Command of the Commons Boasts: An Invitation to Lawfare?

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Roll on thou deep and dark blue ocean—roll!
Ten thousand fleets sweep over thee in vain
Man marks the earth with ruin—his control
Stops with the shore

Lord Byron, Childe Harold’s Pilgrimage

Introduction

Lord Byron’s humble respect for the sea contrasts sharply with the commonly held view of the tenth-century Danish King Canute. Canute is often (mistakenly) said to have believed that he could hold back the incoming tide by dint of royal will. To silence a group of courtiers prone to excessive flattery, the king is said to have agreed to place his throne at the low tide line on the shore in Bosham, to demonstrate the absurdity of their suggestion that he could “command the obedience of the sea.” Royal will failed to keep his majesty dry as the tide rose. “Just-so,” as Kipling would say. What might we learn from the King Canute fable? We might start by expressing our envy for the ancient king, who at least had the good

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
fortune to face a “predictable” threat environment. Even in the tenth century, the
daily tidal cycle was probably well known. The challenge facing the king in his “in-
telligence preparation of the environment” was therefore minor. The same cannot
be said for the threat environment we face in the twenty-first century, which is ev­
everywhere described as one characterized by its uncertainty and accelerating pace of
change. As one astute observer of our current situation might put it: if you do not
expect to be surprised—even shocked—by what happens next, you are not paying
attention.4 Second, one must admire the king’s practical modesty. He could have
accepted the flattery, but he knew he could not “command” that great commons
known as the sea.

The first panel in this, the 2006 Naval War College, International Law Depart­
ment conference on “Global Legal Challenges: Command of the Commons, Strate­
gic Communications, and Natural Disasters,” has been asked to offer a US
perspective on current assertions regarding the US command of the commons. It is
my privilege to moderate the discussion by a distinguished panel that includes Vice
Admiral Lowell E. (“Jake”) Jacoby, US Navy (retired), the immediate past director
of the Defense Intelligence Agency; Vice Admiral John G. Morgan, Jr., US Navy,
deputy chief of naval operations for plans and strategy (N3/N5); and Rear Admiral
Joseph L. Nimmich, US Coast Guard, assistant commandant of the Coast Guard
for policy and planning.

It is noteworthy that this conference takes place at a time when the intelligence
community has reliable indications that the Democratic People’s Republic of Korea
(DPRK) has fueled one or more Taep’o-dong 2 missiles, in apparent preparation
for a test launch of the DPRK’s new intermediate-range weapon. In response, the
US missile defense system has been activated and two Aegis-equipped cruisers are
stationed off the Korean peninsula. How did we obtain our information on missile
preparation going on within one of the world’s most closed societies? Why are US
warships deployed to the far western Pacific to erect a missile defense thousands of
miles from the US mainland? What does the story unfolding on the Korean penin­
sula tell us about claims to a “command of the commons”?

As the sole lawyer on the panel, the task fell to me to identify the most salient legal
issues raised by claims to command of the commons. But I was also invited to
weigh in on the involved factual and policy questions. My goals in this short article
are modest. After setting out a lawyer’s response to claims of command over the
commons, I turn to a brief legal analysis of the problems raised by this so-called
hegemonic approach. The first and most obvious problem is that any assertion of
command over the commons collides head-on with the relevant international law.
The second problem—and the one strategy drafters would do well to bear in
mind—is that such assertions could invite a response from lawfare practitioners, a
move that could jeopardize the freedom of access and maritime mobility on which our national security depends.

I. The Panel’s Precepts

The organizers of this year’s conference might well have been moved to include a command of the commons topic after seeing a banner to that effect displayed in the Pentagon. The text of that banner is reproduced in the appendix to this article. Our panel is asked to focus on the perspective of the United States to command of the commons. We were provided a list of questions in advance. We are first asked, “How broadly should the global commons be conceived (space, air, surface, subsurface, seabed, cyber)?” Next, we are asked, “What are the primary threats emanating from the global commons?” Our third issue is “What role should elements of the Intelligence Community play? How should they be integrated into a plan for ‘command of the commons’?” Finally, we are told that “The CNO and the National Plan to Achieve Maritime Domain Awareness call for a ‘persistent’ Intelligence, Surveillance and Reconnaissance (ISR) capability in the global maritime commons,” and then asked to consider “What obstacles will we face in achieving that? Are any of those obstacles legal ones?”

In its reference to “the commons,” the Pentagon banner lists the sea (including undersea), air, space and cyberspace. As our discussion unfolds, the three panelists appear to adopt a somewhat broader definition of the spatial dimensions of the commons, which includes the airspace, waters and seabed and its subsoil outside national jurisdiction, along with outer space and the electromagnetic spectrum. (Cyberspace was occasionally listed separately, though without distinguishing the privately or publicly owned cyberspace components that fall outside the commons.) It takes but little imagination to appreciate the wide-ranging utility and pervasive usage of the commons. Some serve as a buffer (particularly for insular nations, like the United States), a highway of transit and transport, a place to lay cables and pipelines or to orbit satellites, and—ininfrequently for the last six decades—a battlespace. Outside of naval planning circles, it is also recognized that the commons are an important source of protein, a recreational arena, a key regulator of our planetary carbon cycle and climate, and, not nearly often enough, a place of scientific discovery. The importance of the commons in an era when the globalization “mega-trend” penetrates nearly every corner of the planet is undeniable.

In addition to questions about the spatial dimensions of the commons, it is necessary to address the more difficult temporal and conceptual dimensions of “command.” By temporal, I mean whether the command referred to is meant to prevail in times of peace and war (to the extent that dichotomy any longer has meaning).
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By conceptual, I mean the dimensions or degree attached to the claim of control. In the law of the sea context, the relationship between the State and a body of water is variously described in terms of “sovereignty,” “sovereign rights,” and “jurisdiction.” Assuming that “command” means something less than sovereignty over the sea (or any other common), what are its conceptual dimensions? The goals of sea command or control are relatively easy to identify. They typically include the goal of ensuring freedom of access and movement for warships, auxiliaries and supporting merchant vessels. Such access is essential to a power projection strategy. The National Defense Strategy appears to stop here; calling only for a capability to “operate from” the global commons, not to control them. At times, however, claims to access take the form of presence, persistent presence, seabasing and perhaps even “global fleet stations.” And at times sea command or control strategies include denying use of the sea to one’s adversaries, at least during periods of conflict.

In assessing the bounds of what might be included in a “command” of the commons, my first recourse was to a common dictionary. Were I to attempt to explain what I meant by command of the commons to a layperson, I should assume that person would apply the common definition (a point we lawyers often forget). In the dictionary I consulted, the most relevant definitions for “command” included “to have authoritative control over; to rule; to have at one’s disposal; to dominate by position.” “Authoritative” control implies for me some legitimate basis for exercising such control. “Rule” carries unfortunate connotations for many. On the assumption that usage of the term in the actual national strategy documents or literature was also relevant, particularly in the present audience, I decided to conduct a cursory literature search. The resulting definitions for command of the sea (and its sister phrases) were all over the board. After reflecting on the US Navy’s “Sea Power 21” concept papers and the Australian Naval Strategy, I came to the conclusion that the most useful definition of “command” over a space—physical or virtual—would have to focus on the putative commander’s capability, capacity and intent. It also became clear to me that one could distinguish the fact of “command” from the grand strategy that might lead a country to pursue such a command.

Although it might have been easy to declare that the command of the commons concept is too vague to serve as an organizing principle amenable to legal analysis, I chose instead to craft a working definition that focused mainly on the sea command and would capture what appeared to be the commonly held attributes of command constructs. For this article, I ultimately settled on a definition that includes the requisite capability and intent to ensure freedom of movement for one’s vessels (power projection) during times of peace and war; and, during times of...
armed conflict, to deny such movement to one’s enemies (sea denial); and to exert that measure of control over neutral or unidentified craft that the law of neutrality permits (sea control).\(^{18}\)

**II. Assessing the Claim to US Command of the Commons**

The claims espoused in the Pentagon banner find support in the 2003 article “Command of the Commons: The Military Foundation of U.S. Hegemony,” by MIT professor and Strategic Studies Program Director Barry Posen. Indeed, one suspects the banner authors had carefully studied Posen’s works. Writing in *International Security*, Professor Posen described his concept of command of the commons as the capability to effectively deny use of the commons to any other nation and to prevail in any military contest for the commons.\(^{19}\) He then went on to argue that the United States already enjoys de facto command of the commons; by which he means the sea, deep seabed, space and international airspace, and that command of the commons has supported the hegemonic grand strategy pursued by the United States since the late 1990s.\(^{20}\) In explaining his use of the term, Posen equated “command of the sea” with what the historian Paul Kennedy referred to as “naval mastery”—more than mere superiority, but certainly less than claims to “rule” over space.\(^{21}\) Posen admits that “command of the commons” does not mean that other States cannot use the commons in peacetime, nor does the concept gain—say that there will be contested areas—the littoral and riverine regions, continental urban centers and jungles (but none of those areas are within anyone’s working definition of the commons anyway). The true commons, Posen asserts, are commanded, under his definition, by the United States. He then concludes with a warning that “U.S. command of the commons provides an impressive foundation for selective engagement. It is not adequate for a policy of primacy.”\(^{22}\)

**A. The Claim to De Facto Command of the Commons**

Applying the chosen test of capability, capacity and intent to claims of command of the commons leaves me with considerable doubt regarding the accuracy of those claims. Vice Admiral Jacoby’s warning only increased that doubt.\(^{23}\) On the contrary, it seems to me that the claims to a command of the commons reflect a troubling combination of unjustified confidence regarding a very uncertain threat environment\(^{24}\) and a thin ear regarding the effect such claims are likely to have upon much of the audience of greatest concern to us. I could add that assertions that the United States presently enjoys command of the commons failed to impress the conference attendees I overheard, who, like skeptical Missourians, insisted on proof. Indeed, the reaction by one attendee to the title of this panel went something
like: “We couldn’t ‘command’ the commons with a 600-ship navy. How could we be expected to do it with 280 ships, 200,000 fewer sailors, and an ever-shrinking merchant fleet?” Another asked, “If we command the commons, why can’t we stem the flow of illegal migrants and narcotics into our country?”

A quick look at the numbers is not likely to instill confidence in the Missourians. The seas cover 71% of the planet. The Pacific Ocean alone covers 64 million square miles (admittedly, some of which falls within the national waters of coastal States). If all 12 US Navy aircraft carriers were available to patrol the Pacific, each would still be responsible for an area of more than 5 million square miles (if you assume six-month deployment rotations, you must double that number). Those who suggest that the focus should be on targets of potential interest, not surface area, would do well to consider the United Nations Conference on Trade and Development’s recent annual report on shipping, which puts the number of merchant vessels in the world at more than 600,000. That would cut down the carrier workload to just 5,000 vessels each. Of course, that does not include the growing fleet of unmanned vehicles operating on, under and over the seas. As a final feasibility measure, I thought back to the 2004 Northern Command Homeland Defense Symposium, where it was emphasized that the United States plainly lacks a maritime surveillance system anything like the one the North American Aerospace Defense Command (NORAD) provides for the air domain. Although some progress has been made using Automatic Identification System (AIS) and Long Range Identification and Tracking (LRIT) systems, maritime domain awareness still has a long way to go.

The lawyers among us will be quick to point out that any assessment of our “capability” to command the commons must include an assessment of our legal authority to act. As the 2003 So San incident demonstrated,27 military capability unaccompanied by an adequate prescriptive and enforcement regime will sometimes utterly fail to produce the desired end state. Spanish Marines proved to be powerless to achieve a goal where the law fell short. Our legal authorities and capabilities are plainly not adequate to even “secure” the commons, let alone “command” them sufficiently to protect us against maritime terrorism or weapons of mass destruction (WMD) transport. The fact that the common four-part “DIME” inventory of the instruments of national power (diplomatic, information, military and economic) omits our law enforcement capabilities and capacities may be partly to blame for this blind spot in most maritime strategy thinking.

Capability is also a function of vulnerability. Ex ante claims to command of international airspace must be reassessed in an age when even terrorist organizations have access to unmanned aerial vehicles (UAVs) and missiles—including missiles capable of taking one of Israel’s most modern warships out of action.”
Similarly, any claim to a “command” of outer space must be tempered by the knowledge of the vulnerability of satellites to laser or missile attack, a high-altitude nuclear explosion, or jamming from the ground, and to the growing ease of access our adversaries now have to commercial satellites such as Google Earth™ and Digital Globe®. The vulnerability of vital communication cables strung across the deep seabed and of critical military and commercial networks to “cyber-attack” similarly renders doubtful any claim that the nation has attained “command” of either of those domains. On the contrary, we can only hope that a defense establishment that connects and leverages its now lighter and more dispersed forces through a networked information and communications grid has studied the “unrestricted warfare” battle plan and has not thrown out its semaphore flags. In response to those who might argue that such vulnerability represents only the potential to lose command of the commons, and does not diminish present command, I would be tempted to respond by asking how they distinguish “command” from the more temporally limited concept of “superiority.”

In short, my initial look at the numbers fails the Missouri “show me” test. Indeed, one might be moved to remonstrate that the only reason that a claim to “command” of the commons is plausible at present is because no one is out there contesting the commons. The interest has moved to the littorals, ports and land domains. Witness China’s so-called “String of Pearls” ambition, to ensure access to sea lines of communication connecting it to the Persian Gulf oil fields through a string of bases stretching from Gwandar, Pakistan to Hainan Island. In these domains—the favored battlespace of the fourth-generation warfare practitioners—the fates of the USS Stark, USS Cole, USS Kearsarge and USS Ashland, and the INS Hanit belie any notion of command. Here, there be dragons, and their riders are reading Mao and Ho Chi Minh, the Small Wars Manual and the Sling and the Stone.

B. Command of the Commons as a Hegemonic Grand Strategy Element
The Pentagon banner includes a citation to Rear Admiral Alfred Thayer Mahan, suggesting that the banner authors’ concept of command of the commons has its roots in a larger strategy. Why Mahan, and why that particular passage? Is the Department of Defense suggesting that a strategy calling for command of the commons will be found in the old “foundations of strategy” that were “laid upon a rock”? Did Mahan believe that the United States would “guarantee” other States “their freedom to navigate the sea, air or space,” as the banner claims? With the trepidation any lawyer should feel before wading into national defense strategy, I decided to see just what Mahan stood for.
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I took as my point of departure the belief that grand strategy, including its foreign policy elements, can be a useful window into a nation’s intent with regard to the commons. What do the US strategy documents say about the nation’s intent with respect to the commons? My brief study of the literature persuades me that the evolutionary path of maritime and naval strategy in the United States has not been linear (Justice Holmes made a similar remark with regard to the evolution of the common law). It demonstrates many of the characteristics of the dialectic, while occasionally producing what economic historians might call a logistic surge, what Thomas Kuhn described as a revolutionary paradigm shift, or what evolutionary biologists refer to as punctuated equilibrium. Essentially all such constructs describe a cycle of peaceful interludes punctuated by dramatic revolutions. Futurist Alvin Toffler warned that the frequency of that cycle is rising sharply. Peter Schwartz adds that surprise—by which he means discontinuities—should no longer be surprising. Current indications suggest we might be on the verge of just such a shift in grand strategy, as the mass of antithetical evidence and sentiment grows. Justice Holmes, a battle-tested Civil War veteran, would likely agree.

Over the years, naval and maritime strategy documents and treatises have adopted a variety of terminology to refer to the ends and means that make up the grand strategy. The choices are informed by history, policy, capability and perhaps even a little bit of law. Navies (and merchant fleets) figure prominently. The Greek historian Herodotus makes it clear that the Athenian navy’s defeat of the much larger Persian fleet at the Battle of Salamis (480 BC) was a decisive victory for the Greeks. Indeed, Athens’ naval “superiority,” obtained more by strategy and skill than by relative fleet size, was the city-State’s signature strength for nearly eight decades (it was lost when Athens executed most of its naval leaders, leading to a defeat by Sparta). Moving forward from the Greek and Roman experiences to the modern era, we see several shifts in the ends and means elements in strategy documents. They raise questions regarding distinctions between “superiority” in a given domain and “control” or “command” of that domain, and between the concept of “naval” superiority (or strategy) and “maritime” superiority (or strategy), and whether these are ends or means, and whether they are merely notional or aspirational. And finally, is it only the primacists who seek to “control” the commons?

Any examination of “sea control” and the correlative opportunity for “power projection” begins with Captain (later Rear Admiral) Alfred Thayer Mahan and Rear Admiral Stephen Luce, first president of the US Naval War College. Mahan was a naval officer and Naval War College professor (and later president) who characterized the sea as a “wide common.” The commons included potential battlespaces, where the naval combatants would mass and meet, and sea lines of
communication, through which both warships and merchant vessels traveled. His magisterial 1894 book, *The Influence of Sea Power Upon History*, reveals Mahan as a naval strategist who saw sea control as the paramount goal of naval strategy. He rejected the coastal defense and commerce raiding strategy of the day and offered in its place a vision of naval warfare as a contest for command of the sea. In Mahan’s view, sea control was essential for a belligerent to be assured of access to the sea and freedom of mobility, while denying such access or movement to the opponent. Later asymmetric strategies did not so much challenge Mahan’s assumptions; rather, they looked for ways to circumvent the adversary’s control of the seas.

In his 1911 treatise *Some Principles of Maritime Strategy*, Sir Julian Corbett took a broader and slightly less aggressive approach, rejecting what he considered to be a “big-battle fixation” by writers who advocated the principle of concentration. Corbett distinguished “naval strategy,” which focuses on command of the sea, from “maritime strategy,” which focuses on the interplay between naval and land forces. To Corbett, naval strategy was but a subset of the maritime strategy, the purpose of which was to accomplish the sovereign’s broader goals. He admonished that command of the sea was not a proper goal in and of itself but rather a strength that could be employed to support the nation’s overall military objective. Corbett concluded (as does Vice Admiral Jacoby) that it is rarely possible to achieve full control of the sea. He argued that a belligerent must always attempt to either secure command of the sea or prevent its opponent from doing so. Nevertheless, he concluded that the “most common situation in naval war is that neither side has the command; that the normal position is not a commanded sea, but an uncommanded sea.”

In 1954, a very young Samuel Huntington penned an unsettling article announcing that, in his view, the Mahanian strategy based on the clash of great fleets massing against each other was obsolete. Viewing the Soviet Union as a massive land-force power that posed little or no naval threat, Huntington concluded that the US Navy force structure should be reshaped to prepare it for littoral warfare and power projection ashore. John Keegan, in his *Price of Admiralty*, carries the concept forward; or should I say upward and downward? Looking back to World War II, and demonstrating how technology can quickly reshape the meaning of command of the commons, he concludes that the US Navy’s aircraft carriers were the “supreme instrument of command of the sea” in that war. But, then, turning to the present, he falls prey to the sin of presentism, asserting that “command of the sea in the future unquestionably lies beneath rather than on the surface.” Keegan acknowledged, however—quite prophetically—that future naval battles will likely be fought close to land, where there is less maneuvering space.
Command of the sea reached its most recent apogee with the appointment of John Lehman to serve as President Reagan’s secretary of the Navy. Secretary Lehman is, of course, known as the author of the 600-ship Navy and “the” maritime strategy. Writing in his autobiography, Command of the Seas, Lehman reports considerable pushback in response to his maritime superiority strategy by those who considered it too ambitious and too provocative. Nevertheless, some give considerable credit to the aggressiveness of Lehman’s strategy and force buildup for the eventual capitulation of the Soviet Union.

As the Reagan era came to a close and with it the Cold War, naval strategy took a decisive turn inland. Two capstone documents of the 1990s, From the Sea in 1992 and Forward . . . From the Sea in 1995, demonstrated that the focus on command of the sea had given way to a need to establish “forward presence,” and that Mahan’s blue-water battles between major combatants would give way to green- and brown-water activities and “maritime security operations.” For some, it looked like coastal defense and blockades were back in style. As one analyst put it more than a decade ago: “From the Sea writes the epitaph to the command of the sea ‘system’ that has dominated naval strategic thought since the sixteenth century when, thanks to the growth of seaborne commerce and the development of warships capable of keeping the sea, ‘true naval war’ replaced ‘cross-ravaging’ as the main purpose of military power at sea.” The intervening years have mostly borne that out, as naval forces have been extensively engaged in maritime security operations in the littorals of the Greater Mideast and in “projecting” power from the sea into the former Yugoslavia, Afghanistan and Iraq.

As we reflect back on a history that includes Salamis, Trafalgar, Midway, the Barbary Pirates and Cole, and briefly consider the various naval and maritime strategies that have competed for adherents, the lesson may be that any notion of command of the commons is held hostage by the competition for the strategic vision. Professor Posen makes a strong case for his claim of US hegemony. He traces the path to our current hegemonic posture to the late 1990s, while recognizing that the hegemonic character of the strategy got an injection of steroids with the 2002 National Security Strategy (though only for contested areas or with respect to specific threats, not for the commons). But, as noted earlier, he concludes that the hegemonic status, while sufficient for an effective strategy of selective engagement, is not adequate to support a policy of primacy (elements of which are contained in the 2002 National Security Strategy). In the dialectic of grand strategy, there are clear signs that US thinking is backing away from its flirtation with primacy. Whether it lands on Posen’s selective engagement or some variant of offshore balancing or strategic restraint is an open question. Are the differences among the strategies important for the legal analysis that follows? Perhaps. To the extent that
both primacy and selective engagement rely on some level of hegemonic command of the commons, they both raise legal questions. There is also good reason to be concerned that a strategy that purports to command what others consider common is likely to be opposed; and the opposition might well draw on all of the instruments of national (and non-State) power, including lawfare to frustrate the hegemon’s design.

1. The National Security Strategy Capstone Documents
Current US high-level strategic plans embrace some elements of primacy, along with cooperative security and selective engagement. The 2002 National Security Strategy called on the Department of Defense to ensure its current military dominance was not challenged. The 2006 National Security Strategy reiterates that “[w]e must maintain a military without peer.” The Clinton-era Department of Defense joint Vision 2020 established the goal of “full spectrum dominance,” which was carried into the 2004 National Military Strategy. At the same time, however, both the 2006 National Security Strategy and the National Defense Strategy acknowledge that the United States lacks the capability to address global security alone. Moreover, the National Defense Strategy expressly disclaims any intent to achieve “dominance” in all areas of military capability. And far from a pretension of presently commanding the commons, it asserts that “[w]e will operate in and from the commons by overcoming challenges to our global maritime, air, space and cyberspace operations.”

Other national strategy documents embrace a cooperative, multilateral approach. The National Strategy to Combat Weapons of Mass Destruction and the National Strategy for Combating Terrorism both rely on cooperative, multilateral and interagency approaches. The National Strategy to Combat Weapons of Mass Destruction recognizes that “it is vital that we work closely with like-minded countries on all elements of our comprehensive proliferation strategy.” Similarly, the National Strategy for Combating Terrorism calls for strengthened coalitions and partnerships, including partnerships with international organizations. The Proliferation Security Initiative and the concept once referred to as the 1,000-ship navy similarly embrace the multilateral approach.

National Security Presidential Directive 41 on maritime security policy clearly emphasizes the need for cooperation—combined, joint and interagency—in the pursuit of security in the maritime domain. In calling for a new National Strategy for Maritime Security (NSMS), the president described the “maritime domain” as “all areas and things of, on, under, relating to, adjacent to, or bordering on a sea, ocean, other navigable waterway, including all maritime-related activities, infrastructure, people, cargo, and vessels and other conveyances.” The NSMS and its
eight supporting plans were promulgated in 2005. Rear Admiral Joseph Nimmich and Dana Goward, writing in this volume, explain that the hallmarks of the national strategy for maritime security are its commitment to obtaining maritime domain awareness, sharing the intelligence, providing a common operating picture, and establishing and enabling a layered defense. In the words of many, "information superiority" will give way in the coming months to "information sharing" (a concept that might not sit well with primacists). The president’s directive also makes it clear that the strategy will be carried out in a way that respects the rule of law and does not unnecessarily impede legitimate maritime commerce.


At the 2006 Current Strategy Forum held shortly before our conference, the Chief of Naval Operations, Admiral Mike Mullen, called for the development of a new maritime strategy to guide the Navy in the coming years. The new strategy document will join three other capstone planning documents, including Sea Power 21, the Navy Strategic Plan and the CNO-CMC Naval Operations Concept, along with the forthcoming revision to the Naval Doctrine Publication on Naval Warfare (NDP-1). The strategy is also likely to embrace what was once referred to as the 1,000-ship navy concept (now the Global Maritime Partnership) and the National Fleet Policy. And the strategy will be consistent with higher-level plans, including the National Security Strategy and the National Strategy for Maritime Security. At the time this article was prepared, it was not clear what path the new maritime strategy would take. Primacy, selective engagement, cooperative security and offshore balancing were all being examined in what has been known as a “competition of ideas” that seeks to cull the best from the “wisdom of groups.” Some have strongly advocated some version of offshore balancing, while Posen and others appear to favor a return to Clinton-style selective engagement. The debate over grand strategy has clearly moved beyond naval planning circles to both the national and global stages.

It seems safe to say that global maritime security is now seen by most as a team sport, but one that involves States of disparate ability and willingness. The advent of regional maritime security initiatives and risk-specific approaches like the Proliferation Security Initiative may portend the new modalities that will replace command and control approaches. Whether the threat comes from regional armed conflicts or Malaccan pirates, this increasingly globalized world plainly benefits from a maritime security approach that protects the sea lines of communication for peaceful navigation, commerce and overflight. While those common rights are
protected by international law, it is sometimes said that covenants without the sword are but words.\textsuperscript{87}

**III. Command of the Commons and the Law**

Turning from an amateur’s examination of the policy questions presented to our panel to the legal question, two issues present themselves. The first concerns the legality of any claim to control over the commons, particularly if control takes the form of sea denial or assertions regarding access or presence exceeding those protected by the law. The second is one well suited for the Naval War College audience and concerns the potential lawfare use of a maritime strategy that purports to command the commons.

**A. Command of the Commons and the International Law of the Commons**

Lord Byron was not available to the young Dutch jurist, Hugo Grotius, who wrote his famous *Mare Liberum* (the sea is free) in 1608,\textsuperscript{88} but Grotius would almost certainly have appreciated Byron’s respect for the sea. Grotius’ *Mare Liberum* was the opening salvo in the “battle of the books” with the Englishman John Selden. Selden opposed Grotius’ freedom of the seas concept with his own *Mare Clausum* (the sea is closed) ten years later.\textsuperscript{89} Grotius eventually won the battle for freedom of the seas. Even England eventually repudiated Selden’s thesis. In one of Lord Stowell’s most often-quoted decisions while on the English High Court of Admiralty, he explained that two principles of public international law are recognized as “fundamental”:

> One is the perfect equality and entire independence of all distinct states. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate.

> The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. . . .\textsuperscript{90}
Modernly, the sovereign equality of States is enshrined in the UN Charter, and the freedom of the seas—at least of the high seas—is codified in articles 87 and 88 of the 1982 Convention on the Law of the Sea (1982 LOS Convention).91

Military strategists are regarded by most international lawyers as contemptuous of the law and legal institutions. Clausewitz’s canonical text for strategists refers to the “certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom.”92 Foreign policy pundit George F. Kennan is remembered for his attack on what he saw as an excess of “legalism” (and moralism) in American foreign policy during the Wilson presidency years.93 Although international and constitutional law scholar Philip Bobbitt has come to Wilson’s (and FDR’s) defense,94 few from the strategy community have joined him. Unfortunately, too many international lawyers are unwilling to engage the security strategists directly. They therefore have the potential to create what Clausewitz would call “friction.”95

Most international lawyers would likely agree that, under the law, the phrase “command of the commons” is an oxymoron. It is in the very nature of a commons that no State has sovereignty over it. Indeed, such commons as the seabed beyond the limits of national jurisdiction are often referred to as the “common heritage of mankind.”96 That said, it must also be admitted that freedom within the commons in peacetime does not necessarily prevail when the drums beat the call to quarters. Accordingly, a distinction must be drawn in this analysis between laws applicable in peacetime and those that control in times of armed conflict. The former is largely set out in the UN Charter and 1982 LOS Convention. The latter is taken from a variety of sources including the conventional and customary law of armed conflict, the law of neutrality, specialized doctrines of blockade,97 and the right of visit and search.98 No exhaustive treatment of either is attempted here; however, command of the commons advocates must be alert to several key legal limits on their sea command, control and denial strategies.

The UN Charter rests on the principle of the sovereign equality of all States and prohibits the use of force—or the threat to use force—against the territorial integrity or political independence of another State.99 Under the 1982 LOS Convention, neither the high seas nor the deep seabed beyond national jurisdiction are subject to any nation’s sovereignty.100 The same is true for international airspace. Over the years, the United States has jealously guarded high seas freedoms against coastal State encroachments,101 as the recent US reaction to Australian measures extending pilotage requirements to the Torres Strait demonstrates.102 The high seas and the deep seabed beyond national jurisdiction are also reserved for “peaceful purposes.”103 And what of those 600,000 merchant ships plying the oceans? While on the high seas, merchant vessels (and warships) come under the exclusive
jurisdiction and control of their respective flag States, thus limiting the extent to which a hegemon can exert denial or control strategies against them.104

Under relevant laws applicable during armed conflicts, neutrals generally enjoy most of the same freedoms that prevail during peacetime, so long as they do not aid any of the belligerents or carry contraband on their behalf. That general statement is subject to two important qualifications, including the belligerents’ right of visit and search,105 and the somewhat unsettled regime of maritime “zones.”106 If, however, sea denial is reserved only for times of armed conflict, and is implemented in accordance with the international law governing the rights and obligations of neutrals, the law cannot be said to preclude “command” in the sense of the ability to deny uses of the sea in ways that conflict with those laws.

Although this brief comment will not focus on the outer space commons, it is worth mentioning that any claim to command of outer space is difficult to reconcile with the legal regime established by the Outer Space Treaty.107 It is also interesting to note the stark contrast between the “command” notion and the provisions of the Treaty on Open Skies,108 which permit overflight of the national territory of each party, to provide potential adversaries a “confidence building measure.” Primacists would do well to consider why a global hegemon with “command of the commons” would permit Russian military aircraft to overfly and photograph its naval and air bases. But the logic in such confidence-building measures as a means of enhancing national security is likely to elude most primacists.109

In closing, it is important to acknowledge that our Janus-faced law both empowers and limits the United States. Boasts that the Navy has the capability to intimidate a hostile or potentially hostile coastal State or its government by parking a carrier battle group or expeditionary strike group 12 miles off the State’s coastline carry with them a risk that the law is neither as clear nor as stable as the boaster might hope.

B. Assertions of Command of the Commons as an Invitation to Lawfare

The foregoing analysis focused on the legal limits on attempts to exploit putative command of the commons to deny vessels or aircraft of another State access or transit rights protected by international law. This section is designed to alert the reader to the danger that an aggressive command of the commons posture may backfire and motivate other States to undertake measures to reduce the would-be commander’s access or transit rights. It begins with the often heard assumption that when the stronger naval power controls the sea, the “correct” strategy for the weaker power is to attempt to deny its opponent use of the sea as much as possible.110 The concept of lawfare might provide one means to deny, or at least to limit, a hegemon’s use of the sea.111
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The term “lawfare” was apparently coined in the 1970s, but initially lacked a coherent definition. Today the concept is most often associated with Air Force Major General Charles Dunlap, who defines lawfare as the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective. It is noteworthy that lawfare tactics are included in the Chinese book on “Unrestricted Warfare.” The authors suggest an approach that applies international law asymmetrically: binding the more powerful nation, but not its less powerful opponent. The authors also recognize the important role of a sympathetic media to a lawfare strategy, as did Hezbollah during the 2006 conflict with Israel.

To be sure, the United States has never hesitated to use what has been described as lawfare to advance its national interests. Witness the new republic’s complaints that British boardings of US merchantmen to impress seamen for duty in the Royal Navy violated international law. Professor Davida Kellogg, among others, advocates a principled, proactive use of lawfare. But she warns that we must also be on guard against false or misleading versions of the law contained in the “pronouncements of nongovernmental organizations (NGOs), terrorist sympathizers and apologists, and uninformed reporters with political agendas.”

Concern for lawfare tactics found its way into at least one high-level strategy document. The 2005 National Defense Strategy appears to expect that lawfare tactics will be used against the United States, warning in its section on “vulnerabilities” that “[o]ur strength as a nation will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism.” “Judicial processes and terrorism”? Putting tactless juxtapositions to one side, the secretary is probably right to be concerned. A few suggestions show why.

If I were giving advice to a client seeking to bind a would-be maritime hegemon through lawfare moves, several come to mind. First, I might advise the client to identify those States that most resent claims to command of the commons and seek their support within the United Nations General Assembly (UNGA) for, inter alia, a request that the International Court of Justice (ICJ) issue an advisory opinion condemning any attempt to “command of the commons” as a violation of the UN Charter, the 1982 Law of the Sea Convention and the 1967 Outer Space Convention, which collectively stand for the proposition of equal access for all States to those commons. Next I would suggest that the client work through the UN Informal Consultative Process on Ocean Affairs and the Law of the Sea to propose a General Assembly resolution defining “due regard for the exercise of the freedom of the high seas” and “peaceful use” under articles 87 and 88, respectively, of the Law of the Sea Convention in a way that renders illegal any claim to “command” of those seas or “sea control” by any nation’s warships. At the same time, the client might move for a resolution defining “innocent passage” to exclude any passage by
warships (or unmanned vehicles, which are nowhere mentioned in the convention) the flag State of which purports to command the seas in ways that conflict with the freedoms of other States, or to vessels en route to a "sea base" assignment (where the vessel will, in the minds of some, "threaten" the use of force, in violation of the UN Charter and the Law of the Sea Convention). Another tactic that is sure to attract the support of a number of coastal States would utilize the ICJ or UNGA to effectively reduce the commons, by legitimizing "security zones" of up to 200 nautical miles, within which no foreign warship, military aircraft (manned or unmanned) or intelligence gathering platform could operate without the consent of the coastal State, and only then when in full compliance with any applicable restrictions on vessel numbers, speed, weapons and means of propulsion, along with positive requirements to carry transponders and disclose to the coastal State any information gathered during the transit. A final tactic might be to build upon the suggestion of prominent publicists who argued in an earlier volume of the "Blue Book" series that naval warfare doctrines like blockade and neutrality are no longer viable in the post-UN Charter era, and would thus provide no authority for interfering with shipping in a manner inconsistent with the 1982 LOS Convention.

Lest the reader think my goal here is to feed ideas to the nation's enemies, let me assure you I have no such intent. My goal is to alert public and military officials to the risk that their assertions, whether in strategy documents or banner displays, can have serious unintended consequences. A message intended to raise the morale of service members or garner service support in congress might lead to legal pushback from opponents within and beyond the nation, in ways that create unwelcome and avoidable friction over access to the commons. The Navy war games strategies. Why not war game strategic communications? Why not ask your red team's legal expert to game a response to any proposal for a "command of the commons" campaign?

**Conclusion**

De facto command of the commons will be seen by many as an unattainable goal in an age of asymmetric warfare against amorphous enemies who operate through dispersed cells. Those who confidently speak of having such command must be prepared to answer the practical questions regarding how the putative "command" would fare in response to an adversary's war plan that calls for the targeting of all of the satellites and submarine cables on which the elaborately networked command depends in the first 96 hours. The command advocates must also address the economics of obtaining and maintaining command. The cost of restoring the Army and Marine Corps to their pre-Operation Enduring Freedom/Operation Iraqi
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Freedom readiness levels will almost certainly make it impossible to build and maintain the resources effective command would require. It is unlikely that the world will soon realize the dream that we will beat our collective swords into plowshares. But the coming budget showdown in the United States does suggest that there is a growing risk that in the coming decade four Navy aircraft carriers might, in effect, be turned into armored Humvees for the Fleet Marine Force.121

Law is a vital enabler for liberal democracies and an important safeguard for our military forces. That law respects the sovereign equality of States and precludes any State from asserting dominion over the commons. Strategic statements that suggest a cavalier disregard for legally protected rights will almost certainly generate resentment and produce undesired effects. Those who might be tempted to post banners announcing “command of the commons” would also do well to reflect on what is to be learned from the “strategic communications” panel that follows in Part III of this volume. To make such a claim in peacetime, while the United States is simultaneously lobbying other States to join in a 1,000-ship navy to meet the urgent need for maritime security, disserves the national interest. And in an age when much of the world and virtually all of the media seem bent on discrediting the US defense establishment, claims to a “command of the commons” seem unnecessarily provocative.122
Appendix

Command of the Commons*

Command of the Commons is the key military enabler of the United States.

The United States now enjoys command of the commons—command of the sea (including undersea), air, space and cyberspace. While other States can use the commons in peacetime, the United States guarantees their freedom to navigate the sea, air or space. Command of the commons is the key military enabler of the United States’ global power position. It allows us to utilize other sources of power, including our own economic and military might, as well as the economic and military might of our allies.

How do we maintain command of the commons?

Maintaining command of the sea/undersea. Command of the sea allows us to project our national power and influence, and also enhances our country’s economic prosperity. 99% of the volume—and 80% of the value—of the world’s intercontinental trade moves by sea. The Air Force provides battle space management, precision navigation, weather services, close air support targeting and air refueling for both military and commercial users to solidify United States control over the sea.

From time to time the superstructure of tactics has to be altered or wholly torn down; but the old foundations of strategy so far remain, as though laid upon a rock.

Alfred Thayer Mahan

Maintaining command of the air. Unsurpassed by any nation, the United States Air Force maintains joint air and space dominance across the globe. Specialized attack, jamming and electronic intelligence aircraft combined with well-trained, professional airmen allows extensive control and exploitation of air, space and near-space domains. Given the superior capabilities the Air Force possesses, the United States is able to deter enemy threats and ensure forward operations providing an essential contribution to global security.

* Approximate text of a display in the Pentagon in 2006 (any formatting errors are mine alone).
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Freedom from attack; freedom to attack.

Maintaining command of space. Maintaining command of space allows the United States to see across the entire globe in order to gather vast amounts of useful information. Over the last 50 years the United States has invested $830 billion in space assets. Through capabilities developed and executed by the Air Force, the United States can track and identify military targets with fidelity and communicate this actionable information in a timely fashion.

See first—understand first—act first.

Maintaining command of cyberspace. The new strategic communication of the 21st century is cyberspace. Like its conceptual predecessor, cyberspace is an international domain of trade and intercontinental communication that connotes not only the Internet but an area of information and cognition that includes the channels of mass media and finance. Command of cyberspace can increase, sustain or diminish a nation's position of power in economic, diplomatic or military terms.

A new medium for communications, command and control.
Notes

1. George Gordon (Lord Byron), Childe Harold’s Pilgrimage (1812–1818). The term “childe” was a medieval title for a young man who was a candidate for knighthood.

2. King Canute has been unfairly maligned for centuries. The “authoritative” version of the king’s apocryphal encounter with the sea makes it clear that the king never believed he could hold back the tides.

3. Rudyard Kipling, The Crab that Played with the Sea, in Just So Stories (1902) (attributing tidal cycle to Pau Amma, the disaffected crab).

4. Peter Schwartz, INEVITABLE SURPRISES: THINKING AHEAD IN TIME OF TURBULENCE (2003). Schwartz argues that we live in a time of “perpetual discontinuity,” a time in which “bombshells and shockers” are part of everyday life.


6. My thanks to the 2006 International Law Department Conference Chair, Rear Admiral and Stockton Professor Jane Dalton, for her notes on the text of the Pentagon banner. They are reproduced in the appendix. Any errors in recording are mine alone.

7. The National Defense Strategy limits its definition to “space, international waters and airspace, and cyberspace.” Department of Defense, National Defense Strategy of the United States 13 (Mar. 2005). Vice Admiral Jacoby argues for a broad definition of the global commons “if it is to be a useful construct in this era of globalization, rapid information age advancements, and the threats to terrorism and weapons of mass destruction.” Interestingly, he would add “ungoverned areas,” like parts of Somalia where there is no effective government and may therefore serve as a haven for terrorists, as part of the global commons. Lowell Jacoby, The Global Commons and the Role for Intelligence, which is Chapter III in this volume, at 51.

8. The Department of Defense Dictionary defines “cyberspace” as “the notional environment in which digitized information is communicated over computer networks.” Chairman of the Joint Chiefs of Staff, Joint Publication 1-02, DoD Dictionary of Military and Associated Terms 138 (Apr. 2001, as amended through Aug. 2006) [hereinafter DoD Dictionary].

9. “Battlespace” is defined as “the environmental factors, and conditions which must be understood to successfully apply combat power, protect the force, or complete the mission. This includes the air, land, sea, space and the included enemy and friendly forces, facilities, weather, terrain, the electromagnetic spectrum, and information environment within the operational areas and areas of interest.” DoD Dictionary, id. at 64. The principal battlespace long ago shifted to the littorals and landward, where asymmetric warfare is the most effective. See the discussion below on naval and maritime strategies of the 1990s.

10. Lawyers fond of the bundle-of-sticks analogy explain that “sovereignty” denotes the full bundle of sticks, while usufructuary rights of innocent or transit passage represent far fewer “sticks.” A variety of legal labels have been attached to the seas and the interests of the States in those seas. One debate that concerned the deep seabed divided those who held the res nullius view from those who espoused the res communis approach. In his dissent in United States v. California, Justice Frankfurter concluded that the majority was confusing the concepts of imperium and dominium. He explained that the Roman law concept of dominium was concerned with property and ownership, while imperium related to political sovereignty. United States v. California, 332 U.S. 19 (1947) (Frankfurter, J. dissenting).


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15. The DoD Dictionary defines “capability” as “[t]he ability to execute a specified course of action. (A capability may or may not be accompanied by an intention.)” DoD Dictionary, supra note 8, at 76. The National Defense Strategy adopts a capabilities-based planning approach that links capabilities to joint operating concepts across a broad range of scenarios. National Defense Strategy, supra note 7, at 11. One writer defines military capability as “simply the ability to achieve a desired effect in a specific operating environment.” He also defines military capability as having three pillars: readiness, sustainability and force structure. Alan Hinge, Preparedness, excerpted at http://www.defence.gov.au/RAAF/organisation/info_on/operations/military_capacity.htm.

16. If “capability” is understood to refer to the nature of the ability, “capacity” refers to the amount of that ability that can be delivered in a particular period of time.

17. An intent to command the commons does not necessarily imply a primacy strategy.

18. In its section on “command of the sea,” the Australian doctrine concludes:

   A modern analyst [*] has noted that all these commentators were interested in war and they were concerned with dominance. They were acutely conscious of the historical advantages that lay with the utilisation of the sea to further national power. One of the first products of their thought was the concept of command of the sea, which was considered to be the principal objective of naval forces operating in a maritime campaign. This is defined as the possession of such a degree of superiority that one’s own operations are unchallenged by the adversary, while the latter is incapable of utilising the sea to any degree.

AUSTRALIAN MARITIME DOCTRINE, supra note 14, at 37.

*The “modern analyst” referred to is Rear Admiral J. Richard Hill (Royal Navy, ret.), author of MARITIME STRATEGY FOR MEDIUM POWERS (1986).


20. Definitions of “hegemony” vary, and I was not able to find a clear definition of what constitutes a hegemonic grand strategy. One source describes hegemony as the dominance of one group over other groups, with or without the threat of force, to the extent that, for instance, the dominant party can dictate the terms of any intercourse to its advantage. It seems clear that the term has accumulated a distinctly sinister connotation over the past ten years.


22. Posen, supra note 19, at 44.

23. Vice Admiral Jacoby concluded that command of the commons was not a realistic goal, particularly given the limits on intelligence. As he put it, “If we attempt to know everything about everyone all the time, we will fail.” Jacoby, supra note 7, at 53.

24. The secretary of defense asserts that uncertainty is “the defining characteristic of today’s strategy threat environment.” National Defense Strategy, supra note 7, at 2. In assessing claims to command of the commons, the entire threat environment, including threats from irregular, catastrophic and disruptive threats, must be considered. Id. at 2–3.
25. Navy ranks have dropped below 350,000 (down 220,000 from its 1991 level). Active duty Marine Corps strength is about half that number. See also Summary of Remarks by Chief of Naval Operations, Admiral Mike Mullen, at West 2006, January 12, 2006, in Neal Thompson, West 2006 Wrap Up, U.S. NAVAL INSTITUTE PROCEEDINGS, Feb. 2006, at 42 (reporting that the Navy’s current fleet strength of 281 ships is not enough to meet the service’s growing responsibilities, which include maintaining readiness to fight on two fronts, combating terrorist activities, drug and weapons trafficking, and piracy at sea, along with rescue and recovery efforts in the wake of Hurricane Katrina and the 2004 Asian tsunami).


27. In late 2002, Spanish warships intercepted the freighter So San while on the high seas off the coast of Yemen. The vessel was suspected of transporting missiles to an unknown destination. A boarding team of Spanish Marines from the Navarra, later joined by US Navy personnel, conducted a non-compliant boarding of the So San, and during the subsequent search discovered North Korean–made Scud missiles and components hidden beneath the vessel’s cargo of bagged cement. When it was determined that there was no basis to seize the vessel or her cargo, the vessel was released. See Nuclear Threat Initiative, North Korea: U.S., Spanish Forces Seize Scud Shipment, Dec. 11, 2002, available at http://www.tni.org/d_newswire/issues/20021211/7p.html.


29. US Claims that China has Used Lasers to Attack Satellites, JANE’S DEFENCE WEEKLY, Oct. 18, 2006, at 7. The article points out that a high-altitude nuclear explosion would wipe out US low-earth-orbit satellites.


31. The US Armed Forces envision a global information grid (GIG) that stretches from the commander in chief to deployed units. An examination of its “teleport” schematic reveals the GIG’s dependence on satellites. Chairman of the Joint Chiefs of Staff, Joint Publication 6-0, Joint Communications System, at II-1–24 (2006).


33. The vessels, assigned to an expeditionary strike group carrying the 26th Marine Expeditionary Unit, were fired at with Katyusha rockets and mortars during a port call in the Jordanian Red Sea port of Aqaba on August 19, 2005. None of the ships were hit.

34. US MARINE CORPS, SMALL WARS MANUAL (1940) (declassified in 1972).


36. National security strategy is defined as “[t]he art and science of developing, applying, and coordinating the instruments of national power (diplomatic, economic, military and informational) to achieve objectives that contribute to national security. Also called ‘national strategy’ or ‘grand strategy’.” DoD Dictionary, supra note 8, at 362.
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37. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) (“The life of the law has not been logic, but experience”).


40. SCHWARTZ, supra note 4.

41. Following a relatively minor defeat in the battle at Arginusae, in which Athens lost 12 ships, the Athenian civilian leaders executed all of their top naval commanders, destroying the morale of their navy. Shortly thereafter, the Spartan general-cum-naval commander Lysander defeated the Athenian navy at the battle of Aegospotami, destroying 168 Athenian ships. See generally DONALD KAGAN, THE PELOPONNESIAN WAR (2003).

42. ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY 1660–1783, at 25 (5th ed. 1894).

43. It is true that he also argued that navies exist for the protection of commerce, id. at 26, but the means of protection come back to sea power. At the same time, for Mahan, “[s]ea power in the broad sense . . . includes not only the military strength afloat that rules the sea or any part of it by force of arms, but also the peaceful commerce and shipping from which alone a military fleet naturally and healthfully springs, and on which it securely rests.” Id. at 28.

44. His vision was taken up and acted upon by a former assistant secretary of the Navy who ascended to the presidency in 1901, at the age of 43. Just how much Admiral Mahan’s thinking influenced Theodore Roosevelt’s decisions to send Admiral Dewey and his Great White Fleet of four battleship squadrons around the world (1907–1909) or to construct a canal across the Panamanian isthmus (1904–1914) is a matter of speculation.


46. Corbett explains in his chapter on command of the sea: “That this vital feature [command of the sea] of naval warfare should be consecrated as a maxim is well, but when it is caricatured into a doctrine, as it sometimes is, that you cannot move a battalion overseas until you have entirely overthrown your enemy’s fleet, it deserves gibbeting.” Id. at 101. The “gibbet” was a form of gallows, where executed criminals were hung for public display.

47. Id., pt. III, ch. I.

48. Id. at 87.


The fundamental element of a military service is its purpose or role in implementing national policy. The statement of this role may be called the strategic concept of the service. . . . If a military service does not possess such a concept, it becomes purposeless, it wallows about amid a variety of conflicting and confusing goals, and ultimately it suffers both physical and moral degradation.

A military service capable of meeting one threat to the national security loses its reason for existence when that threat weakens or disappears. If the service is to continue to exist, it must develop a new strategic concept related to some other security threat.


Battle of Midway, disagreed. He is reported to have said that “the submarine beat Japan.” See AL-
EXANDER P. DESEYVERSKY, VICTORY THROUGH AIR POWER 70 (1943).

52. KEEGAN, supra note 51, at 272. Although the book was written in 1988, shortly after the
Falklands-Malvinas conflict, he does not include the naval battles in that conflict within his anal-
ysis.

commentators objected that claims to maritime “superiority” might be newly provocative to the
Soviets).

54. US Navy Department, ... From the Sea: Preparing the Naval Service for the 21st Century
(1992), reprinted, with commentary, in U.S. NAVAL STRATEGY IN THE 1990S: SELECTED DOCU-
Volume 27, Professor Hattendorf’s most recent Newport Paper, continues the work he began in
volume 19. JOHN B. HATTENDORF, THE EVOLUTION OF THE U.S. NAVY’S MARITIME STRATEGY,
ter for Naval Analyses has compiled a study titled “US Navy Capstone Strategies and Concepts
(1970–2006).” The study is available on The John Hopkins University Applied Physics Labo-
13, 2006).

55. US Navy Department, Forward ... From the Sea (1995), reprinted, with commentary, in

56. The Royal Australian Navy Doctrine explains:

Command of the sea was theoretically achievable through the complete destruction or
neutralisation of the adversary’s forces, but it was a concept that, however historically
valid, became increasingly unrealistic when naval forces were being faced by a range
of asymmetric threats brought about by technological innovations such as the mine, the
torpedo, the submarine and the aircraft. Furthermore, attempting to command the sea
carried the risk of dissipating resources by a failure to recognise that the sea, unlike the
land, was a dynamic medium and that the value of maritime operations was in relation
to the use of the sea for movement and not for possession of the sea itself. Julian
Corbett, in particular, recognised these dilemmas. He pointed out that all naval conflict
was fundamentally about the control of communications. With this in mind, Corbett
qualified the concept of command of the sea, a process which led in the 1970s to the
development of the contemporary term sea control.

AUSTRALIAN MARITIME DOCTRINE, supra note 14, at 38.

57. Jan S. Breemer, The End of Naval Strategy, 22 STRATEGIC REVIEW 40 (1994). Not every-
one agreed. In 1999, noted grand strategist Colin Gray’s Modern Strategy argued that Mahan was
(mainly) right. COLIN S. GRAY, MODERN STRATEGY 217–227 (1999) (concluding that Admiral
Mahan was “wiser than his critics”). After criticizing Paul Kennedy’s treatment of Mahan, Gray
goes on to opine that Mahan might be the most under-rated theorist of modern strategy. Id. at
217.

58. Posen, supra note 19, distinguishes hegemony from primacy. See also STEPHEN WALT,
TAMING AMERICAN POWER: THE GLOBAL RESPONSE TO U.S. PRIMACY (2006); Stephen M. Walt,
American Primacy: Its Prospects and Pitfalls, 55 NAVAL WAR COLLEGE REVIEW 9 (2002); Stephen


60. He explains that “[i]perhaps the first problem that primacy will create for the U.S. com-
mand of the commons is greater difficulty in sustaining, improving, and expanding the global
base structure that the United States presently enjoys.” Posen, supra note 19, at 45.


63. Chairman of the Joint Chiefs of Staff, Joint Vision 2020, at 6 (June 2000) (defining full spectrum dominance as "the ability of US forces, operating unilaterally or in combination with multinational and interagency partners, to defeat any adversary and control any situation across the full range of military operations"). See also Chairman of the Joint Chiefs of Staff, National Military Strategy of the United States 23–26 (2004). Beginning in 2004, the Joint Vision document is incorporated into the National Military Strategy.

64. See 2006 National Security Strategy, supra note 62, Introduction (our strength “rests on strong alliances, friendships, and international institutions”); National Defense Strategy, supra note 7, at 5 (listing as a vulnerability: "[o]ur capacity to address global security challenges alone will be insufficient"); id. at 18 (“our security is inextricably linked to that of our partners”).


66. Id. at 13.


69. NS-CWMD, supra note 67, at 6.

70. NS-CT, supra note 68, at 19.


74. Id. at 2.


76. Joseph L. Nimmich & Dana A. Goward, Maritime Awareness: The Key to Maritime Security, which is Chapter IV in this volume, at 61–64.


78. Clark, supra note 13, at 32.


81. Supra note 72.

82. The CNO has defined the 1,000-ship navy as a network of international navies, coast guards, maritime forces, port operators, commercial shippers and local law enforcement, all working together.


87. THOMAS HOBBES, THE LEVIATHAN, ch. 17 (1651) ("covenants, without the sword, are but words and of no strength to secure a man at all").

88. HUGO GROTIOS, THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE (James Brown Scott ed., Ralph van Deman Magoffin trans., 1916; reprinted 2001) (1608). Cynics might observe that the militarily weak Dutch had no choice but to argue for such protection under the law against the much more capable English and Spanish. See ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 10 (2003).

89. JOHN SELDEN, MARE CLAUSUM: OF THE DOMINION, OR, OWNERSHIP OF THE SEA (2004 reprint of the first edition by Lawbook Exchange Ltd.) (1635). Selden’s book was written in 1617 or 1618 but was not published until 1635.


92. CARL VON CLAUSEWITZ, ON WAR 75 (ed. and trans. by Michael Howard & Peter Paret, 1984) (1827). He would not, however, ignore moral values in war. Id. at 137.
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94. PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY (2002). Bobbitt explains “What Wilson—and Roosevelt—understood quite clearly was the domestic wellspring of a sustainable foreign policy. They sought popular endorsement by playing the U.S. government’s strongest card, the American commitment to constitutional ideas as law.” Id. at 362.

95. Clausewitz laments that “[e]verything in war is simple, but the simplest thing is difficult.” CLAUSEWITZ, supra note 92, at 119. And the general’s battlefields did not include 24-hour news services, NGOs or congressional staffers.

96. 1982 LOS Convention, supra note 91, art. 136.

97. The most recent example was Israel’s so-called “blockade” of Lebanon in the 2006 cross-border conflict with Hezbollah. See ISRAEL IMPOSES BLOCKADE ON LEBANON, REUTERS, July 13, 2006 (citing Israeli military source who announced a “full naval closure on Lebanon, because Lebanon’s ports are used to transfer both terrorists and weapons to the terror organizations operating in Lebanon”).


100. 1982 LOS Convention, supra note 91, arts. 89 (“No State may validly purport to subject any part of the high seas to its sovereignty”) and 137 (“No state shall claim or exercise sovereignty or sovereign rights over any part of the Area”). The “Area” is defined as the seabed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction. Id., art. 1.

101. The second of the 14 Points President Wilson laid out in his address to Congress in 1918 was “[a]bsolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or part by international action for the enforcement of international covenants.” Woodrow Wilson, Address to Joint Session of Congress, Jan. 8, 1918, available at http://www.lib.byu.edu/~rdh/www/ww1/1918/14points.html.


103. 1982 LOS Convention, supra note 91, arts. 88, 141, 301.

104. Id., art. 92.

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109. Confidence-building measures are seen by many as the key to providing the transparency necessary for effective arms control. Such measures may be found in the International Atomic Energy Agency safeguards and in the Organization for the Prohibition of Chemical Weapons (OPCW) challenge inspections under Article IX of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 INTERNATIONAL LEGAL MATERIALS 800, reprinted in THE LAWS OF ARMED CONFLICT 239 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

110. Mine warfare is an often cited example of a sea-denial strategy.


114. See KAGAN, supra note 88, at 10. He explains:

George Washington, Alexander Hamilton, John Adams, and even Thomas Jefferson were not utopians . . . They were realistic enough to know that they were weak, and both consciously and unconsciously they used the strategies of the weak to get their way in the world . . . They appealed to international law as the best means of regulating the behavior of nations, knowing well they had few other means of constraining Britain and France. They knew from their reading of Vattel that in international law, ‘strength or weakness . . . counts for nothing. A dwarf is as much a man as a giant; a small Republic is no less a sovereign State than the most powerful Kingdom.’


116. Id. at 50


119. Consider, for example, General Assembly Resolution 3314 (XXIX) (1974), in which the assembly adopted, without a vote, a definition of “aggression.” The assembly’s definition was later picked up by the International Court of Justice in the case brought against the United States by Nicaragua. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 1, para. 195 (June 27) (merits) (holding that the description in paragraph 3(g) of the annexed definition “may be taken to reflect customary international law”). The tribunal found it unnecessary to cite evidence of State practice or *opinio juris* to support its conclusion.


121. Former Naval War College president and Carter-era director of Central Intelligence Admiral Stansfield Turner, is apparently ready to give up the carriers. Stansfield Turner, *Do We Need Carriers?* U.S. NAVAL INSTITUTE PROCEEDINGS, July 2006, at 16.

122. See National Defense Strategy, *supra* note 7, at 5 (“Our leading position in world affairs will continue to breed unease, a degree of resentment, and resistance”).