**Appendix Ten**

Minority Report and Rebuttal

**Senate Executive Report 110-9**

**IX. MINORITY VIEWS OF SENATORS DeMint AND Vitter**[[1]](#footnote-1)

Ronald Reagan Biographer Dinesh D’Souza tells of an incident that occurred only a few weeks after Reagan was elected president:

According to aides who were present at the meeting, Reagan was asked by Alexander Haig, his new Secretary of State, to approve continuing negotiations for the Law of the Sea treaty. Reagan said he would not support the treaty and asked that negotiations be suspended.

Incredulous, Haig tried to make him see the light by pointing out that discussions had been ongoing for years and that every recent president and virtually all leading figures in both Parties accepted the general framework of the treaty.

‘‘Well, yes,’’ Reagan said, ‘‘but you see, Al, that’s what the last election was all about.’’

‘‘About the Law of the Sea treaty?’’ Haig sneered.

‘‘No,’’ Reagan replied. ‘‘It was about not doing things just because that’s the way they’ve been done before.’’[[2]](#footnote-2)

Since that time, proponents have attempted to paint Reagan’s objections as limited in scope, focused on a few minor changes to the seabed mining section. Meanwhile, key Reagan advisers like Ed Meese,[[3]](#footnote-3) Jeanne Kirkpatrick[[4]](#footnote-4) and James Malone have countered that his concerns were much more broad, relating to the fundamental collectivist philosophy embodied in the treaty. They suggested that even if the seabed mining regime was fixed or even deleted altogether, Reagan would still not have signed it. Who is correct?

For a quarter century, this question has gone unanswered. However, we now have new insights, with the release of The Reagan Diaries. On page 90, we find the answer in President Reagan’s own hand—

Tuesday, June 29 [1982]. Decided in NSC meeting—will not sign ‘‘Law of the Sea’’ Treaty even without seabed mining provisions.

Reagan’s concerns with the treaty were summed up in a 1984 article written by his chief Law of the Sea Negotiator, James Malone.

The Law of the Sea Treaty’s provisions establishing the deep seabed mining regime were intentionally designed to promote a new world order—a form of global collectivism known as the new international economic order (NIEO) that seeks ultimately the redistribution of the world’s wealth through a complex system of manipulative central economic planning and bureaucratic coercion.[[5]](#footnote-5)

This applies not only to the seabed mining regime, but to all of the treaty with the exception of a few provisions dealing with navigation. In 1995, Commenting on the 1994 Agreement, Ambassador Malone reiterated his earlier criticism:

This remains the case today. All the provisions from the past that make such a [new world order] outcome possible, indeed likely, still stand. It is not true, as argued by some, and frequently mentioned, that the US rejected the Convention in 1982 solely because of technical difficulties with Part XI. The collectivist and redistributionist provisions of the treaty were at the core of the US refusal to sign.[[6]](#footnote-6)

Reality:President Reagan pointed solely to certain deep seabed mining provisions of the Convention as flawed. He considered that those provisions could be fixed and specifically identified the elements in need of revision. In a 1983 Ocean Policy Statement, President Reagan directed the US government to abide by the non-deep-seabed provisions of the Convention and encourage other countries to do likewise. The 1994 Agreement fixed the flawed deep seabed mining provisions in ways that meet each one of President Reagan’s objections.

[Source: Myths and Realities, 5/07[[7]](#footnote-7)]

An examination of President Reagan’s official and private writings show that he supported ratification of the Law of the Sea Convention if the provisions on deep seabed mining could be fixed:

*January 29, 1982*:

* “while most provisions of the draft convention are acceptable and consistent with United States interests, some major elements of the deep seabed mining regime are not acceptable.”
* “The United States remains committed to the multilateral treaty process for reaching agreement on the Law of the Sea. If working together at the Conference we can find ways to fulfill these key objectives, my administration will support ratification.”

*July 9, 1982*:

* “my administration would support ratification of a convention meeting six basic objectives.”
* “Those extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with United States interests and, in our view, serve well the interests of all nations. That is an important achievement and signifies the benefits of working together and effectively balancing numerous interests.”

His writing also show that President Reagan understood that the institutions set up by the Convention were not UN bodies:

*December 30, 1982*:

* “the Law of the Sea Preparatory Commission is legally independent of and distinct from the UN. It is not a UN subsidiary organ and not answerable to that body.”

Actual texts of President Reagan’s writings on the Law of the Sea Convention follow.

PRESIDENT RONALD REAGAN ON THE LAW OF THE SEA CONVENTION

*Thursday, January 21, 1982*

The Reagan Diaries:[[8]](#footnote-8)

     **At N.S.C. meeting we decided to go back to the law of the sea negotiations but make it plain we could not accept their proposals on sea bottom mining, etc.**

*January 29, 1982*

NSDD 20, United States Law of the Sea Policy:[[9]](#footnote-9)

I have reviewed the interagency report on United States Law of the Sea issues, along with the agencies’ recommendation, and have decided that:

* The United States will continue to participate in the negotiations at the Law of the Sea Conference.
* United States objectives in these negotiations will be a treaty that:

(a) will not deter development of any deep seabed mineral resources to meet national and world demand;

(b) will assure national access to these resources by current and future qualified entities to enhance US security of supply, to avoid monopolization of the resources by the operating arm of the International Authority and to promote the economic development of its resources;

(c) will give the United States a decision-making role in the deep seabed regime that fairly reflects and effectively protects its political and economic interests and financial contributions;

(d) will not allow for amendments to come into force without United States approval, including the advice and consent of the Senate;

(e) will not set other undesirable precedents for international organizations; and

(f) will be likely to receive the advice and consent of the Senate. (In this regard, the convention should not contain provisions creating serious political or commercial difficulties, including provision for the mandatory transfer of private technology and participation by and funding for national liberation movements.)

* Fulfillment of these objectives shall be considered mandatory in the negotiations. It is understood that the United State negotiating effort will be based on the guidelines set forth in the interagency review.
* United States negotiating strategy will make clear what aspects of the current draft convention are unacceptable to the United States and will be designed to achieve those changes necessary to fulfill all US objectives [clause redacted during declassification review].

Improvements consistent with United States interests in other areas shall be sought if opportunities arise and if this can be accomplished without risk to the military navigation and other important United States interests.

The United States will continue active negotiations with other countries interested in deep seabed mining with a view to concluding a reciprocating states agreement as early as possible on recognition of deep seabed mining licenses.

The United States will also continue to exercise its rights with respect to navigation and overflight against claims that the United States does not recognize in accordance with the established procedures and review for that program.

The Senior Interdepartmental Group, including all relevant agencies, shall develop detailed instructions for achieving the objectives set forth above after immediate consultation with key allies and, as appropriate, other major participants in the conference. Any agency differences shall be forwarded for my consideration by February 15, 1982. The Senior Interdepartmental Group shall also oversee the Law of the Sea negotiations. [remaining text redacted during declassification review]

*January 29, 1982*

Statement by the President: US announcement to resume participation in law of the sea negotiations:[[10]](#footnote-10)

The world’s oceans are vital to the United States and other nations in diverse ways. They represent waterways and airways essential to preserving the peace and to trade and commerce; are major sources for meeting increasing world food and energy demands and promise further resource potential. They are a frontier for expanding scientific research and knowledge, a fundamental part of the global environmental balance and a great source of beauty, awe and pleasure for mankind.

Developing international agreement for this vast ocean space, covering over half of the earth’s surface, has been a major challenge confronting the international community. Since 1973 scores of nations have been actively engaging in the arduous task of developing a comprehensive treaty for the world’s oceans at the Third United Nations Conference on the Law of the Sea. The United States has been a major participant in this process.

Serious questions had been raised in the United States about parts of the draft convention and, last March, I announced that my administration would undertake a thorough review of the current draft[[11]](#footnote-11) and the degree to which it met United States interests in the navigation, overflight, fisheries, environmental, deep seabed mining and other areas covered by the convention. We recognize that the last two sessions of the Conference have been difficult, pending the completion of our review. At the same time, we consider it important that a Law of the Sea Treaty be such that the United States can join in and support it. Our review has concluded that while most provisions of the draft convention are acceptable and consistent with United States interests, some major elements of the deep seabed mining regime are not acceptable.

I am announcing today that the United States will return to those negotiations and work with other countries to achieve an acceptable treaty. In the deep seabed mining area, we will seek changes necessary to correct those unacceptable elements and to achieve the goal of a treaty that:

will not deter development of any deep seabed mineral resources to meet national and world demand;

will assure national access to these resources by current and future qualified entities to enhance US security of supply, to avoid monopolization of the resources by the operating arm of the International Seabed Authority, and to promote the economic development of the resources;

will provide a decisionmaking role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;

will not allow for amendments to come into force without approval of the participating states, including in our case the advice and consent of the Senate;

will not set other undesirable precedents for international organizations; and

will be likely to receive the advice and consent of the Senate. In this regard, the convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements.

The United States remains committed to the multilateral treaty process for reaching agreement on the Law of the Sea. If working together at the Conference we can find ways to fulfill these key objectives, my administration will support ratification.

I have instructed the Secretary of State and my Special Representative for the Law of the Sea Conference, in coordination with other responsible agencies, to embark immediately on the necessary consultations with other countries and to undertake further preparations for our participation in the Conference.[[12]](#footnote-12)

*Tuesday, June 29, 1982*

The Reagan Diaries 91:

     **Decided in NSC meeting---will not sign “Law of the Sea” treaty even without seabed mining provisions.**[[13]](#footnote-13)

*July 9, 1982*

NSDD 43, United States Law of the Sea Policy:[[14]](#footnote-14)

I have reviewed the interagency report on Law of the Sea issues forwarded by the Department of State on June 16 and noted that while the navigation, overflight and most other provisions of the Law of the Sea Convention are acceptable and consistent with United States interests, the deep seabed mining part of that Convention does not meet any of the United States objectives set forth in NSDD 20 of January 29, 1982.

Having considered the report and views and recommendations of the interested agencies, I have decided that:

* The United States will not sign the Convention as adopted by the Conference on April 30.
* With respect to deep seabed mining, the United States will substantially increase its international efforts and focus them exclusively on the objectives of having our allies and, as appropriate, other countries not accept the deep seabed mining regime in—and thus not sign or ratify—the Convention and of establishing an alternative arrangement to that regime.
* The United States will participate at the technical level in the remaining Conference process: namely, the Drafting Committee in July-August, the Informal Plenary in September, and the Caracas Session in December (including signing the Final Act). This participation will be limited to the non-seabed mining provisions of the Convention to protect US interests and will not extend to the seabed mining part.
* The United States will not participate in the Preparatory Commission.

The Department of State, in coordination with the interested agencies and the NSC, OMB and OSD staffs, will prepare an action plan with specific steps and objectives of United States efforts [text redacted during declassification review]. Near-term actions, including possible intervention at the highest levels, should be forwarded for consideration within two weeks. If longer-term actions are not included in the initial report, they should be forwarded by August 31.

The Department of Defense, in conjunction with the Departments of State and Transportation and the NSC staff, will review the United States navigation and overflight program focusing on protecting United States rights and directing the practice of states toward the US interpretation of the navigation and overflight provisions of the Law of the Sea Convention. This report and recommendations regarding the future nature, scope and procedures for the program should be submitted for consideration by July 30.

*July 9, 1982*

Statement by the President: The United States will not sign the convention:[[15]](#footnote-15)

The United States has long recognized how critical the world’s oceans are to mankind and how important international agreements are to the use of those oceans. For over a decade, the United States has been working with more than 150 countries at the Third United Nations Conference on the Law of the Sea to develop a comprehensive treaty.

On January 29 of this year, I reaffirmed the United States commitment to the multilateral process for reaching such a treaty and announced that we would return to the negotiations to seek to correct unacceptable elements in the deep seabed mining part of the draft convention. I also announced that my administration would support ratification of a convention meeting six basic objectives.

On April 30 the Conference adopted a convention that does not satisfy the objectives sought by the United States. It was adopted by a vote of 130 in favor, with 4 against (including the United States) and 17 abstentions. Those voting “no” or abstaining appear small in number but represent countries which produce more than 60 percent of the world’s gross national product and provide more than 60 percent of the contributions to the United Nations.

We have now completed a review of that convention and recognize that it contains many positive and very significant accomplishments. Those extensive parts dealing with navigation and overflight and most other provisions of the convention are consistent with United States interests and, in our view, serve well the interests of all nations. That is an important achievement and signifies the benefits of working together and effectively balancing numerous interests. The United States also appreciated the efforts of the many countries that have worked with us toward an acceptable agreement, including efforts by friends and allies at the session that concluded on April 30.

Our review recognizes, however, that the deep seabed mining part of the convention does not meet United States objectives. For this reason, I am announcing today that the United States will not sign the convention as adopted by the conference, and our participation in the remaining conference process will be at the technical level and will involve only those provisions that serve United States interests.

These decisions reflect the deep conviction that the United States cannot support a deep seabed mining regime with such major problems. In our view, those problems include:

Provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries.

A decisionmaking process that would not give the United States or others a role that fairly reflects and protects their interests.

Provision that would allow amendments to enter into force for the United States without its approval. This is clearly incompatible with the United States approach to such treaties.

Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits.

The absence of assured access for future qualified deep seabed miners to promote the development of those resources.

We recognize that world demand and markets currently do not justify commercial development of deep seabed mineral resources, and it is not clear when such development will be justified. When such factors become favorable, however, the deep seabed represents a potentially important source of strategic and other minerals, the aim of the United States in this regard had been to establish with other nations an order that would allow exploration and development under reasonable terms and conditions.

*September 30, 1982*

NSDD 58, United States Oceans Policy and Law of the Sea:[[16]](#footnote-16)

Having reviewed the Interagency Group’s proposed actions, as forwarded by the Secretary of State’s memorandum of August 10, for United States near-term efforts [text redacted] I have decided that:

* The United States will promptly send a special Presidential emissary to key allied capitals for high level discussions;
* Donald Rumsfeld will be that emissary; and
* Pending his visit, the Secretary of State will advise key allies as early as possible and urge them not to make any premature commitments to sign or ratify the LOS convention.

I have also decided that the Senior Interagency Group on LOS will now be the Senior Interagency Group on Ocean Policy and LOS. The SIG will continue to be comprised of the Secretary of State (chairman); the Secretaries of the Treasury, Defense, the Interior, Commerce, Labor, Transportation, and Energy; the Attorney General; the Director of Central Intelligence; the United States Representative to the United Nations; the Chairman of the Joint Chiefs of Staff; the Administrator of the Environmental Protection Agency; the Director of the National Science Foundation; the Director of the Office of Management and Budget; and the Assistant to the President for National Security Affairs. Representatives from other departments and agencies with responsibilities for specific matters to be considered will attend on invitation by the chairman.

The SIG will be responsible for all oceans policy matters and LOS or LOS-related international issues, except for purely domestic matters involving activities within the existing US territorial sea and contiguous zone and activities related to resource development on the continental shelf as defined by law. The SIG will:

* Develop, review, and prepare alternatives and recommendations on US oceans policy and LOS issues, including prompt consideration of an Exclusive Economic Zone and other possible initiatives;
* Complete preparations for the emissary’s visit promptly, including proposed letters for me to other Heads of State to be carried by the emissary;
* Proceed with work on longer-term actions as called for by NSDD 43;
* Coordinate efforts of other high-level US contacts with key foreign governments on these matters; and
* Establish subordinate interagency groups as necessary for the execution of its mandate.

*Wednesday, October 13, 1982*

The Reagan Diaries 105:

    **Met with Don Rumsfeld who is going abroad to meet with our allies and try to persuade them to join us in rejecting the deep sea mining provisions of the Law of the Sea treaty.**

*Monday, December 13, 1982*

The Reagan Diaries 118:

     **Don Rumsfeld came to report on his mission to steer our allies off the Law of the Sea treaty. He did a good job, Japan, U.K., F.R.G., Italy etc. all joined us in not signing. The treaty would turn the entire oceans of the world over to an international body with supreme power even to tax.**

*December 13, 1982*

NSDD 72, United States Program for the Exercise of Navigation and Overflight Rights at Sea:[[17]](#footnote-17)

I have considered agency views and recommendations on the subject program and decided that the United States will continue to protect US navigation, overflight, and related security interests in the seas through the vigorous exercise of its rights against excessive maritime claims. The current uncertainty in the law of the sea and the US decision not to become a party to the Law of the Sea (LOS) Convention make all the more necessary a clear assertion of our rights and a revitalized and more effective navigation and overflight program. Accordingly, I have also decided that the following procedures be instituted immediately to implement this program.

U.S. interests are to be protected against the following categories of excessive maritime claims:

. . . .

The Department of State, in conjunction with this program, will continue to protest in diplomatic channels the excessive claims of littoral countries.

*December 30, 1982*

Statement by the President: withholding of United States funds from the Law of the Sea Preparatory Commission:[[18]](#footnote-18)

On December 3 the United Nations General Assembly passed a resolution that would, among other things, finance the Preparatory Commission under the Law of the Sea treaty from the regular UN budget.

My administration has fought hard to uphold fiscal responsibility in the United Nations system and, in this case, consistently opposed this financing scheme. It is not a proper expense of the United Nations within the meaning of its own Charter, as the Law of the Sea Preparatory Commission is legally independent of and distinct from the UN. It is not a U.N. subsidiary organ and not answerable to that body. Membership in the UN does not obligate a member to finance or otherwise support this Law of the Sea organization.

Moreover, these funds are destined to finance the very aspects of the Law of the Sea treaty that are unacceptable to the United States and that have resulted in our decision, as I announced on July 9, 1982, not to sign that treaty. The Preparatory Commission is called upon to develop rules and regulations for the seabed mining regime under the treaty. It has no authority to change the damaging provisions and precedents in that part of the treaty. For that reason, the United States is not participating in the Commission.

My administration has conducted a review of the financing scheme for this Commission. That review has confirmed that it is an improper assessment under the U.N. Charter that is not legally binding upon members. It is also adverse to the interests of the United States. While the United States normally pays 25 percent of the regular U.N. budget, the United States is opposed to improper assessments and is determined to resist such abuses of the U.N. budget.

In this light, I have decided that the United States will withhold its pro rata share of the cost to the United Nations budget of funding the Preparatory Commission.

*March 10, 1983*

NSDD 83, United States Ocean Policy, Law of the Sea and Exclusive Economic Zone:[[19]](#footnote-19)

Having reviewed the Senior Interagency Group’s report and recommendations on the above subject, as forwarded by the Department of State on February 1 and 27, I have decided that:

* [text redacted during declassification review]
* The United States will establish an Exclusive Economic Zone in which it will exercise sovereign rights in the living and non-living resources, except as qualified below, within 200 nautical miles of its coast.
* Within this zone all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight.
* The establishment of such a zone will not change existing US policies with respect to marine mammals, the continental shelf and fisheries, including highly migratory species of tuna.
* The United States will continue efforts to reach agreements among concerned countries for the effective management of highly migratory species of tuna.

These policy directions will not affect the application of existing United States laws concerning the high seas or existing authorities of any US government agency.

The Senior Interagency Group on Ocean Policy and Law of the Sea is responsible for overseeing implementation of these decisions. It will oversee and coordinate efforts to work with Congress to achieve legislation to implement the Exclusive Economic Zone in a manner that will be fully within the guidance established by this directive and other related US policies and not otherwise go beyond the Law of the Sea Convention. This effort will include priority consideration to introducing an Administration bill or package of amendments to bills introduced in Congress

[paragraph redacted during declassification review]

*March 10, 1983*

Statement by the President on Oceans Policy:[[20]](#footnote-20)

The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.

Last July I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

The United States does not stand alone in these concerns. Some important allies and friends have not signed the convention.[[21]](#footnote-21) Even some signatory states have raised concerns about these problems.

However, the convention contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.

Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law.

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans–such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, acquiescence in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.

Within this Zone all nations will continue to enjoy the high seas rights and freedoms that are not resource related, including the freedoms of navigation and overflight. My proclamation does not change existing United States policies concerning the continental shelf, marine mammals, and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction.[[22]](#footnote-22) The United States will continue efforts to achieve international management of these species. The proclamation also reinforces this government's policy of promoting the United States fishing industry.

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal states to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised in a manner consistent with international law.

The Exclusive Economic Zone established today will also enable the United States to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.

The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States Government agency.

In addition to the above policy steps, the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.

The administration looks forward to working with the Congress on legislation to implement these new policies.

*May 4, 1984*

Written responses by the President to questions submitted by Pacific Magazine on United States policy in the Pacific Island Region:[[23]](#footnote-23)

Q. The United States has not yet signed the Law of the Sea Convention. Why not? Is it possible that the United States would sign it if it were in any way amended?

The President. When we announced that the United States would not sign the convention, I stated that the deep seabed mining section did not meet US objectives. Our problems with the deep seabed mining regime include:

-- provisions that would actually deter future development of deep seabed resources, when such development should serve the interest of all countries;

-- a decisionmaking process that would not give the United States or others a role that fairly reflects and protects their interests;

-- provisions that would allow amendments without United States approval. This is incompatible with our approach to treaties;

-- stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits; and

-- the absence of assured access for future qualified deep seabed miners to promote the development of these resources.

In spite of our well-known objections and renewed negotiating efforts in early 1982, the Law of the Sea Conference adopted the convention on April 30, 1982, although, after nearly 2 years, it has not yet come into force. I would also point out that many major industrialized nations share our concerns. As to amending the convention, at this point it would be most difficult, and we are not aware of any move to do so.

Nevertheless, the convention contains many positive and significant accomplishments. We are prepared to accept and act in accordance with international law as reflected in the Law of the Sea Convention that relates to traditional uses of the ocean. We are willing to respect the maritime claims of others, including economic zones, that are consistent with international law as reflected in the convention, so long as the international rights and freedoms of the United States and others in such areas are respected.

*March 16, 1987*

NSDD 265, Freedom of Navigation Program:[[24]](#footnote-24)

Since March 1979, the United States has successfully conducted a Freedom of Navigation (FON) program to protect US navigation, overflight, and related interests on and over the seas against excessive maritime claims.

Policy

In July 1982, the United States announced that it would not sign the Law of the Sea Convention because of several problems in the Convention’s deep seabed mining provisions. The United States does, however, support the provisions of the Law of the Sea Convention governing traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.

General US policy on the Law of the Sea is contained in NSDD-83 (US Oceans Policy, Law of the Sea, and Exclusive Economic Zone) and the public Presidential statement of March 10, 1983. Two important aspects of those documents pertain to US policy on freedom of navigation and are reflected below.

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Categories of Excessive Maritime Claims

. . . .

Program Guidance

. . . .

*December 27, 1988*

Presidential Proclamation 5928, Territorial Sea of the United States of America:[[25]](#footnote-25)

By the President of the United States of America

A Proclamation

International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.

The territorial sea of the United States is a maritime zone extending beyond the land territory and internal waters of the United States over which the United States exercises sovereignty and jurisdiction, a sovereignty and jurisdiction that extends to the airspace over the territorial sea, as well as to its bed and subsoil.

Extension of the territorial sea by the United States to the limits permitted by international law will advance the national security and other significant interests of the United States.

NOW, THEREFORE, I, RONALD REAGAN, by the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty.

The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits.

Nothing in this Proclamation:

(a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom; or

(b) impairs the determination, in accordance with international law, of any maritime boundary of the United States with a foreign jurisdiction.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

/s/ Ronald Reagan

Minority views:

We believe certain provisions of the United Nations Convention on the Law of the Sea, particularly those dealing with navigation, have merit. We further appreciate the Navy’s interest in the treaty. However, the navigation provisions are primarily limited to the first 4 parts—11 pages out of a 188 page treaty.

Reality: Part I (Definitions), Part II (Territorial Sea and Contiguous Zone), Part III (Straits Used for International Navigation) and Part IV (Archipelagic States) are only a portion of the parts of the Convention protecting and promoting US navigation interests. Major aspects of navigation are also protected in Part V (Exclusive Economic Zone), Part VI (Continental Shelf), Part VII (High Seas), and Part XIII (Marine Scientific Research).

Minority views:

The rest establishes a massive bureaucracy to govern the seas and anything that can be construed to impact the seas—even if the impact is de minimus.

Reality: False. No bureaucracy is established to govern the seas much less anything that can be construed to impact the seas. The International Seabed Authority, located in Kingston, Jamaica, deals only with mineral resources of the deep sea bed; it has a staff of 37 authorized posts and a biannual budget of $13,014,700 for 2011-2012.[[26]](#footnote-26) The budget for 2017-2018 is $17,130,700.[[27]](#footnote-27) The 21-member Commission on the Limits of the Continental Shelf, elected by the Parties, deals with only claims to continental shelf beyond 200 nm, and is supported by the Secretariat. The 21-member Tribunal, elected by the Parties, adjudicates disputes subject to its jurisdiction; it is supported by a staff of 37 with a budget for the biennium 2011-2012 amounting to €20,398,600.[[28]](#footnote-28) For the 2015-2016 biennium the total expenditure was €18,662,719, representing 99.18 per cent of the total appropriations (€18,817,600).[[29]](#footnote-29) For 2017–2018 biennium the total expenditure was €18,105,109, representing 85.73 per cent of the total appropriations (€21,119,900).[[30]](#footnote-30)

Minority views:

Taxes.—Article 13 imposes direct ‘‘fees’’ on United States’ corporations engaged in seabed mining. Article 82 requires ‘‘payments’’ of up to 7 percent for drilling on the outer continental shelf (OCS). The United States would be assessed for 7 percent of any oil, natural gas, or other resources derived by OCS exploration. The payments would be made directly to the Authority, which would redistribute the money to the other signatory nations. We believe it is unwise to create an international organization with taxing authority.

Reality:This is not the UN—and there are no taxes on individuals or corporations. Concerning oil/gas production within 200 miles of shore, the US gets exclusive sovereign rights to seabed resources within the largest such area in the world.  There are no finance-related requirements in the treaty with respect to that area. Concerning oil/gas production beyond 200 miles of shore, the US is one of a group of countries that is potentially entitled to extensive continental shelf beyond its 200 mile zone in which, only as a party, would it have exclusive sovereign rights to seabed resources there. Countries that benefit from extra continental shelf have no requirements for the first 5 years of production at a site; in the 6th year of production, they are to pay 1% of production, capped at 7% in the 12th year of production.  If the US were to pay royalties, it would be because US oil and gas companies are engaged in successful production beyond 200 miles. But if the treaty is not passed, US companies will likely not be willing or able to engage in oil/gas activities in such areas, i.e., in the absence of clear legal means to secure tenure. Concerning mineral activities in the deep seabed, which is beyond US jurisdiction, an interested company would pay an application fee for the administrative expenses of processing the application. Any amount that did not get used for processing the application would be returned to the applicant.   The Convention does not set forth any royalty requirements for production; the US would need to agree to establish any. In no event would any royalties go to the UN, but rather would be distributed to countries in accordance with a formula that the US would have to agree to.[[31]](#footnote-31)

Minority views:

As a far-reaching environmental accord addressing vessel source pollution, pollution from seabed activities, ocean dumping and land-based sources of marine pollution, the Convention promotes continuing improvement in the health of the world’s oceans.

True.

Minority views:

There is almost no limit to what any smart international lawyer could do with these pollution provisions. Further, the United States has demonstrated historically that it takes its treaty obligations seriously. Other nations have not done the same. Why should we bind ourselves to a treaty that will handcuff our economy, while other nations will simply ignore the rules? The Senate has voted to reject the Kyoto Agreement for these same reasons; we should reject this backdoor Kyoto now.

Reality. Only as a party can the US employ the compulsory dispute settlement provisions against parties that do not take their treaty obligations seriously.

Minority views:

UN Secretary General Picks Arbitrators.—If ratified, the United States has stated it will select binding arbitration if disputes arise. Under Annex VIII, Article 3, in the likely event that Parties to a dispute cannot agree on arbitrators, they are selected by the Secretary General of the United Nations. This was confirmed by key witnesses in support of the treaty.

Reality: The key witnesses in support of the treaty did not say that it was “likely” that the Parties to a dispute cannot agree on arbitrators. To date this provision has not been invoked in cases of special arbitration set up under the Convention. Under Annex VII, Arbitration, the President of the International Tribunal for the Law of the Sea makes the selection when the parties do not agree. This provision has been used successfully several times since 2007.

Minority views:

It is puzzling why we would want to submit to a judicial authority selected by the United Nations, given the organization’s corruption scandals, and the fact that of the 152 countries Party to the treaty, the median voting coincidence with the United States in the 2006 General Assembly was less than 20 percent. This treaty subjects the United States to a governing body that is hostile to American interests.

Reality: The International Tribunal for the Law of the Sea is elected by parties to the Convention, and are not selected by the UN. The United States is already party to the International Court of Justice.

There is no governing body for the Law of the Sea Convention.

There are now 168 parties to the Convention in 2019.

Minority views:

Nations Vote Against US interests.—Like the United Nations, the US would be assessed for 22 percent of the operations, even though we only have one vote in the 152 nation assembly, and no veto. The American people have lost confidence in Congress. Handing over sovereignty to a new international body with the power to tax and regulate American citizens and businesses will not help restore that confidence.

Reality:The Convention transfers no sovereignty to a new international body. Rather the Convention permits the United States to enhance its sovereignty. The new bodies established by the Convention do not have the power to tax.

Minority views:

Military Activities.—The treaty reserves the sea for ‘‘peaceful purposes’’ and creates a labyrinth of regulations and restrictions on acceptable activities. We are worried that the treaty could be used to inhibit legitimate military and intelligence activities. The Resolution of Ratification highlights the vagueness of Article 298(1)(b), suggesting that each State Party has the exclusive right to determine whether its activities are or were ‘‘military activities’’ and that such determinations are not subject to review. However, this is not stated in the treaty, and therefore it is our belief that the court or tribunal will likely make its own decision as to what constitutes a .military activity. notwithstanding the non-binding understandings included in the Resolution.

Reality:The first understanding states that nothing in the Convention impairs the inherent right of self-defense or rights during armed conflict, including Convention provisions that refer to ‘‘peaceful uses’’ or ‘‘peaceful purposes.’’ This understanding, which is a statement of fact, underscores the importance the United States attaches to its right under international law to take appropriate actions in self-defense or in times of armed conflict, including, where necessary, the use of force.[[32]](#footnote-32)

The second declaration concerns the exclusion of certain categories of disputes from the dispute settlement procedures. Article 298 of the Convention permits a State to opt out of binding dispute settlement procedures with respect to one or more enumerated categories of disputes, namely disputes regarding maritime boundaries between neighboring States, disputes concerning military activities and certain law enforcement activities, and disputes in respect of which the UN Security Council is exercising the functions assigned to it by the UN Charter. The declaration states that the United States elects to exclude all three of these categories of disputes from binding dispute settlement, which would include all of the procedures related thereto.

With respect to disputes concerning military activities, the declaration further states that US consent to accession is conditioned upon the understanding that, under Article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were ‘‘military activities,’’ and that such determinations are not subject to review.[[33]](#footnote-33)

The following 18 States have already elected to opt out of binding dispute procedures with respect to military activities, and thus cannot bring the question before a tribunal: Argentina, Belarus, Brazil, Canada, Cape Verde, Chile, China, Cuba, France, India, Mexico, Portugal, Republic of Korea, Russia, Tunisia, Ukraine, United Kingdom and Uruguay.[[34]](#footnote-34)

Minority views:

Intelligence Gathering Activities.—The Treaty fails to clearly include intelligence, surveillance, and reconnaissance activities under ‘‘military activities.’’ While administrations have stated that these terms are covered, the United States Senate and House of Representatives consider these separate functions and have different committees that oversee the intelligence community and the armed services. When there is a disagreement on terms, this disagreement is settled by the courts.

Reality:Questions were raised during the course of the committee’s review as to whether intelligence activities would be considered covered by the term ‘‘military activities.’’ Consistent with prior testimony from officials of the Department of Defense and the Central Intelligence Agency before the Select Committee on Intelligence, the Department of State confirmed, in a letter to Chairman Biden (included in the forthcoming hearing print), that intelligence activities at sea are military activities for purposes of the US dispute settlement exclusion under the Convention and thus the binding dispute settlement procedures would not apply to US intelligence activities at sea.[[35]](#footnote-35)

The question has been raised whether the Convention (in particular articles 19 and 20) prohibits intelligence activities or submerged transit in the territorial sea of other States. It does not. The Convention’s provisions on innocent passage are very similar to article 14 in the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which the United States is a party. (The 1982 Convention is in fact more favorable than the 1958 Convention both because the list of non-innocent activities is exhaustive and because it generally uses objective, rather than subjective, criteria in the listing of activities.) A ship does not, of course, enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act in the territorial sea aimed at collecting information to the prejudice of the defense or security of the coastal State, but such activities are not prohibited by the Convention. In this respect, the Convention makes no change in the situation that has existed for many years and under which we operate today.[[36]](#footnote-36)

Minority views:

In addition, under Article 19 foreign ships may be denied passage through a coastal state’s Territorial Sea if it engages in a number of activities, including any act aimed at collecting information to the prejudice or security of the coastal state; the carrying out of research or survey activities; any other activity not having a direct bearing on passage. These are activities that would be necessary for the United States to collect intelligence information that could be crucial to our self-defense.

Reality:The United States considered it essential that a comprehensive law of the sea treaty contain a compulsory dispute settlement system, in order to promote compliance and protect US interests. At the same time, the system needed to be appropriately flexible in terms of both venue and subject matter. In terms of intelligence activities, the Convention does not prohibit or otherwise regulate such activities. Even if another Party sought to bring a case against the United States concerning such activities, no tribunal under the Convention would have jurisdiction over such a case. Disputes concerning military activities, including intelligence activities, would not be subject to dispute settlement under the Convention.[[37]](#footnote-37)

Minority views:

Article 20 further limits the ability of the United States to collect intelligence: in the Territorial Sea, submarines and other underwater vehicles are required to navigate on the surface and must show their flag. Under the treaty, the United States would have to surface the submarine, and fly a conspicuous American flag, so that everyone would know that an American submarine was in the vicinity. The Treaty fails to protect the significant role submarines have played, especially during the Cold War, in gathering intelligence very close to foreign shorelines.

Reality:Article 20 is the substantive equivalent of Article 14 paragraph 6 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, that has been in force for the United States since 1964.

Article 20 provides that submarines and other underwater vehicles are required to navigate on the surface and to show their flag in order to enjoy the right of innocent passage; however, failure to do so is not characterized as inherently not ‘‘innocent.’’

The committee further understands that, as in the case of the analogous provisions in the 1958 Convention on the Territorial Sea and Contiguous Zone (Articles 18, 19, and 20), the innocent passage provisions of the Convention set forth conditions for the enjoyment of the right of innocent passage in the territorial sea but do not prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right.[[38]](#footnote-38)

1. Senate Foreign Relations Committee, Report on the Convention on the Law of the Sea, Sen. Exec. Rept. 110-9, Dec. 19, 2007, at 24–27. Formatting of and footnotes to the Minority Views are by the author. [↑](#footnote-ref-1)
2. D’Souza, Ronald Reagan: How an Ordinary Man Became an Extraordinary Leader 230 (1997). [↑](#footnote-ref-2)
3. Meese, Reagan Would *Still* Oppose Law of the Sea Treaty, Human Events online April 25, 2005, copy on file with author. [↑](#footnote-ref-3)
4. Jeane J. Kirkpatrick Testimony before the Senate Armed Services Committee April 8, 2004, copy on file with author. [↑](#footnote-ref-4)
5. Malone, Who Needs the Sea Treaty?, Foreign Policy, No. 54, Spring 1984, at 44, 45, *available at* <https://www.jstor.org/stable/1148354?seq=1#page\_scan\_tab\_contents>. [↑](#footnote-ref-5)
6. Malone, *Observations of Ambassador James L. Malone, A Former Special Representative of the President for the Law of the Sea*, *in* Center for Oceans Law and Policy University of Virginia School of Law Nineteenth Annual Seminar, Toward Senate Consideration of the 1982 Law of the Sea Convention: A Tribute to the Honorable John R. Stevenson 79, at 80 (1995). [↑](#footnote-ref-6)
7. Law of the Sea Briefing Book 16, copy on file with author. *Accord* Gerson, The Kirkpatrick Mission: Diplomacy Without Apology America at the United Nations 1981–1985, at 178–179 (1991). [↑](#footnote-ref-7)
8. Douglas Brinkley (ed.), The Reagan Diaries 64 (HarperCollins, New York, 2007). [↑](#footnote-ref-8)
9. Christopher Simpson, National Security Directives of the Reagan and Bush Administrations: The Declassified History of US Political and Military Policy, 1981–1991, at 90–91 (Westview Press, 1995). [↑](#footnote-ref-9)
10. I Public Papers of the Presidents: Ronald Reagan, 1982, at 92 (1983). [↑](#footnote-ref-10)
11. Reference presumably is to the statement issued by the Department of State on March 2, 1981. For text, *see* American Foreign Policy: Current Documents, 1981, Doc. 112; *id.*, Doc. 114, note 2, at 351. [↑](#footnote-ref-11)
12. Also reproduced in 82 Dep’t of State Bulletin, No. 2060, March 1982, at 54–55, and Doc. 114, “U.S. Announcement to Resume Participation in Law of the Sea Negotiations,” American Foreign Policy: Current Documents 1982 (1985), at 351–352. *Extracted in* II Cumulative Digest 1729–1730. [↑](#footnote-ref-12)
13. Article 309 of the LOS Convention precludes reservations, *i.a.,* to the seabed mining provisions. [↑](#footnote-ref-13)
14. National Security Directives of the Reagan and Bush Administrations 151–152. [↑](#footnote-ref-14)
15. II Public Papers of the Presidents: Ronald Reagan, 1982 (1983), at 911–912. Also *reproduced in* Doc. 120, “The United States Will Not Sign the Convention,” American Foreign Policy: Current Documents, 1982 (1983), at 360, and 82 Dep’t of State Bull., No. 2065, Aug. 1982, at 761. *Extracted in* II Cumulative Digest 1730–1731. [↑](#footnote-ref-15)
16. National Security Directives of the Reagan and Bush Administrations 204–205. [↑](#footnote-ref-16)
17. National Security Directives of the Reagan and Bush Administrations 223–225. [↑](#footnote-ref-17)
18. II Public Papers of the Presidents: Ronald Reagan, 1982, at 1652. [↑](#footnote-ref-18)
19. National Security Directives of the Reagan and Bush Administrations, at 278–279. [↑](#footnote-ref-19)
20. I Public Papers of the Presidents: Ronald Reagan, 1983, at 378–379. [↑](#footnote-ref-20)
21. Germany, United Kingdom, Israel, Turkey, Ecuador, Peru, and Venezuela, among others, declined to sign the LOS Convention. [↑](#footnote-ref-21)
22. Effective January 1, 1992, the United States commenced exercising jurisdiction over tuna in the US EEZ. 16 US Code § 1812, as amended by Pub.L. 101-627. [↑](#footnote-ref-22)
23. I Public Papers of the Presidents: Ronald Reagan, 1984, at 629–630 (1986). [↑](#footnote-ref-23)
24. National Security Directives of the Reagan and Bush Administrations 785–788. [↑](#footnote-ref-24)
25. 54 Fed. Reg. 777, Jan. 9, 1989; 3 C.F.R. 547 (1988 Comp.). [↑](#footnote-ref-25)
26. International Seabed Authority Assembly Decision May 6, 2010, *available at* <https://www.isa.org.jm/files/documents/EN/16Sess/Assembly/ISBA-16A-10.pdf>. [↑](#footnote-ref-26)
27. International Seabed Authority Assembly Decision July 22, 2016, ISBA/22/A/13. [↑](#footnote-ref-27)
28. SPLOS/127, *available at* <https://www.un.org/Depts/los/meeting\_states\_parties/SPLOS\_documents.htm>. [↑](#footnote-ref-28)
29. SPLOS/306, March 27, 2017. [↑](#footnote-ref-29)
30. SPLOS/29/3. [↑](#footnote-ref-30)
31. Myths and Realities, 5/07, *supra* n. 2. [↑](#footnote-ref-31)
32. Sen. Ex. Rep. 110-9, at 11–12. [↑](#footnote-ref-32)
33. *Id.* at 11. [↑](#footnote-ref-33)
34. UN, Multilateral Treaties Deposited. [↑](#footnote-ref-34)
35. Sen. Ex. Rep. 110-9, at 11. [↑](#footnote-ref-35)
36. Legal Adviser Taft prepared testimony to HIRC May 12, 2004; and to SSIC June 8, 2004; *see also* Taft letter to Sen. Warner, April 6, 2004. Reaffirmed in letters from the Director of Naval Intelligence to SSIC, Aug. 8, 2007, and from SSIC to SFRC, Sept. 14, 2007, Sen. Ex. Rep. 110-9, at 30–41. [↑](#footnote-ref-36)
37. Legal Adviser Taft answer to Sen. Roberts SSIC Q#15, June 8, 2004; Legal Adviser Taft prepared testimony to SSIC, June 8, 2004, Sen. Ex. Rep. 110-9, at 38–39. [↑](#footnote-ref-37)
38. Sen. Ex. Rep. 110-9, at 12; *see also* prepared testimony of Legal Adviser Taft to Senate Select Committee on Intelligence, June 8, 2004, *id*. at 37. [↑](#footnote-ref-38)