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THE WHITE HOUSE
WASHINGTON

August 13, 1976

*Henry
Kissinger
J. Edgar Hoover
J. Edgar Hoover*

Dear Mr. Secretary:

The Counsel's Office has reviewed the material you sent to me on Puerto Rico's requests in regard to the Law of the Sea Conference and treaty.

After consultation with the Domestic Council, it is the Counsel's Office view that the issues raised by Puerto Rico should be responded to by the State Department. Thus, I am returning to you Governor Hernandez-Colon's letter and your draft response to him. The draft response appears appropriate.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

The Honorable Henry A. Kissinger
Secretary of State
Washington, D. C. 20520

Enclosures

THE WHITE HOUSE
WASHINGTON

August 17, 1976

Treaties

also

State

HOLD

MEMORANDUM FOR:

KEN LAZARUS

FROM:

PHILIP BUCHEN *P.*

Attached is a communication from Monroe Leigh concerning a draft Executive Order which includes a copy of Bob McCloskey's letter to Jim Lynn and a copy of the draft that has been cleared by Secretary Kissinger and Attorney General Levi.

Please prepare the comments of this office.

August 6, 1976

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Dear Phil:

Pursuant to our recent telephone conversation, I have enclosed a copy of the draft executive order on treaties and other international agreements, along with the accompanying letter from Bob McCloskey to OMB.

The draft order was transmitted to OMB earlier today.

Sincerely,

Monroe Leigh

Enclosures:

1. Draft executive order
2. Letter to OMB

August 5, 1976

Dear Mr. Lynn:

Transmitted herewith for submission to the President is a draft executive order on Treaties and Other International Agreements of the United States (Tab 1). The primary purpose of the proposed order is to require that all treaties or executive agreements concluded by any agency of the U.S. Government receive the prior approval of the President or of the Secretary of State. The draft order further requires the texts of concluded agreements other than treaties to be transmitted to the Department of State no later than 20 days after their entry into force, thus permitting the Department to meet its obligation under the Case Act (P.L. 92-403) to transmit such agreements to the Congress no later than 60 days after their entry into force. The draft order also makes clear that the Department of State is to make the determination whether any proposed arrangement or document, or series of arrangements or documents would, if concluded, constitute one or more international agreements within the meaning of the Case Act.

The need for such an executive order has become increasingly apparent. Certain agencies and departments of the Government are not clearing with the President or the Secretary of State, either before or after negotiation, agreements they have concluded with foreign governments or agencies. Certain agencies believe that they - not the Department of State - have the legal right to determine whether any particular document or set of documents for which they have primary responsibility constitutes an international agreement within the meaning of the Case Act. Certain agencies are either not sending their concluded agreements to the Department for transmittal to

The Honorable

James T. Lynn, Director

Office of Management and Budget,

Washington, D.C. 20503.

the Congress pursuant to the Case Act, or are sending them too late for the Department to meet the Act's 60-day requirement. The draft order is designed to remedy each of these deficiencies.

The issue has generated adverse congressional comment, particularly by Chairman Sparkman of the Senate Foreign Relations Committee, who complained in a recent letter (Tab 2) to Secretary of State Kissinger that the Foreign Relations Committee "has had considerable difficulty in obtaining executive agreements within the time limit of 60 days" required by the Case Act. He cited three agreements concluded by an independent commission, but not transmitted to the Department of State.

On March 1 Senator Abourezk called for criminal penalties for Case Act violations (Tab 3). He was reacting to a Report (Tab 4) issued on February 20 by the General Accounting Office which stated that 34 agreements with Korea, most of which were concluded by officers in the field, had never been submitted to the Department of State or to the Congress.

Many individual examples could be cited of failure to clear agreements with the President or the Department of State, and of late transmittals of concluded agreements to the Department of State. In a few cases, the legal authority for agreements not previously cleared in the Department of State was questionable. In one recent case the Department of State Treaties Office was not permitted even to examine an agreement with a foreign country already concluded by another Department of the U.S. Government.

It is not possible to conduct the foreign policy of the United States in a coherent and coordinated manner if various Government departments and agencies may conclude international agreements as they wish and without State Department or Presidential approval, or may develop their own criteria for deciding what constitutes an international agreement. Further, failure to send concluded agreements to the Department of State in timely fashion prevents the fulfillment of the Department's statutory obligations. I believe that the issue has probably exacerbated the problem of current

congressional attempts to establish a right of legislative veto over executive agreements.

In our judgment, nothing short of an executive order will resolve these difficulties. Lesser efforts, even by senior Department of State officials, have not had the desired results. On September 6, 1973, Acting Secretary of State Rush sent a letter (Tab 5) to all departments and agencies calling their attention to the provisions of the Case Act and providing guidance with respect to the types of agreements covered by the Act. While the Rush letter has been helpful in securing the cooperation of many departments and agencies, clearly it has been insufficient. Too many officials in other departments have asserted a right to ignore it.

In March, 1976, the Legal Adviser of the Department of State sent to Department officers in the field and to all departments and agencies further detailed guidance (Tab 6) concerning the criteria applied by the Legal Adviser in interpreting and implementing the Case Act. Yet the problem has continued unabated.

In the Department's view, there is no legal question raised by the draft executive order. The President of the United States, as chief executive and negotiator for the nation in international affairs, has the legal right and responsibility under the Constitution to approve before conclusion any treaty or executive agreement negotiated by an officer of the U.S. Government. The President may also require departments and agencies to consult with the Secretary of State prior to the negotiation of treaties or agreements, and he may delegate the power of approval of treaties or agreements to the Secretary of State. 22 U.S.C. 2656; 3 U.S.C. 301.

This draft executive order has been cleared personally by Secretary of State Kissinger and by Attorney General Levi.

Sincerely yours,

Robert J. McCloskey
Assistant Secretary for
Congressional Relations

Enclosures:

As stated.

L/T:AWRovine:rff 7-29-76 x21074

Clearances: L - Mr. Leigh
H - Mr. Goldberg

EXECUTIVE ORDER _____

Treaties and Other International Agreements
of the United States

The President is responsible for the conduct of the foreign policy of the United States. The Secretary of State is the principal foreign policy adviser of the President and has primary responsibility in assisting the President in the conduct of foreign policy. Pursuant to Section 112a of Title 1 of the United States Code the Secretary of State is required to publish all treaties and all other international agreements to which the United States is a party. Pursuant to Public Law 92-403 (86 Stat. 619, 1 U.S.C. 112b) he is required to transmit to the Congress all international agreements other than treaties no later than sixty days after their entry into force. In view of the fact that the Department of State and several other agencies of the Government have responsibilities which result in the conclusion of treaties or other international agreements, and to assist the President and the Secretary of State in discharging their foreign policy responsibilities, it is necessary to coordinate the formulation, negotiation, and conclusion of any such treaties or other international agreements.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including Section 2656 of Title 22 of the United States Code, and Section 301 of Title 3 of the United States Code, and as President of the United States, it is ordered as follows:

Section 1. The Secretary of State shall be responsible on behalf of the President, for coordinating the formulation of all treaties and other international agreements proposed for negotiation.

Section 2. Any agency proposing that any treaty or other international agreement be drafted or negotiated on a matter within its responsibility shall consult with the Secretary of State. No officer may negotiate, sign, or otherwise conclude a treaty or other international agreement, without my express approval unless he shall have first obtained the concurrence of the Secretary of State. Such concurrence may be given for categories of treaties or agreements, or for specific treaties or agreements.

Section 3. The final text of any international agreement other than a treaty shall, as soon as possible after its conclusion, but in no event later than twenty days thereafter, be transmitted to the Department of State, for the attention of the Assistant Legal Adviser for Treaty Affairs, for transmission to the Congress pursuant to Public Law 92-403 (86 Stat. 619, 1 U.S.C. 112b).

Section 4. This Order shall apply to any international arrangement (including, but not limited to, any agency-level or implementing arrangement) that constitutes an international agreement, whether authorized by statute, treaty, or the Constitution. The determination whether any arrangement or document, or series of arrangements or documents constitutes, or would, if concluded, constitute one or more international agreements, shall be made by the Secretary of State.

Section 5. The term "agency" as used in this Order means each authority of the Government of the United States, whether or not it is within or subject to review by another agency.

Section 6. The Department of State is hereby authorized to issue regulations to implement this Order.

Section 7. This Order supersedes any Executive Order, regulation, or delegation inconsistent herewith.