Viewpoint

Walter Berns

Mining the Seas for a Brave New World

UNDER ESTABLISHED international law, we are entitled to mine the seas even as we might fish them. Elliot Richardson himself, who was President Carter's special representative for the UN Law of the Sea Conference until October 1, 1980, acknowledges that deep seabed resources may be recovered by any state or its nationals in "an exercise of a traditional high-seas freedom." Thus, as matters now stand, without the Law of the Sea Treaty, "nations can license their own nationals to mine the deep seabed and can reciprocally agree to respect the licenses granted by other nations." Nevertheless, last year the United States came to the very brink of approving the treaty and agreeing to relinquish this right to the international entity the treaty would create.

That poses an obvious question. Why should the United States, possessed of both the legal right to mine the seas and the technological and financial capabilities needed to do so, cede that right to an authority that will be governed by others? What is striking is how Richardson answers this question. He explains that other countries, and especially the so-called developing or third-world countries, are not happy with the current international law on this subject, and that we must therefore acquiesce in their demand that it be superseded by the new treaty. After all, in this one world, they outnumber us.

What is also striking to me is that such one-world sentiment continues to exist among us. At a meeting earlier this year, attended by representatives of various organizations that make it their business to follow United Nations affairs, I found—much to my surprise—people who continue to promote the cause of world government. I was surprised not so much by their presence as by the fact of their continued existence. For some reason—with hindsight I now see that it was merely because I had myself long since ceased to pay any attention to the issue—I had assumed that the world government enthusiasts had become discouraged by their evident lack of success and had turned to other good causes (such as saving Planet Earth or Newfoundland's baby seals).

I had done my best to discourage them. Back in the 1950s, I had argued that, whatever its constitution or nominal form and regardless of its organizing principle (fear of atomic annihilation or some statement of the brotherhood of man), any world government would almost certainly be a worldwide tyranny. I said it was folly to assume, as the proponents did, that a world government would be a liberal democracy, a judgment supported by the fact that even then there were relatively few liberal democracies in the world. Free government, I wrote, is difficult to establish even under the most propitious circumstances, and without mutual trust, literate populations and, to cite one other condition, a tradition of obedience to the rule of law, it would be impossible to maintain. This was the argument and I thought it persuasive. But, as an antecedent of subsequent events, it was probably not so persuasive as one episode in the life of what was then the largest of the world-government organizations, the United World Federalists.

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According to the published account in the

Walter Berns is a resident scholar at the American Enterprise Institute.

Journal of Politics, the Federalists were indeed united on the need for a "global government able to enforce law (in the sense of 'domestic law') on individual violators," as well as in the opinion that, "given a certain amount of good will and political education," such a global government was possible. They also agreed that the "only practicable form for such a world government was the federal form." Unfortunately (for them at least), they could not agree as to "how such a world federation was to be brought about, which of the present states should be founding members, and what powers should be constitutionally delegated to it." In the course of trying to resolve their differences on these secondary issues, the members became "enraged," accusing each other of "political immaturity" and demanding that the charters of affiliated groups be revoked. The upshot was a series of schisms that left the parent organization with only half its membership.

This ought to have been a sobering experience, especially for those directly involved in it (and it ought to have provided a valuable lesson for anyone involved today in "global negotiations"). Setting out to unite the people of the entire world under a single government, they quickly learned that they could not even unite themselves. Yet, despite the example of the no-longer United World Federalists, there are still people—world federalists, planet-earthers, or whatever—who hope to bring about a genuine government of the world, if only by stages, by establishing regulatory regimes over this or that piece of the world and this or that aspect of international commerce. And all this despite the evidence of what the United Nations has become.

What it has become is "a dangerous place" for the likes of the United States. In 1955, it comprised some fifty nations and, on the whole, its dominant spirit was that of the liberal democracies; now it comprises more than three times fifty nations and the liberal democracies are a beleaguered and, by the standards that govern it, a despised or ridiculed minority. It is to such a league of disparate nations that the proposed Law of the Sea Treaty would have us yield the significant sovereign rights we now possess and are fully capable of exercising. The Seabed Authority would be dominated by nations contemptuous of our institutions and liberties, yet envious of our wealth.

Having nothing to lose and, in theory at least, everything to gain, these ascendant and developing nations began the seabed negotiations by demanding too much, even for our acquiescent negotiators. But the treaty as amended is a compromise, it is said, and one we can accept. It is a compromise between the demands of the developing countries, which look upon the resources of the high seas as part of "the common heritage of mankind" and, as such, to be reserved for an international equivalent of a government monopoly, and the position of the industrialized countries, which seek to guarantee the right of equal access through "a licensing system for all qualified seabed miners, whether private corporations or state entities."

Enough has been written in this journal to enable readers to judge for themselves whether the seabed provisions of the treaty represent a fair compromise between the parties. (See "One OPEC Is Enough" by Northcutt Ely in this issue and "A Global Straitjacket" by Richard Berryman and Richard Schifter in the previous issue.) I wish to address the theoretical assumptions and underpinnings of the treaty. By advocating ratification, Richardson would have us accept the developing nations' understanding of "the common heritage of mankind" as well as the legal consequences that flow from it. That understanding is the principle embodied in the treaty, and even the particular terms of the compromise reflect it. It is a pernicious principle.

My colleague, Robert A. Goldwin, has demonstrated that properly understood a resource that is part of mankind's common heritage is a resource that is owned not by everybody but by nobody ("Locke and the Law of the Sea," *Commentary*, June 1981). It is nobody's property because nobody has ap*prop*riated it, which is to say, nobody has made it his own; and until somebody has made it his own it is worthless, worthless to mankind in general and to men in particular. But, by accepting this so-called compromise, Richardson acknowledges a property right in mankind *and*, what is more, agrees that mankind has, or should have, a juridical personality through which that right may be exercised. The Seabed Authority would be a kind of mini-world government.

It is puzzling that nobody seems to have understood that by ratifying the Law of the Sea Treaty, we the people of the United States

would be doing, formally at least, nothing essentially dissimilar to what we did in 1787–88. On that celebrated occasion we ordained and established the Constitution of the United States, ceding to the United States our individual natural rights to govern ourselves; that is, we relinquished the legislative, executive, and judicial powers each of us possessed in the state of nature and by natural right. We did so because, as we acknowledged in the Declaration of Independence, we knew that the natural rights with which we were equally endowed could not be enjoyed or secured in our natural condition. ("To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.") Precisely in order to secure our rights, we yielded them (but not all of them) to the government we constituted in 1787–88 and under which we have lived for almost 200 years.

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So, too, it is now proposed that we relinquish our our natural and internationally recognized right to appropriate unowned minerals by ceding it to another government that we, in the company of the rest of mankind, are constituting. But who are the "we" constituting the government over seabed mining, and who were the "we" who constituted the government of the United States?

The "we" constituting the International Seabed Authority are (or would be), in principle, all the world's states, comprising, in the words of the Book of Common Prayer, "all sorts and conditions of men" and, more to the point, all sorts and conditions of governments: tyrannies, despotisms (both benign and malign, and most of them unfriendly to the United States), and a pitiful handful of liberal democracies. It was a different sort of "we" who constituted the government of the United States.

In the course of the 1787 constitutional debates when various delegates suggested that we were thirteen peoples, James Wilson of Pennsylvania insisted that, with the meeting of the First Continental Congress, Pennsylvanians were no more, Virginians were no more, et cetera. "We are now," he said, "one nation of brethren." This may have been something of an exaggeration; yet, as Tocqueville was to point out shortly thereafter, the Americans were a homogeneous people on the whole; as he put it, the citizens of Maine and Georgia, separated by a thousand miles, had more in common than those of Normandy and Brittany, "separated only by a brook." Even so, what is significant is that, despite their common language, their common memories, their common heritage, and their common aspirations, the Americans of 1787 constituted a government that is characterized by *distrust.*

Men are not angels, Madison said in Federalist 51, and although popular and regular elections should be the primary control on the government, "experience has taught mankind the necessity of auxiliary precautions." These precautions took the form of the various institutions built into the very structure of government and familiar to everyone who has had so much as a high school civics course: a complex system of representation, checks and balances, separation of powers and, for one more example, an independent judiciary. Together, these institutional devices were designed to prevent government by simple majorities of the people. The Americans of 1787 did not trust even themselves—though they had, in 1776, declared themselves "one people."

Against this background, the willingness of some of their descendants to accept the structure that would be established under the seabed treaty cries out for an explanation. There would be an Assembly in which the United States (along with all signatory countries) would be represented and, if the UN General Assembly can serve as a guide, regularly outvoted. There would be a thirty-six-member Council, similar to the UN's Security Council (but without a veto provision), which would take some decisions by consensus, some by a three-fourths vote, others by a two-thirds vote, and still others by a vote of a simple majority—and on which the United States might or might not be represented. (The Soviet bloc, on the other hand, would be guaranteed at least three seats.) And there would be a Seabed Disputes Chamber consisting of eleven members selected

from among the members of the International Tribunal for Law of the Sea—on which, again, the United States might or might not be represented. One provision, however, is very clear: since nations would contribute funds to the Seabed Authority in proportion to their UN assessments, some 25 percent of the money would come from the United States. On that point the world was indeed united.

Speaking before the American Mining Congress in September 1980, Elliot Richardson made much of the fact that the "rules, regulations, and procedures of the Authority will have been developed by the Preparatory Commission before the treaty enters into force. . . ." This would be more reassuring if the views of the United States with respect to the "rules, regulations, and procedures" were guaranteed a fair hearing during the meetings of this commission. Richardson assured the Mining Congress that the commission would proceed carefully and that "experts will have more influence in [it] than in the Law of the Sea Conference itself." That is an interesting admission. But what he does not say, because he cannot honestly say it, is that *our* "experts" would have an influence commensurate with their expertise or, indeed, that they would be *our* experts, not only by nationality but by inclination. We cannot know the answers to these questions until *after* the treaty is ratified. What is even more disquieting is that these "rules, regulations, and procedures" can be changed by consensus in the Council (on which the United States might or might not be represented), and as Northcutt Ely points out, the judicial tribunal of the Seabed Authority would be forbidden to declare such changes *ultra vires*. In short, this quasi-government would have a judiciary, but this judiciary would not have the sort of review power on which we have come to depend for protection from official misconduct.

One can understand why the Soviet Union supports the treaty. One can understand why the third-world countries support it. One can even understand why Canadian Prime Minister Trudeau supports it enthusiastically: There are provisions in it protecting Canadian minerals from having to compete in the world market with those that might be scooped from the seabeds. Besides, Trudeau seems to be eager to become a leader of the third world—what better platform from which to shake an admonitory finger at the United States?—and to do whatever is required, by way of national economic policy, to make Canada eligible for membership in that group. But it passeth all understanding why an American should support it.

As Gary Knight of Louisiana State University has pointed out, the treaty is seen by its friends as the first step in the campaign to implement the New International Economic Order, that "grandiose plan for massive redistribution of political and economic power from the north to the south." With the treaty, the principle for this redistribution would be in place and its implementation would follow as circumstances permit: we are part of one world called mankind; wealth is the "common heritage of mankind"; the United Nations or the Seabed Authority or some other broad international entity speaks for mankind; and, with the cooperation of the Soviet Union, the third world controls these organizations. (In the actual event, of course, the power and wealth would go not to the third-world countries but, rather, to the self-selected third-world elites.)

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This brave new world is not what the United World Federalists had in mind. They wanted a government similar to the one they already enjoyed, a government that secured the rights of man even as it guaranteed the peace. They too readily assumed that the rest of mankind shared these goals, but, as anyone familiar with the UN knows, the spokesmen for the rest of mankind—by which I mean the mankind living outside the liberal democracies—have an inflated idea of rights (or, at least, their rights) and a parochial idea of peace (a war of national liberation does not breach the peace).

Fortunately, with the new mood in Washington, there is little danger that the United States will sign the present treaty and, if the administration does sign it, scarcely any possibility that it will be approved by the constitutionally required two-thirds vote of the Senate. We can thank an earlier and wiser generation of Americans for that auxiliary precaution. ■