Mr. O'Connell

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Mr. Brenner

There are two problems in connection with the draft legislation approving the Bretton Woods Agreements that have not yet been solved. The first relates to the method of obtaining Congressional approval of an executive agreement, and the second relates to financing the United States subscription to the Fund and the Bank.

I.

The first section of the Treasury Department draft authorizes the President to sign the Articles of Agreements of the Fund and the Bank. The State Department has proposed that the first section merely contain a statement that it is the policy of the United States to accept membership in the Fund and the Bank. The State Department's view would require the inclusion of additional provisions granting to the Fund and the Bank the status, immunities and privileges called for by the Articles of Agreement. It would also require the addition of a section making unenforceable exchange contracts entered into in violation of the exchange controls of other member countries. Another State Department proposal, which is presently under consideration by Mr. Acheson, would provide that Congress accept membership in the Fund and Bank and grant authority to the President to give effect to such acceptance. In legal effect this approach would be the same as that proposed by the Treasury Department and would appear to be entirely acceptable.

It is desirable to avoid, so far as possible, a lengthy bill containing matters which are related to committees other than the Banking and Currency Committees. A short bill will be more easily understood and if its provisions are closely related to the work of the Banking and Currency Committees there will be less friction in the Congressional machinery. Moreover, the Treasury approach makes it clear on the face of the legislation that Congress is approving the Articles of Agreement which were drafted at Bretton Woods. This is not clear from the State Department draft since it only declares a policy and does not specifically approve the Articles of Agreement.

The basis of the difficulties which may arise in connection with this matter is the question of whether international contracts such as those prepared at Bretton Woods should be submitted to the

Senate as treaties or executed by the President as executive agreements. Since the State and Treasury Departments agree that the Fund and Bank Agreements should be executed by the President as executive agreements, the differences as to approach should be resolved in a manner best calculated to prevent other issues than the question of treaties v. executive agreements from arising. In this connection it should be noted that the anxiety of the State Department is caused by the recent defeat of the St. Lawrence Seaway project. In that case a treaty was executed by the President and submitted to the Senate for ratification. The Senate failed to ratify, the word "treaty" was struck out wherever it appeared in the document, the word "agreement" was substituted therefor, and the recent Rivers and Harbors Appropriation Bill contained a provision authorizing the President to sign the document as an executive agreement. This provision in the Rivers and Harbors Bill was defeated. At the time the Senate was considering the authorization, the Legal Advisor of the State Department appeared before a Senate committee in defense of the provision. Apparently his efforts confused the Senators instead of clarifying their thinking. In addition, when Senator Ferguson of Michigan discussed the matter with Mr. Acheson the latter was apparently unaware of the effect of United States v. Pink and United States v. Belmont on the status of the executive agreement as the law of the land.

Accordingly, it seems to me that there are really two questions involved in the examination of any approach to the problem of obtaining Congressional approval of an executive agreement:

1. There must be a valid reason why Congressional approval is required or desired by the Administration; and

2. There must be a clear explanation of the effect which the legislation will have when enacted.

If there is a sound reason for presenting the matter to Congress for approval, and the legal effect of Congressional action is made clear, whatever debate follows will be restricted to the question of whether a treaty or executive agreement is the appropriate procedure. Obviously, this is not a problem of the particular words in which the legislation is cast. It is really a problem of making adequate preparations to meet the questions which will be raised by Congress no matter how the bill is framed.

Both questions can be satisfactorily answered if the Treasury Department approach is used. It is doubtful whether the second will be as easy to answer in the event that the State Department proposal is adopted.

In either case the reason for seeking Congressional approval of the Bretton Woods Agreements is two-fold. The Secretary of the Treasury has repeatedly told the Congress that no agreement on these subjects would

be entered into without their approval. In addition, the President alone cannot carry out the obligations which the United States would assume under the Agreements. In particular, he cannot provide the Fund and the Bank with the subscriptions of the United States.

There is a simple answer to the question as to the legal effect of an executive agreement executed in accordance with an authorization of Congress. Under the Pink and Belmont cases a properly executed executive agreement has the same force of law as a properly executed treaty. Should Congress approve the President's signing a particular document as an executive agreement, which document's terms are known to Congress at the time it acts, there could certainly be no question as to the validity of its execution by the President. Accordingly, under the Supreme Court's ruling in the Pink and Belmont cases, the Fund and Bank Agreements would have the force of law if approved by Congress as proposed by the Treasury. On the other hand, the State Department draft would not make the Articles of Agreement the law of the United States. This is admitted by the fact that their draft includes provisions concerned with immunities and privileges, etc. What the legal effect of the Agreements would be is difficult to determine.

I believe, therefore, that the difficulties encountered in connection with the St. Lawrence Seaway will not be encountered when the Bretton Woods proposals are before Congress, provided that Administration spokesmen at the hearings are completely prepared to answer the questions which may be raised by Congress. If this is so, the Treasury Department approach should be adopted for the purpose of presenting to Congress the simplest and briefest bill possible.

II.

Apparently no agreement has been reached within the Treasury as to the method of financing United States subscriptions to the Fund and the Bank. It had been proposed that the Joint resolution contain provisions which would make it unnecessary to take the matter up with Congress a second time in order to obtain funds for the subscriptions. The Congressional members of the United States Delegation were inclined to doubt the wisdom of this procedure and efforts have been made to follow their suggestion that a separate appropriation be obtained.

It is intended that $1,800,000,000 presently in the Stabilization fund be used to meet a part of the subscription. It is also intended that all of the money which may ultimately be required for payment to the Bank be made available at once in order that the borrowing and guaranteeing operations of the Bank should not be interfered with by the necessity of going back to Congress for appropriations in the event that the Bank makes calls in future years to meet losses. A third intention is that wherever possible both the Fund and the Bank should hold their dollar assets in the form of non-interest bearing demand notes of the United States rather than in the form of bank balances.

All three of these objectives would be attained by the original proposal. The allocation of $1,800,000,000 out of the stabilization fund would not be an appropriation since that Fund has already been appropriated. The stabilization fund is a matter which is always considered by the Banking and Currency Committees and the allocation of a part of it for use in meeting the subscriptions of the United States would be a proper subject for that Committee. Calls which might be made by the Bank in future years to meet losses would be handled by paying to the Bank non-interest bearing demand notes instead of cash. Moreover, a part of the United States subscription to the Fund would be paid in non-interest bearing demand notes rather than cash and it would not be necessary to pay the whole amount to the Fund in cash and then borrow a portion of it back against non-interest bearing demand notes.

There are two objections to the original proposal:

1. It does not require a separate appropriation; and

2. It authorizes the issue of securities without benefit of an appropriation.

It is my understanding that the first objection is political in nature and the second is a matter of policy within the Treasury Department. I do not believe that there is any legal problem involved in either objection.

A full consideration of the factors involved leads me to believe that this approach is the best from all points of view. Legislatively it is simpler than any other procedure. From a budgetary point of view, it seems to be sound. The subscriptions to the Fund and the Bank are not immediate expenditures in the normal sense. Not more than 20% of the subscription to the Bank will be called for a number of years. If the Bank is successful the other 80% will never be called. In the case of the Fund, only the amount necessary for a working balance will be held in the form of a bank deposit and for some time to come the Fund will hold a considerable part of the United States subscription in the form of non-interest bearing demand notes. In view of the peculiar type of investment involved in subscribing to the Fund and the Bank, I do not believe that a precedent is set for the actual expenditure of funds for governmental purposes without appropriations. This is a unique case, and accordingly, the use of an unusual financial procedure does not appear to involve any fundamental change in more normal financing methods of the Government.

On the other hand, there will be difficulties in connection with obtaining an appropriation, if that is necessary as a result of the view expressed by the Congressional members of the Delegation. We cannot appropriate the $1,800,000,000 out of the Stabilization Fund since that has already been appropriated and the Appropriation Committees would not have jurisdiction. Accordingly, we will have to make an appropriation

for the amounts that would otherwise be handled through the issue of non-interest bearing demand notes. Since it is more desirable to issue these notes directly to the institutions than to pay the subscriptions in cash and then borrow back the cash by issuing the notes, the logical way to make an appropriation is to set up a Fund for the redemption of the notes. In view of the manner in which the Second Liberty Bond Act operates, however, it is unnecessary to set up such a revolving fund. Thus, the appropriation would have to be a cash appropriation to meet the subscription of the United States. This means appropriating approximately $4,125,000,000 at a time when no appropriation is necessary. It seems to me to be illogical and the fact that the money would not be spent would not make it any easire to get the Appropriation Committees to report favorably on such a bill. The net result might be that they would withhold the 80% portion of the subscription to the Bank that is a reserve to meet losses. This would have an adverse effect on the ability of the Bank to carry out its lending and guaranteeing operations at low interest rates.

If it is possible to do so, I believe that the financing problem should be reexamined in the Treasury and then discussed again with the Congressional members of the United States Delegation.

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