UNCLOS KEY TO INCREASING NAVIGATIONAL FREEDOM

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As an admirer of James Madison, I am proud to be a conservative. And as a conservative, I am proud to support the President's call for the Senate to act favorably on the Law of the Sea Convention.[1] While I differ with my colleagues, Baker Spring and Frank Gaffney, on some other issues—particularly their excellent work in relation to missile defense—I am an admirer of their work.

My conservative credentials were earned the hard way: as the principal academic supporting the lawfulness of United States' assistance to South Vietnam during the Vietnam War.[2] My conservative credentials were also earned the hard way in the Law of the Sea negotiations. I took over as the head of the negotiations at the Seabeds Committee following a serious split in the United States delegation over something called the "list of issues."

At stake in that debate was whether the United States was going to insist on all of our navigational rights, transit passage through, over, and under straits used for international navigation, or whether we would accept the advice of some that this was simply a nonnegotiable issue, and we should damp it down. Well, I am happy to say that despite a difficult interagency battle, the conservatives in the United States government under President Richard Nixon won that battle. President Nixon set up a National Security Council Interagency Task Force on the Law of the Sea. I headed an eighteen-agency process in which the

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1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

2. *See, e.g.*, John Norton Moore, *The Lawfulness of Military Assistance to the Republic of Viet-Nam*, 61 AM. J. INT'L L. 1 (1967).

Department of Defense and the Joint Chiefs and others were very important players.[3]

I am also pleased to suggest that, contrary to the nay-sayers who said that we would never win on these issues, a tough United States' position prevailed. Indeed, the United States prevailed on all of the security provisions of the Convention—security provisions which were very much at stake in the negotiations. We fully preserved navigational freedom, including transit passage through, over, and under international straits.[4] We extended United States' resource jurisdiction into the oceans in an area larger than the entire land mass of the United States, and we insisted on assured access to seabed minerals for United States' firms.[5] In short, the Law of the Sea Convention and its negotiation remains one of the seminal negotiating successes of the United States throughout its history.

Moreover, the United States was not a bit player in all of this, nor was it an isolated participant. The United States was overwhelmingly the leader in this negotiation. This is in sharp contrast to what you may have seen in the negotiations for the Rome Treaty[6] or for the Ottawa Treaty.[7] This is one in which the United States led, and the United States won. There should be no mistake about that.

Now, shortly after I left the government, a new U.S. delegation brought in a Part XI—pertaining to deep-seabed mining—that I believed went beyond the instructions that I had worked out through the interagency process. And I sent, at that time, a letter to President Ronald Reagan urging that he not go forward with Part XI until it was renegotiated successfully.[8] Again, there

3. *See generally* John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77 (1980) (giving a detailed account of the negotiations over navigation rights).

4. UNCLOS, *supra* note 1, arts. 37–45, 1833 U.N.T.S. at 411–14.

5. *See id.* art. 56, 1833 U.N.T.S. at 418 (acknowledging a state's sovereign rights to exploit resources within its exclusive economic zone); *id.* art. 150, 1833 U.N.T.S. at 451 (guaranteeing the opportunity for all states to participate in the economic development of international seabed resources).

6. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (establishing the International Criminal Court).

7. *See* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 (banning land mines).

8. *The UN Convention on the Law of the Sea (T. Doc. 103-39): Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 5 (2003) (statement of Prof. John Norton Moore, Director, Ctr. for Oceans L. & Pol'y, Univ. of Va. Sch. of L.). *See generally* Robert Brooke, *The Current Status of Seabed Mining*, 24 VA. J. INT'L L. 361 (1984) (discussing the

were many voices that said you cannot renegotiate Part XI. I disagreed. And I am delighted to say that once again my recommendations turned out to be correct in 1994, as we not only ultimately prevailed in a renegotiation of Part XI that met every single one of the conditions set by President Reagan for the United States to adhere to the Convention, but we also achieved some things beyond what the President had wanted at the time.[9]

Now why should conservatives support this president in urging Senate advice and consent to the Convention? Well, it would take much too long to go through all the reasons, but I shall provide a few.

This is a critical national security concern to the United States. Admiral Baumgartner is absolutely correct on all of the points that he has indicated. This treaty was a great victory for the United States Navy and for navigational freedom and our security interests on the world's oceans. It would be a tragedy to throw that away at this point and basically to do the work of the Group of 77 that we defeated within the negotiation itself.[10]

In addition, this treaty works the greatest expansion of resource jurisdiction in United States' history. It gives us far greater resource jurisdiction than we got in the Louisiana Purchase and the acquisition of Alaska combined.[11] We also have a great security interest in energy independence as a vital national concern. And in this particular case, our oil companies have made it very clear they cannot develop beyond the 200-mile economic zone without going forward under the treaty. We have

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negotiations over seabed mining and the United States' rejection of the original Part XI); James L. Malone, *The United States and the Law of the Sea*, 24 VA. J. INT'L L. 785 (1984) (same).

9. *See, e.g.*, *The United Nations Convention on the Law of the Sea: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 76–77 (2004) (statement of John Norton Moore, Walter L. Brown Prof. of L., and Director, Ctr. for Oceans L. & Pol'y, Univ. of Va. Sch. of L.) (noting that the Agreement on Part XI, Annex, Section 9 guarantees the United States a seat on the Finance Committee as one of "the largest financial contributors").

10. The "Group of 77" was established in 1964 by 77 developing countries at the United Nations Conference on Trade and Development. *See* http://www.g77.org/doc/index.html (last visited May 20, 2008) (detailing the establishment of the Group and stating that the members of the Group aim to "articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system"). *See generally* Alan G. Friedman & Cynthia A. Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea*, 16 SAN DIEGO L. REV. 555 (1979) (discussing the Group's role in the negotiations leading to UNCLOS).

11. Lawrence S. Eagleburger & John Norton Moore, *Opportunity On the Oceans: America Wins With the Law of the Sea Treaty*, WASH. POST, July 30, 2007, at A15.

a potential 600-mile area off Alaska and the Continental Shelf for oil and gas, and there may be billions of dollars in access that will not be developed if we do not go forward.[12]

In addition, the United States led the world in developing deep seabed mining institutions and technology. Because of the delay, we have already lost one of the four mine sites we had to the Germans. Another one of our firms has simply abandoned its site because of the ten-year delay in moving forward on the Law of the Sea Treaty. These mine sites control very important quantities of copper, nickel, cobalt, and manganese, mineral resources that are of great strategic importance to the United States, and they are very much at risk.

Now in addition to that, I think it is worthy of note that all the United States' oceans industry—whether it is oil and gas, fishing, shipping, or others—support it. So does the entire United States national security community, the chiefs in the Navy, the Air Force, and all of the various military forces, as has already been indicated.[13] This is very important for United States' industry. This is not something they are coming to lately and thinking about lately. They participated very actively on the interagency task force that I had set up.[14] Finally, let me suggest that nonadherence has reduced the voice of the United States of America, a terribly important voice in the world, and continued nonadherence will further reduce that voice on issues that are critical for us.

Now just a very brief word about the International Seabed Authority that has caused so much confusion.[15] Why do we negotiate to create some kind of new seabed authority here? The answer is because there is no other way to create property rights in deep sea minerals, something conservatives understand

12. *See* Maywa Montenegro, *Deep Space: The last great land rush on the planet will be at the bottom of the ocean*, SEED MAGAZINE, Dec. 20, 2007, *available at* http://seedmagazine.com/news/2007/12/deep_space.php?page=all (noting that with its wide continental margin, the United States could lay claim to as much as $1.3 trillion in resources).

13. William D. Baumgartner, *UNCLOS Needed for America's Security*, 12 TEX. REV. L. & POL. 445, 445 & n.2–3 (2008).

14. *See supra* note 3 and accompanying text; Finn Laursen, *Security Versus Access to Resources: Explaining a Decade of U.S. Ocean Policy*, 34 WORLD POLITICS 197, 216–17 (1982) (discussing the participation of the oil industry in the pre-1982 negotiations).

15. *See* UNCLOS, *supra* note 1, arts. 156–58, 1833 U.N.T.S. at 457–58 (establishing the International Seabed Authority). *See generally* International Seabed Authority, http://www.isa.org.jm/en/home (last visited May 20, 2008).

to be very important.[16] You could not simply take what might be called a fishing approach to go out and grab the nodules and come back. Why not? Because industry said, absolutely no way. It takes us two billion dollars of investment to go forward in one of these areas that is approximately the size of the state of Rhode Island, and we will simply not put that money up front if you are going to tell us we do not have any kind of property rights.[17]

This is not an area that we own. This is not sovereignty. This is not an area that anyone has ever claimed as sovereign under the United States. In addition to that, the Congress of the United States recognized in legislation in 1980 that this area was not sovereign under the United States and that we had no legal rights to that area.[18]

Now what was at stake for the United States in this? At stake was access to these mineral resources, these huge mine sites that are equivalent to the largest in the world today. The aggregate value of the minerals in the mine sites we are going to lose if we do not move forward on this treaty, may be—hold on to your hats—one trillion dollars.[19] Now just to put that into perspective, the total cost so far of the Iraq War is debated as being somewhere between a quarter of a trillion and three-quarters of a trillion dollars.[20] This large amount, a trillion dollars may be at stake in access to critical minerals for the United States of America in going forward with this treaty.

Now, how about this new agency being a precursor for world government? Well, it has been in existence for twenty-five years. It has a staff of thirty-five, counting the secretaries, and it has a

16. *See* Ian Bezpaiko, *The Deep Seabed: Customary Law Codified*, 44 NAT. RESOURCES J. 867, 883 (2004) (discussing the free-rider problem associated with mining in international waters).

17. *See* Brooke, *supra* note 8, at 369–70 (describing the reluctance of mining companies to invest in operations without firm legal guarantees).

18. *See* Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1401(b)(1) (2006) (stating as its purpose "to encourage the successful conclusion of a comprehensive Law of the Sea Treaty, which will give legal definition to the principle that the hard mineral resources of the deep seabed are the common heritage of mankind").

19. *See* UNITED NATIONS, 20TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982–2002, OCEANS: THE SOURCE OF LIFE 6 (Dec. 9–10, 2002), *available at* http://www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf ("Marine minerals have been estimated to generate nearly $1 trillion every year.").

20. *See, e.g.*, *Estimating the Costs of Military Operations in Iraq: Hearing Before the S. Comm. on the Budget*, 110th Cong. 3–5 (2007) (statement of J. Michael Gilmore, Asst. Director for Nat'l Sec., Congressional Budget Office) (discussing Iraq War cost estimates).

total budget of less than $12 million.[21] World government? I do not think so. This is simply yet another run-of-the-mill international organization. There are hundreds, like the U.S.-Canadian Fisheries Convention, the International Maritime Organization, and many others. This is not something fundamentally different.

But ladies and gentlemen, there is more at stake here, I would suggest, for conservatives in this debate than simply supporting or opposing the Law of the Sea Convention. It is, I believe, a very serious debate about what kinds of arguments should be accepted as conservative arguments. As a conservative, I believe that true conservatives share certain first principles. Conservatives root their assessments in fact and accurate statements, not in sloganeering; not in emotionalism; not in stretched truth or imaginary horribles.

Conservatives see the big picture. They do not lose themselves in the weeds and fail to see the forest. In assessing U.S. interests, they understand that the issue is the entire Convention and our effort to protect the navigational freedom that we have been struggling for, over the past hundred years, and will continue to struggle for, in the next fifty years. It is not about an "aha" moment in discovering one particular provision that they may not like.

Conservatives are also not isolationists, and they are not naïve. They understand that the United States must engage in a dangerous and difficult world. And they understand that we cannot conduct international relations by simply shooting our way around the world's oceans, nor can we resolve disputes with NATO partners and other democratic nations such as Canada and Brazil by simply shooting at them in the oceans. In addition to that, let me suggest that conservatives, while always properly reserving a healthy skepticism about expert opinion, understand the importance of listening to expert opinion and differentiating between opinion that is, in fact, knowledgeable, and opinion that is not—that seeks instead, in the absence of facts, to raise the level of generalization and to create slogans

21. Press Release, Int'l Seabed Auth., Seabed Assembly Begins Consideration of Report of Authority's Secretary-General (Aug. 18, 2005), *available at* http://www.isa.org.jm/files/documents/en/press/press2005/sb-11-10.pdf.

and say them over and over again, such as "LOST,"[22] as a way to oppose it.

When one engages in surgery, one wants a surgeon. When one engages in a war, one wants professional military judgment. I would suggest, when assessing this, it is a very useful thing to hear what Rear Admiral Baumgartner and the chiefs, and members of the American industry, and those who were engaged in difficult negotiations in running this in the United States government for many years, have to say.

Does this mean we should not listen to Baker Spring and Frank Gaffney, who do not, as I understand it, have a background in this area? No, it does not mean that at all. We should always listen to all the voices who wish to be heard. But it does mean that they have a special burden, it seems to me, when their voice is in opposition to that of the entire United States industry, the entire United States national security community, the entire Law of the Sea group that has dealt with these issues, and the unanimous congressionally authorized U.S. Commission on Ocean Policy that made support for this treaty the first thing it wanted to do.[23] I think there is at least a special obligation in these settings and particularly for those clearly not experts in the area..

Now let me also say that by those first principles, I am deeply disappointed at voices which continue to violate, it seems to me, those principles in this Law of the Sea negotiation. Allow me to present a few examples. Over and over again we hear voices urging that the Convention would give our sovereignty away. The Convention gives away not a single ounce of United States' sovereignty. This is not only false, but it is absolutely upside down.

What was the reality of these negotiations? The reality is the greatest expansion of national resource jurisdiction in the history of the world. This was a coastal state win, hugely, not

22. Opponents of UNCLOS often refer to it using the acronym "LOST" (Law of the Sea Treaty). *See, e.g.*, Frank J. Gaffney Jr., *A L.O.S.T. Presidency*, TOWNHALL.COM, May 14, 2007, http://www.townhall.com/columnists/frankjgaffneyjr/2007/05/14/a_lost_presidency (criticizing President Bush for supporting ratification).

23. *See* U.S. COMM'N ON OCEAN POL'Y, U.S. COMMISSION ON OCEAN POLICY RESOLUTION: UNITED NATIONS LAW OF THE SEA CONVENTION (2001), *available at* http://www.oceancommission.gov/documents/los_resolution.pdf (unanimously recommending U.S. accession to UNCLOS).

some kind of internationalist win for the straw argument Elisabeth Mann Borgese socialists[24] that are cited over and over again by opponents.[25] They lost one hundred percent. Some of the academic community did support that.[26] They did not get anywhere near this Convention. This convention was a victory for nationalism and state sovereignty. And that is why you see the massive extension of 200-mile economic zones and continental shelves in this Convention.[27]

Some of the voices, by the way, are saying that we created the International Seabed Authority, giving it total jurisdiction over all the oceans and everything in them.[28] Nothing could be further from the truth. This is a narrowly drawn international agency that has jurisdiction over one thing: jurisdiction over mineral resources, the mining only of those resources on the deep ocean floor in areas beyond national jurisdiction.[29] That is it. Any "taxes" they have the ability to impose are nothing more than charging you for your ability to have access to those minerals, just like Indonesia, Saudi Arabia, or any other country in the world would charge in a setting where we have no rights—no access rights, no sovereignty rights—to those minerals. It is an excellent property rights regime. In fact, we probably have an easier regime for miners to operate—I have been told by a number of the mining companies—than we do even under United States mining laws. It did not start out that way. It turned

24. Elisabeth Mann Borgese (1918–2002) was a leading advocate for international control of the oceans. *See generally* ELISABETH MANN BORGESE, THE OCEANIC CIRCLE: GOVERNING THE SEAS AS A GLOBAL RESOURCE (1998) (discussing the current UNCLOS regime and advocating further steps toward international governance of the oceans).

25. *See, e.g.*, William P. Clark & Edwin Meese, *Reagan and the Law of the Sea*, WALL ST. J., Oct. 8, 2007, at A19 (describing Borgese as one of the "prime movers" behind UNCLOS, whose intent was "to promote global government at the expense of sovereign nation states").

26. *See generally* PACEM IN MARIBUS (Elisabeth Mann Borgese ed., 1972) (collecting various essays by academics supporting an international ocean treaty).

27. *See* UNCLOS, *supra* note 1, art. 57, 1833 U.N.T.S. at 419 (setting the limits of the exclusive economic zone at 200 miles); *id.* arts. 76–77, 1833 U.N.T.S. at 428–30 (defining a coastal state's sovereign rights over adjacent continental shelf).

28. *See, e.g.*, Phyllis Schlafly, *Sink the Law of the Sea Again*, EAGLEFORUM.ORG, Sept. 26, 2007, http://www.eagleforum.org/column/2007/sept07/07-09-26.html (warning that UNCLOS gives the International Seabed Authority "total jurisdiction over all the oceans and everything in them").

29. *See* UNCLOS, *supra* note 1, art. 158, 1833 U.N.T.S. at 457 (establishing the International Seabed Authority and defining as its purpose to "organize and control activities" and "administer[] the resources" of the seabed area).

around after President Reagan insisted that we had to renegotiate Part XI, on seabed mining.[30]

Let me say just one sentence in conclusion, then. I would simply ask you as conservatives to think about first principles in relation to all of this as you make your judgment about the Convention—the Convention as a whole, not minutiae; reality, not myth.

30. *See* Statement on United States Actions Concerning the Conference on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 877 (July 9, 1982), *available at* http://www.reagan.utexas.edu/archives/speeches/1982/70982b.htm (explaining the United States' opposition to the mining provisions).