt to go into the details of the recent decisions of the Supreme Court which have reaffirmed the soundness of the conclusion which we reached in 1934. These authorities are all to be found in the records of the three hearings which have been held by the Committee on Ways and Means and the two hearings previously held by the Senate Finance Committee on this act. I shall simply state for the benefit of those Members who have not had an opportunity to make an exhaustive examination of this matter for themselves that on the delegation of power issue there are precedents going back to 1794 which show that throughout the entire course of the Nation's history Congress has delegated to the President broad discretionary powers in the regulation of foreign commerce. It is not necessary for Members to take my word for this. Permit me to read to you what the Supreme Court of the United States said in 1936 in the case of United States v. Curtiss-Wright Export Corporation (229 U.S. 304, 324):

> 'Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.'

"So far as I have been able to discover--and I am sure that I am right on this--there has never been a single successful challenge in our courts to any of these acts. On the contrary, there are numerous decisions by the Supreme Court squarely rejecting such challenges and upholding the power of Congress to invoke the assistance of the Executive in dealing with these peculiarly difficult and delicate problems which touch and sometimes go to the very heart of our foreign relations. * * * .

"I shall simply refer to three of the leading cases which I believe, taken together, make it clear beyond any reasonable doubt that there is no improper delegation of legislative power in the Trade Agreements Act. Field v. Clark (143 U.S. 649(1892)) involved an unsuccessful attack on the McKinley Tariff Act of 1890 on both the delegation-of-power and treaty issues; Hampton v. United States (276 U.S. 394 (1928)) established the constitutionality of the so-called flexible-tariff provisions of the Tariff Act of 1922, whereby Congress delegated to the President the authority to modify tariff rates within a 50-percent range; and United States v. Curtiss-Wright Export Corporation (299 U.S. 304 (1936)), where the Supreme Court in unequivocal terms upheld the power of Congress to delegate broad discretion to the Executive in matters which concern the regulation of our foreign commerce.

"It ought not to be necessary, but perhaps it is desirable, to say again that the Trade Agreements Act is one of the most important measures which this Congress has ever enacted in carrying out its plenary power to regulate our foreign commerce. The situation in the world today and for the past 10 years has been such that our responsibility to regulate effectively our foreign commerce called for setting up a procedure which could protect and foster our overseas trade. The Congress would simply be helpless to provide effective regulation of our foreign commerce under these circumstances if it could not establish some procedure which would enable us to deal with and control foreign tariffs and trade barriers as well as our own.

"In the Hampton case the Supreme Court upheld the power of Congress to invoke the assistance of the Executive by delegating to him power to change our tariff rates within a 50-percent limit pursuant to the principle of equalizing costs of production in foreign commerce. During recent years the situation of world trade was such that it was imperative for Congress to administer quickly and effectively to that other equally important aspect of commerce—namely, distribution. Chief Justice Taft recognized the realities involved when he said in the Hampton case that—I quote:

> 'In determining what it [the Congress] may do in seeking assistance from another branch [the executive], the extent and character of that assistance must be fixed according to common sense and the inherent necessities of governmental coordination.'

"The realistic rule laid down in the Hampton case for deciding these questions was stated as follows—I quote:

> 'If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.'

* * * "I submit that the principle on which the Trade Agreements Act rests, of bargaining open foreign channels of distribution and markets in aid of American producers, is an 'intelligible principle' which accords with 'common sense and the inherent necessities of the governmental coordination,' to use the authoritative words of Chief Justice Taft. I cannot attempt to discuss in detail the underlying limitations and policies prescribed in this act, but I can refer any Members who are interested to a very full exposition of this aspect in an article by Francis B. Sayre, in volume 39 of the Columbia Law Review, entitled 'The Constitutionality of the Trade Agreements Act.' So much for the delegation-of-power issue.

"On the second issue--namely, whether the trade agreements must be submitted for ratification by two-thirds of the Senate--the precedents and authorities are equally conclusive. Again I can say that the precedents go back to the early days of the Republic. The various international agreements concluded by this Government without Senate ratification number at least 1,000. These agreements dealt with a variety of matters, and many of them, like the present trade agreements, were concluded pursuant to congressional authorization.

"Since 1792 the Congress has exercised its important powers in connection with the regulation of our foreign mails by delegating certain powers to the executive and invoking his assistance in carrying out congressional policy through the negotiation of executive agreements with other nations. In 1890 Chief Justice Taft, then Solicitor General, upheld the power of Congress to authorize the Postmaster General to adhere to international postal conventions without Senate ratification. A similar statute stands on our books today.

"As I mentioned earlier in my remarks, the reciprocal agreements negotiated pursuant to section 3 of the Dingley Tariff Act of 1897 constitute inescapable precedents on the treaty issue. Some 15 of these agreements were concluded, as expressly authorized by Congress, without Senate ratification. As I have said before, the argument that these agreements were different because the act prescribed the terms and rates to be dealt with in the agreements, is of absolutely no relevance on the treaty issue. These matters go only to the delegation issue, and in view of the ample authorities on this issue, there is no need to, and I do not, rely on these agreements as precedents on the delegation issue. I might simply add for the benefit of those who might otherwise overlook the fact, that the Dingley Act was a Republican measure.

"Finally, as to the treaty issue it is highly significant that of all the executive agreements which have been concluded, not one has ever been stricken down by the courts as being a violation of the treaty-making power. On the contrary, the Supreme Court itself on several occasions has expressly recognized the standing of such agreements concluded without Senate ratification. In the Curtiss-Wright decision, cited previously, the Supreme Court referred to 'treaties, international understandings, and compacts,' declaring that 'the power to make such international agreements as do not constitute treaties in the constitutional sense,' although not 'expressly affirmed by the Constitution, nevertheless exist (s) as inherently inseparable from the conception of nationality.' And in 1937, in United States v. Belmont (301 U.S. 324, 330), the Supreme Court again spoke unmistakably to the point when it stated in respect to certain Executive agreements concluded by this Government:

> 'The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution (art. II, sec. 2), require the advice and consent of the Senate.'

"I have deemed it desirable to refer to the Curtiss-Wright and the Belmont decisions because both are highly pertinent pronouncements of the Supreme Court which had not been decided when the Trade Agreements Act was enacted in 1934. Both of these decisions strongly fortify the conclusion which we reached in 1934 on the basis of precedents and authorities then available; the Curtiss-Wright decision passes directly on the delegation of power issue and speaks directly to the treaty-making issue, while the Belmont case bears directly on the latter issue.

"Three times now--first in 1934, then in 1937, and again in 1940--Congress has given these matters the conscientious consideration which any constitutional question requires. Both in 1937 and in 1940 the latest pertinent decisions of the Supreme Court have confirmed the soundness of our 1934 conclusion. I submit the time has come when we must accept the views of that Court as foreclosing the constitutional question as a subject for further debate. Let us, therefore, direct our attention, as the lawyers say, to the merits. I think we will find the record equally conclusive on that score." (Cong. Record - Feb. 20, 1940 pp.2634-36).

The opponents to the measure thereafter directed their energies to defeating the measure on the merits. Again the measure passed.