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THE SECRETARY OF THE TREASURY
WASHINGTON

JAN 1 1968

MEMORANDUM FOR THE PRESIDENT

Treasury's General Counsel and members of his legal staff have, at the request of members of the White House staff, prepared a contingency draft of an executive order and regulations under the authority of the Trading With the Enemy Act to limit expenditures abroad by Americans other than for transportation. I understand, of course, the considerations which have impelled the preparation of the draft as a contingency planning measure, but I would be remiss if I did not alert you to the serious reasons that I believe militate against the use of this technique to obtain the reduction in foreign travel expenditures proposed in your Message of January 1, 1968.

While other reasons are also very important, far and away the principal one is that Executive action of this type would be widely regarded as the second step leading inevitably to the ultimate imposition of comprehensive foreign exchange controls. All the expertise I can gather indicates that there would be an immediate reaction of serious uncertainty in international financial markets, a strong possibility of rapid movements of capital from the United States, and renewed speculation in the London gold market. This would undo the very salutary results in calming things down which were obtained following the announcement of your program on January 1. You will recall that we went to great lengths when we issued the controls over direct investments abroad to avoid the public interpretation that this action implied the beginning of exchange controls. For this reason, the administration of the program was placed in the Commerce Department rather than the Treasury.

The Direct Investment Controls are controls over capital transfers which are generally accepted to be something different from exchange controls. Capital controls are not prohibited by the International Monetary Fund Agreement. Direct controls over expenditures by travelers abroad, on the other hand, are controls over current transactions which are generally considered to be exchange controls. Thus, there can be no question but that Executive action to institute such controls would be characterized widely as a limited form of exchange control, and there would be widespread rumors and speculation that such controls might well be extended to cover other forms of current transactions.

Moreover, under the IMF Agreement, consultation with and approval of the International Monetary Fund must be obtained before instituting

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controls over current transactions. While such approval could probably be obtained, it could involve considerable controversy and speculation in the press which would be greatly unsettling to international monetary stability. These Controls would also raise a serious legal problem of whether we are freely buying and selling gold within the meaning of the Fund Articles. Public discussion of this question would also be unsettling to financial markets. In addition, under the OECD Code on Invisibles to which we have adhered, we would have an obligation to consult and justify our action to the members of that Organization, which again would generate public debate and speculation in the foreign press as well as our own.

Everywhere that Katzenbach, Deming, and Roth went in Europe, there were questions about the manner in which the travel limitations were going to be imposed. Assurances were given in every case that this would be done through some form of tax measure and not by way of exchange control devices. While many of the foreign representatives had reservations about any travel limitations, it was the unanimous opinion that controls over payments would have repercussions far outweighing any gains which might be anticipated and that the device of taxation was much to be preferred. In the light of these assurances, the use of the exchange control technique for limiting foreign travel would be much more likely than a tax program to engender foreign retaliation. Most foreign countries have in existence an exchange control system which could be activated by executive decision to limit travel to the United States.

The foregoing are the principal reasons for my opposition to the use of this technique; however, there are other important reasons for choosing other techniques.

First, the Trading With the Enemy Act contains serious deficiencies from the standpoint of enforcing a program of this kind. The only weapon generally available for use against violators would be criminal prosecution with the maximum penalties which a court might assess of 10 years imprisonment or $10,000 fine, or both. These sanctions are not appropriate for punishing the numerous minor infractions that would occur. I understand that the Attorney General has some preliminary doubts about the legality of instituting controls over travel expenditures by Executive action under the Trading With the Enemy Act. While my counsel do not share these doubts, there can be no question that certain of the tax alternatives which we have under consideration appear less susceptible to legal challenge on grounds of limiting the Constitutional right of American citizens to travel. There is the incidental point that whatever legal jeopardy there may be in using this course, there is always the risk that the Congress might take steps to repeal or narrow the scope of the Trading With the Enemy Act provision, and there is a serious question of whether we want to take a chance of losing the availability of this the most comprehensive existing authority which the President has in the financial area available for immediate use to counteract threats to our national security.

Finally, there is the point that in your Message of January 1, you indicated that the Administration would seek legislation to support your request to the American people that they defer unnecessary travel outside the western hemisphere. Should you now take the route of Executive action rather than seeking legislation, this might be publicly interpreted as a conclusion by you that enactment of the legislation could not be obtained and that you are now doing by Executive action what the Congress would not be prepared to do by legislative action.

The Interagency Task Force under the chairmanship of Under Secretary Barr has been working under forced draft to develop alternative tax and other measures to accomplish the objective of reducing the travel deficit. These alternatives will be in your hands within a very few days, and we will be discussing them with Chairman Mills and other key Members. I am reasonably confident that these measures will accomplish the objective, that there is a very good possibility that we can obtain the enactment of a meaningful package of legislation to reduce the travel deficit by $500 million in a way which will not involve the serious risks which I have outlined above.

Henry H. Fowler

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