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

MEMORANDUM

NATIONAL SECURITY COUNCIL

~~TOP SECRET~~
 3798
 INFORMATION
 May 25, 1972
Holmes

MEMORANDUM FOR MR. KISSINGER

FROM: Helmut Sonnenfeldt (Denis Clift) *DC*
Melvin Levine *ML*

SUBJECT: Importance of Free Transit Through and Over
International Straits for US Law of the Sea
Objectives

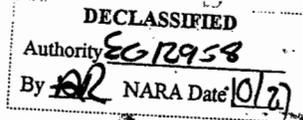
I. Introduction

Your memorandum of March 8 to Secretary Laird asked him to submit for the President's review an analysis of the United States' interests in the issue of freedom of transit through and over international straits. Our position in the UN Law of the Sea negotiations is that we will agree to a 12-mile territorial sea -- we currently recognize three miles -- if there is concurrent international agreement on the right of free transit through and over international straits. The US straits position (text at Tab B) was introduced at the 1971 summer session of the UN Seabeds Committee pursuant to the directives of NSDM 122. At this point, it is not certain that we will be able to obtain international assent to the US straits proposal as it is now formulated.

Your memorandum to Secretary Laird asked him to respond specifically to such questions as:

- which straits are essential to our military interests,
- during 1971, how many US warships and aircraft transited such straits,
- with what countries would bilateral arrangements be required should free passage through straits 24 miles or less in breadth not be obtained in the law of the sea negotiations,
- what alternative negotiating positions might be developed for the law of the sea negotiations to protect our straits interests?

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II. The Defense Response

With the memorandum at Tab A, Secretary Laird forwards a JCS analysis prepared in response to your request. In so doing, Secretary Laird states that he concurs fully with the position set forth by the Joint Chiefs "...that an international extension of territorial seas beyond three miles without the concurrent agreement to a right of free transit through and over international straits would severely erode the strategic position of the United States."

The Joint Chiefs' paper sets forth the two-part position that:

-- free transit through and over international straits wider than six miles is essential to US security;

-- any treaty which would fix the breadth of the territorial sea at greater than three miles must provide for free transit through and over international straits if the United States is to become a party.

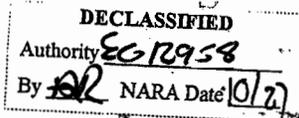
In support of this position, the Joint Chiefs state that mobility is fundamental to the US policy of forward strategy, and that US strategy is designed to take full advantage of the historical freedom of movement on, under and over the world's seas. Extension of territorial seas to 12 miles without free transit through straits would subject the "choke points" -- e.g., the Straits of Gibraltar -- of the oceans to unilateral restrictions that could severely restrict US mobility vital to the employment of many US strategic and general purpose forces.

In further support of their position, the Joint Chiefs dismiss the statistical approach to evaluating the importance of freedom of transit through straits stating that: "A strait which today, and for several years past, has been seldom utilized by US forces could tomorrow be the crucial point in a crisis action." They also argue that it would be unwise to enter into bilateral arrangements, in lieu of multilateral agreement on freedom of transit, in that it would place US interests at the mercy of another sovereign state.

III. Analysis of the Defense/JCS Response

The JCS generally presents a very strong statement in support of the current US position on freedom of transit through and over international straits. It is a very useful paper to have in that it for the first time provides a detailed, official statement of the DOD/JCS position on this law of the sea issue.

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However, when viewed in the broader perspective of the current status of UN law of the sea negotiations and US tactics relating thereto the paper is deficient in that it:

-- does not offer an analysis of current international opposition to the US straits position;

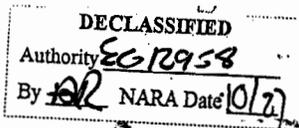
-- does not present recommendations as to the steps that the United States might take to lessen or eliminate criticism of the US straits position;

-- does not attempt to identify alternative US negotiating positions that might be developed to protect our straits interests. (This is perhaps the paper's principal weakness.) In response to the question about an alternative US position on straits the Joint Chiefs recommend simply that the US fall back to the status quo -- i. e., US insistence on a three-mile territorial sea and freedom of transit through straits wider than six miles. The JCS premise here is that a three-mile territorial sea is now the conventional international law and will remain so unless the LOS Conference changes it and that the status quo, therefore, is a sufficient basis for maintaining our transit rights. This premise is shaky, both legally and politically, when one considers the growing number of claims by other countries to territorial seas wider than three miles.

In sum, the Joint Chiefs do not want to consider any changes to our straits position. While it will not be necessary tactically to advance any changes to the US straits position during the UN's preparatory law of the sea negotiations in Geneva this summer, it may be desirable for the US to attempt to answer certain concerns expressed by other countries that relate to the likelihood of international acceptance of our straits position.

The US straits position is not one which the US should plan to alter unnecessarily. However, it is possible that by the time of the 1973 Law of the Sea Conference it will be apparent that the US cannot gain acceptance of the position as now formulated. Accordingly, within the US Government, the Interagency Law of the Sea Task Force should continue to keep the US position on this issue under review. As the JCS position indicates, US national security interests relate primarily to straits wider than six miles. However, the JCS and DOD insist that the US law of the sea position provide for freedom of transit through all international straits arguing that to try to differentiate between straits less than six miles and straits greater than six miles would create an arbitrary breach of principle -- with the

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result that all straits States which claim a territorial sea wider than three miles would assert the right to have their "territorial strait" exempted. Despite the JCS' concerns about a possible "breach of principle," the task force should, for example, look at alternatives that might permit a distinction to be drawn between straits less than six miles and straits six miles or more.

IV. Next Step in Law of the Sea Negotiations

In response to NSDM 157 of March 13, the Law of the Sea Task Force is currently preparing recommended instructions for the US Delegation to this summer's preparatory meeting for the UN Law of the Sea Conference. In so doing the task force is preparing positions designed to counter criticisms related to the US straits position by States such as Spain to the effect that it does not provide for legitimate coastal states' interests such as safety of navigation and avoidance of marine pollution. The thrust of the US position will be to persuade other countries that it is possible to accommodate their concerns on these issues while at the same time providing for free transit. We are monitoring interagency development of these positions. No action is required on your part at this time. Dick Kennedy concurs.

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