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Authority EG 12958  
By AR NARA Date 10/27

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THE WHITE HOUSE  
WASHINGTON

ACTION

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July 22, 1971

MEMORANDUM FOR: THE PRESIDENT  
FROM: HENRY A. KISSINGER *HK*  
SUBJECT: NSSM 125 - U.S. Oceans Policy

Introduction

The review of oceans policy in NSSM 125 has been completed and was discussed at a July 12 meeting of the Senior Review Group chaired by Under Secretary of State Irwin.

This memorandum describes the background which gave rise to a need for the study, the issues and options for your consideration, the various agency views, and my recommended course of action.

Background

Internationally we face a situation in which our interest in freedom of navigation is threatened by a trend toward extensive unilateral territorial sea claims. We have not found it practicable to resist these claims simply by military defense of our customary rights. We hope, instead, to hold the territorial sea line through the achievement of an international agreement on the oceans, hopefully to be nailed down at a Law of the Sea Conference in 1973.

As a result of NSDM 62 and your statement of May 23, 1970, we have proposed the following law of the sea arrangements:

- Territorial Sea - a maximum of 12 miles.
- Straits - a new right of free transit through international straits to compensate for the fact that the 12-mile territorial sea would bring many key straits (including Gibraltar) under national jurisdiction.

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PA/HO Department of State  
E.O. 12958, as amended  
July 12, 2005

DECLASSIFIED

Authority EG 12958

By [signature] NARA Date 10/27

TOP SECRET

- Seabeds/Mineral Resources = dividing the ocean floor into three zones:
  1. National jurisdiction over the seabeds out to the 200-meter depth line;
  2. Beyond this point to the edge of the continental margin the coastal state would, under agreed rules, act as Trustee for the international community;
  3. Beyond the continental margin, full control by an international regime.
- Fisheries - some accommodation of the interests of coastal states in fisheries beyond the territorial sea by giving them carefully defined preferential rights. (We ourselves already claim a 12-mile coastal zone for fisheries. We do not now recognize more extensive claims.)
- Pollution - international agreement on provisions to prevent pollution caused by seabed exploitation.
- Scientific Research - maximum freedom for scientific research.

The proposal on territorial seas and international straits is of paramount importance to U.S. security. We have little or no give in regard thereto. Indeed, it was primarily to secure those interests that we got into the whole law of the sea operation. We do, however, have room for maneuver on seabeds, fisheries, pollution, and research issues.

The underlying negotiating problem is that very few countries care much about "freedom of navigation", but very many want to maximize their claim to fisheries and seabeds resources.

Coastal states are the crucial group for a successful conference. They are numerous, and they share a clear interest in as much control as they can get over the mineral and fish resources off their coasts. If they believe that this interest can be furthered only by a wide territorial sea, they will -- in large numbers -- support that principle. But if the interest in control over resources is satisfied without a wide territorial sea, then most of the coastal states may see no need to extend their territorial jurisdiction beyond 12 miles, and may be willing to accommodate us on that aspect. This is the key to gaining our major objective -- maximum naval and air mobility.

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PA/HO Department of State  
E.O. 12958, as amended  
July 12, 2005

DECLASSIFIED

Authority EG 12958

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TOP SECRET

In addition to the general situation described above, you are already aware of the strain in our bilateral relations, most notably with Brazil, Ecuador, Peru, and Chile resulting from their unilateral claims.

Issues and Options

Against this background, the principal issue for your consideration at this time is the stance the U.S. should take at the preparatory Law of the Sea Conference at Geneva beginning July 19.

There are essentially four options:

Option 1: Stand Fast: Hold firm at this summer's session, indicating we will make no important changes in our position unless other countries indicate a willingness to support positions that are important to us.

The advantage of this option lies in what it would avoid. We would not create the impression of willingness to make concession after concession, so that other countries could wait to see what we had to offer next.

The disadvantage of this option is that it would jeopardize the 1973 Law of the Sea Conference and would risk encouraging further unilateral claims by failing to convince coastal developing countries that they can achieve protection of their resource interests through multilateral negotiation. In addition, we need to take at the Geneva L.O.S. meeting a fisheries position that gives us a basis for the bilateral negotiations with Brazil to which we are committed this fall.

Option 2: A Seabeds Initiative: Authorize our delegation to propose or inspire a proposal fixing the outer limit of the seabed trusteeship zone at 200 miles, instead of determining that limit by a geological formula as in our draft treaty tabled in accordance with your May 23, 1970 statement.

The advantage of this option is that it would be a clear signal of our willingness to accommodate other interests. It is simpler and therefore easier to negotiate. It would demonstrate to developing countries that we are not engaged in a symbolic battle against a 200-mile limit per se, but concerned instead about rights within that limit. Another advantage is that this formula would treat all coastal states alike and end the discrimination against those with narrow continental shelves.

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DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
July 12, 2005

DECLASSIFIED

Authority EG 12958

By AR NARA Date 10/2/02

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The disadvantage of this option would be its focus on the 200-mile concept and the encouragement it might offer to states wishing the 200-mile concept applied to other forms of ocean activity, be it fishing, pollution control, scientific research, and perhaps eventually navigation itself.

Option 3: A Fisheries Initiative: Authorize our delegation to table at the Conference a proposal that recognizes coastal states preferences over offshore fisheries resources, limited by what the coastal state can catch and by the rights of distant-water fisheries interests. This proposal will not satisfy coastal states, since it retains absolute protection for the traditional operations of distant-water states. To further accommodate coastal states, our delegation would at the same time invite other nations to submit reasonable fisheries proposals formulated in such a way as to avoid encroachment by coastal states on freedom of navigation beyond a 12-mile territorial sea. In conjunction with this we would state our willingness to accept a fisheries solution containing the following elements:

- A trusteeship arrangement giving the coastal state substantial controls over fisheries, subject to certain limitations protecting international interests.
- Modification of the principle of absolute protection for existing distant-water fisheries, subject to reasonable licensing fees. Our delegation would also be authorized to explore coastal state preferences for widely migratory species like tuna, if some other delegation raises the issue. However, our delegation would take no affirmative position without referring the matter to Washington. (The NSSM Study indicates that we would attempt to exclude these fish from coastal state control and the SRG did not address the point. However, facing this problem is essential to any accommodation of our bilateral fisheries disputes with the West Coast South American states.)

The advantage of this option is that it (1) applies to fisheries the same concept which we have already decided best protects our law of the sea interests with respect to seabeds; (2) it addresses the resource problem of most immediate concern to developing coastal states and thus may have the best chance of getting multilateral negotiations for a law of the sea headed in the direction we want; and (3) provides us with a multilateral position from which we may reasonably hope to negotiate a modus vivendi with Brazil and other countries with which we have current fisheries disputes.

~~TOP SECRET~~

4

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
July 12, 2005

DECLASSIFIED

Authority EG 12958By AR NARA Date 10/27

The disadvantage of this option is that it would be resisted by states with important distant water fishing interests such as the USSR, Japan, and the U.K., whose support is important to us in other aspects of the law of the sea.

Option 4: A Seabed and Fisheries Initiative: Combine options 2 and 3 above, authorizing our delegation to pursue either or both with its own discretion as to timing.

The advantage of this option is that it would beyond any reasonable doubt demonstrate our willingness to accommodate other coastal states resources interest.

The disadvantage of this option is tactical. It is probably too much too soon at this stage of the negotiations. It might, therefore, destroy our chances to persuade other nations to accommodate our security interests as a quid pro quo for meeting their interest in offshore-resources.

#### The Agency Views

All agencies agree that there must be no change in our position regarding the breadth of the territorial sea and free transit through international straits.

Commerce favors a fisheries initiative but no seabeds initiative.

Transportation could live with any consensus that is reached but is reluctant to see us associate the 200-mile figure with any regime at this time.

State and Interior favor granting our delegation authority to indicate a willingness to move on options 2 and 3 if, after an initial period, our standfast position is not producing serious negotiations. With respect to seabeds, the authority would permit the delegation to indicate a willingness to consider an indeterminate mileage limit for the trusteeship zone, or an explicit 200-mile figure.

Prior to the SRG meeting, JCS formally opposed any new initiative this summer and therefore favored the standfast option. This was also the preferred position of DOD, although it was prepared to move to the State/Interior view if our standfast approach produced no results after an initial period.

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DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
July 12, 2005

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Authority EG 12958

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As a result of the SRG meeting, both ICS and DOD are prepared to accept the State/Interior position based on a majority vote of agencies in the delegation, with the understanding that prior to moving away from our standfast position our delegation would notify Washington.

#### Other Elements of the NSSM 125 Review

The NSSM study raised three points not relating directly to this summer's conference and not discussed at the Senior Review Group meeting:

First is the proposition that the U.S. assert its claimed rights of navigation and overflight beyond 12 miles and through international straits when such actions contravene unilateral jurisdictional claims of others. Two specific examples were cited: (1) that an unarmed military flight be resumed over claimed Peruvian waters between 12 and 200 miles, and (2) that we discontinue the courtesy notification we have been giving to Indonesia before our warships cross through waters of the archipelago.

Although DOD initially urged this course of action in order to demonstrate the importance the U.S. attaches to our navigational interests, Secretary Packard agreed informally that the issue need not be decided before this summer's conference.

The second point suggests that the U.S. use bilateral carrots and sticks to dissuade countries from advancing claims adverse to our interests. All agencies agree that a study of specific situations would be useful.

The third point is the suggestion that a high-level diplomatic initiative be undertaken in support of our L.O.S. objectives. This would involve suggesting that you, yourself and key Cabinet officers mention our L.O.S. concerns to foreign callers, as seems appropriate. The State Department has already sent instructions to our Ambassadors to involve themselves directly. All agencies support this idea.

#### My Views

I believe that the most important question facing us at this time is how to generate broad multilateral support for a law of the sea which protects those aspects of our position which are vital to us, namely a 12-mile territorial sea and free transit through straits. I think, therefore, we must select the initiative most likely to have broad appeal to coastal state interests.

~~TOP SECRET~~

DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
July 12, 2005

~~TOP SECRET~~

I think that we should concentrate our initiative this summer, in the first instance, on the question of fisheries. This is the most pressing law of the sea issue for many less developed coastal countries at this time. It is the resource question on which we have thus far been the least forthcoming. By adopting a more accommodating stand on this question, we will have the best chance of generating serious multilateral talks.

A move on fisheries would build on the trusteeship concept which we have already applied to the seabed. Moreover, a fisheries initiative would give us the basis for interim bilateral talks with Brazil this fall. There is virtually unanimous agreement that our present fisheries position does not offer a basis for negotiating an end to our bilateral fisheries disputes, or for a successful Law of the Sea Conference.

At the same time, I think we should give our delegation sufficient authority to be sure that our seabeds initiative is not deadlocked. Many coastal countries have difficulty in understanding how far out their trusteeship zone would extend. Furthermore, since our current proposal is based on the shape of the continental shelf, it appears unfair to countries with narrow shelves. Accordingly, I think we should give our delegation authority to explore a different formula for the outer limit of the trusteeship zone. This entails the risk of our being pushed to the 200-mile trusteeship zone too early for maximum tactical advantage, but we have to balance that against the risk that otherwise we may lose our whole seabeds approach through inaction. I think we should rely on our delegation to assess these elements, subject to review in Washington.

I also recommend that our delegation be instructed to place more stress upon accommodation of our security interests as an indispensable element to an acceptable Law of the Sea agreement.

On the other questions put forward by the NSSM review, I see no objection to supporting the agencies' consensus that (a) we initiate a study of what we can do through carrots and sticks to persuade individual countries to take more accommodating L.O.S. positions, and that (b) we approve a high-level diplomatic campaign in support of our oceans' objectives. However, I do not think we should initiate a blanket policy at this time of unilaterally asserting our rights of navigation where these contravene the claims of others. Such actions would be counter-productive when we are seeking to enhance multilateral support for our oceans policy. But we could, in the future, review the possibility of such actions, if our negotiations for a law of the sea do not appear to be succeeding.

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E.O. 12958, as amended  
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A draft NSDM reflecting the foregoing recommendations has been prepared for your approval.

RECOMMENDATION: That you approve the draft NSDM at Tab A.

Approve \_\_\_\_\_

Disapprove \_\_\_\_\_

Attachment - Tab A.

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E.O. 12958, as amended  
July 12, 2005