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The U.S. Freedom of Navigation Program: Policy, Procedure, and Future

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THE U.S. FREEDOM OF NAVIGATION (FON) PROGRAM has, for nearly two decades, repeatedly demonstrated its utility in furthering U.S. national interest in maintaining freedom of navigation and overflight on, over, and under the oceans. Indeed, other maritime nations should consider adoption of such a program, either unilaterally or cooperatively with the United States, in order to ensure the stable and predictable law of the sea regime that facilitates effective naval operations. This article analyzes the FON Program, with a focus on the operational assertions of navigation and overflight rights by U.S. military ships and aircraft.[1]

The FON Program seeks to encourage coastal States to conform their ocean claims to international law through peaceful exercise of navigation and overflight rights in ocean areas where such States have made excessive or illegal maritime claims. The program, which began in 1979, is a joint effort of the Department of Defense (DoD) and the Department of State (DoS).[2] It operates on three levels: operational assertions, or FON operations, by military units; diplomatic protests of excessive claims or other diplomatic representations by the DoS; and DoS/DoD consultations with representatives of other States in an effort to promote stability and consistency

in the law of the sea.[3] Since 1979, over 100 diplomatic protests have been filed and over 300 operational assertions have been conducted.[4]

Legal Divisions of the Sea

To grasp the relationship between excessive claims and FON assertions, it is first necessary to understand the legal divisions of the sea and of navigation and overflight rights in its various zones.[5] All maritime zones are measured from "baselines." Baselines normally follow the low-water mark along the coast. In very limited geographic situations, such as deeply indented coastlines, a series of straight baselines may be employed by connecting appropriate points.

All waters inside baselines are internal waters, where the coastal State exercises near absolute sovereignty. Except in limited distress situations, foreign ships and aircraft must have permission to enter internal waters. Immediately beyond the baselines lies the territorial sea, which may extend seaward to a maximum of 12 nautical miles. Coastal State sovereignty in this area is subject to the right of innocent passage, i.e., continuous and expeditious surface transit through it. Aircraft overflight and submerged passage in territorial waters are not permitted, without coastal State permission. When transiting in or over territorial seas that are part of an international strait, ships and aircraft may engage in continuous and expeditious transit passage in their "normal mode." For example, formation steaming, flight operations, and submerged transits are permitted when in transit passage.

A special regime exists for archipelagoes. Archipelagic, or island, nations may draw baselines which connect their islands, subject to certain limitations, and create sovereign archipelagic waters. These waters are subject to the right of archipelagic sea-lanes passage (essentially the same as transit passage) in all routes normally used for international navigation or overflight and in sea-lanes designated by the archipelagic State. Innocent passage applies in archipelagic waters outside these and normal routes.

All waters seaward of the territorial sea are international waters where the ships and aircraft of all States enjoy the high seas freedoms of navigation and overflight.[6] International waters include the contiguous zone, exclusive economic zone (EEZ), and high seas. A State may enforce customs, fiscal, immigration, and sanitary laws in a contiguous zone, which may extend as far as 24 miles from the baseline. It may also exercise sovereignty over resources on its continental shelf and in its EEZ. The EEZ may extend to 200 miles from the

baseline, whereas the continental shelf extends to between 200 and 350 miles, depending in its topography. Subject to the resource-related rights of the coastal State, the freedoms of navigation and overflight in the EEZ, or above the continental shelf where it extends beyond 200 miles are the same as on the high seas. Other than the aforementioned rights, coastal States do not exercise sovereignty over international waters.

Excessive Claims and International Law

As a maritime nation, the national security of the United States depends in great part on the ability to exercise the freedoms of navigation and overflight in and over the world's oceans. Coastal States often assert maritime claims of sovereignty, jurisdiction, or other rights that are inconsistent with international law. These excessive claims attempt to restrict the United States' ability to exercise its rights at sea, including the conducting of military exercises and operations. Examples of excessive claims include:

- Territorial sea claims in excess of 12 nautical miles
- Exclusive economic zone claims that purport to restrict military exercises
- Improperly drawn straight baselines that purport to convert territorial sea areas or international waters (EEZ or high seas) into internal waters, or international waters into territorial waters
- Claims requiring advance notification or permission for innocent passage of warships through the territorial sea
- Archipelagic claims that do not permit archipelagic sea-lane passage in all normal routes of navigation or overflight
- Territorial sea claims in international straits that do not permit transit passage, including overflight of military aircraft or submerged or surface transits, without prior notice
- Security zones in international waters that exclude or restrict entry by warships and military aircraft.[7]

The FON Program's response to excessive claims is based on fundamental international law principles. If maritime nations acquiesce in an excessive claim by failing to exercise their rights, then the claims may eventually be considered to have been accepted as binding law. Examples of change in the law of the sea through acquiescence include the extension of the territorial sea from three nautical miles to twelve, and general acceptance of the EEZ. Given the normative import of acquiescence, both diplomatic protests and the exercise of rights are necessary to preserve operating freedoms.[8]

Military Strategy and U.S. Interests

In the post-Cold War era, the U.S. strategic focus has shifted from a global threat to new challenges. Nevertheless, key elements of our traditional military strategy—forward presence and a crisis response capability—continue to apply. In *National Military Strategy,*[9] the principal threats to America's security are described as regional dangers (potential conflicts among States), asymmetric challenges (unconventional challenges using means the U.S. cannot match in kind, such as terrorism), transnational threats (emergencies, extremism, ethnic disputes, crime, illegal trade, and other challenges), and wild cards (future developments). It further describes four strategic concepts that govern the use of U.S. forces to meet the demands of the environment: strategic agility, the timely employment and sustainment of military power; overseas presence, the visible posture of U.S. forces in or near key regions; power projection, the ability to rapidly deploy and sustain forces; and decisive force, the commitment of sufficient military power to achieve the right resolution. Each depends on the traditional freedoms of navigation and overflight in and over international waters, international straits, and archipelagic sea-lanes, as well as innocent passage through territorial seas and archipelagic waters. Without freedom of navigation, the ability of the United States to project military power, provide logistics support, maintain forward presence, and accomplish missions such as disaster relief, humanitarian assistance, and noncombatant evacuations, will be severely hampered. U.S. strategy requires the ability to move forces quickly and without the advance permission of coastal States through the Straits of Singapore, Malacca, Bab el Mandeb, Hormuz, and Gibraltar, the Philippine and Indonesian sea-lanes, and other key areas. Transit must include surface navigation of warships, submerged submarine transit, and air transit by military aircraft.

Generally, it is in the best interests of both coastal and maritime States that the coastal State not be faced with a decision as to whether or not to permit transits. For example, after certain NATO allies denied permission to cross their land territory in April 1986, U.S. military aircraft overflew the Strait of Gibraltar to conduct air strikes against targets in Libya in response to a Libyan-sponsored terrorist attack on U.S. military personnel. The coastal States—Spain and Morocco, in particular—were not required to "vote" on the propriety of the self-defense mission by consenting (or not consenting) to transit passage through their territorial seas within the Strait of Gibraltar. Similarly, during Operations Desert Shield and Desert Storm, the right of

transit passage enabled U.S. and Coalition forces to transit the straits of Bab el Mandeb and Hormuz without formal coastal State authorization.

An example from *National Security and the Convention on the Law of the Sea*[10] demonstrates the importance of mobility in the movement of a conventionally powered, six-ship carrier battle group from Yokosuka, Japan, to the Persian Gulf. If transit through the Strait of Malacca, the Indonesian archipelago, and the Torres Strait were denied, rerouting around Australia would be necessary. This would delay the arrival of the battle group by sixteen days and result in $2.9 million additional fuel costs.[11] Albeit unlikely, the scenario offers a clear and specific picture of the potential monetary and opportunity costs of mobility restrictions.

In addition to transit rights, traditional high seas freedoms underlie the ability to conduct robust naval operations. For instance, they permit military forces to engage in flight operations, exercises, surveillance and intelligence activities, and weapons testing. Other lawful uses of the oceans important to U.S. military interests, albeit not directly related to navigation, include laying submarine cables, hydrographic surveys, telecommunications activities, and the collection of marine weather and oceanographic data.

In sum, an effective forward defense requires that U.S. forces be available when and where needed to respond to commitments and to preserve the integrity of an alliance or coalition. This position is reflected in U.S. Navy and Marines Corps service doctrine. In . . . *From the Sea*, the Chief of Naval Operations and the Commandant of the Marines Corps have stated:

> Naval expeditionary Forces are: . . . [u]nrestricted by the need for transit or overflight approval from foreign governments in order to enter the scene of action. The international respect for freedom of the seas guarantees legal access up to the territorial waters of all coastal countries of the world. This affords Naval Forces the unique capability to provide peaceful presence in ambiguous situations before a crisis erupts.[12]

In addition to military uses, the United States has myriad other diverse and vital interests in the oceans. Guaranteed access to resources within the high seas, in the exclusive economic zone, and on the continental shelf foster economic well-being. Resource management and environmental protection are key elements in preserving these resources. The scientific community depends on its freedom to conduct marine scientific research. Of course, the U.S. relies heavily on commercial sea-lanes as the trade routes. Disruptions in the flow of commerce have the potential for devastating effects on the global economy.

U.S. Oceans Policy and the Law of the Sea Convention

The 1982 United Nations Convention on the Law of the Sea (LOS Convention) is central to U.S. oceans policy and the FON Program, for it provides a detailed framework for use of the oceans.[13] In particular, the Convention specifies the maximum breadth of each maritime zone and the rights and duties therein, defines the standards for establishing baselines, guarantees freedom of navigation and overflight on, under, and over international waters, and codifies the rights of innocent passage, transit passage, and archipelagic sea-lanes passage for both commercial and military users.

In 1982, President Ronald Reagan announced that the United States would not sign the LOS Convention due to objections to various deep seabed mining provisions in Part XI.[14] The next year, the President issued an ocean policy statement in which he declared that the U.S. would comply with the non-seabed mining provisions of the Convention because they "generally confirm existing maritime law and practice and fairly balance the interests of all states."[15] He also announced that the U.S. would "exercise and assert its navigation and overflight rights and freedoms on a worldwide basis . . . consistent with . . . the Convention . . . [but] will not . . . acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."[16] This statement reaffirmed the Freedom of Navigation Program, which had existed since 1979.

In 1994, Secretary of Defense Les Aspin repeated the central oceans policy theme when he stated that "[t]he armed forces continue to be the instrument for the United States to exercise and assert its navigation and overflight rights and freedoms consistent with the 1982 Law of the Sea Convention." Secretary Aspin further stated that "it is necessary for maritime nations . . . to protest excessive claims through diplomatic channels and to exercise their navigation and overflight rights in the disputed regions. The United States has accepted this responsibility as an important tenet of national policy. Therefore, the Department of Defense maintains an active Freedom of Navigation Program."[17]

Secretary of Defense William Perry reiterated this view in 1994: "[t]he nation's security has depended upon our ability to conduct military operations over, under, and on the oceans. We support the [1982 LOS] Convention because it confirms traditional high seas freedoms of navigation and overflight;

it details passage rights through international straits; and it reduces prospects for disagreements with coastal states during operations."[18]

The LOS Convention came into force for its parties on November 16, 1994. Fortunately, earlier in 1994, UN-sponsored negotiations had resulted in an agreement that reforms the deep seabed mining provisions of the LOS Convention to address long-standing objections of the U.S. and other industrialized nations.[19] Removal of those objections has opened the way for U.S. acceptance of the LOS Convention. In October 1994, the President transmitted the Convention and the U.N.-sponsored agreement to the Senate for its advice and consent.[20]

In 1997, Secretary of Defense William Cohen reiterated the theme of previous administrations and Secretaries: "The LOS Convention . . . establishes rules . . . regarding freedoms of navigation and overflight essential for maintaining the global mobility, presence, and readiness of U.S. armed forces. . . . The United States . . . has much to gain by becoming a party."[21] He further stated that "despite positive developments in the law of the sea, it remains necessary for maritime nations, like the United States, to protest excessive claims . . . through diplomatic channels and to exercise . . . rights in disputed areas. The . . . Freedom of Navigation Program has challenged excessive claims to counter any argument that such claims are valid due to acquiescence over time."[22]

On balance, U.S. oceans policy has been effective. United States forces generally have operated consistent with the LOS Convention without significant repercussion. Most criticism of U.S. operations is based on a misunderstanding of the nature of the operations. For example, military surveys in an EEZ—a high seas freedom—sometimes are mistaken for marine scientific research, which is subject to coastal State consent. Another common misunderstanding results when a coastal State observes a military aircraft or warship apparently violating its territorial seas when it is actually transiting an international strait in a transit passage mode. When queried as to its purpose, the aircraft or ship responds with a simple explanation, such as: "This is a U.S. Navy aircraft in transit passage." The response generally satisfies all concerned.

The success of the existing policy, however, does not mean that U.S. military strategy is best served by the U.S. remaining a non-party to a comprehensive, widely accepted convention governing the world's oceans. On the contrary, the 1982 LOS Convention reflects not only existing custom, but fairly balances the competing interests of coastal and maritime States. The Convention provides a solid framework for environmental protection, and enhances the ability to study and to protect the marine environment. By becoming a party, the U.S. will be in a better position to influence law of the sea

developments in related fora, such as the International Maritime Organization (IMO) and regional fishing organizations. Moreover, universal adherence promises stability and predictability for the movement of commercial cargo, while guaranteeing, through its EEZ provisions, coastal state control of economic activity off its shores.

As to the FON Program, a widely accepted Convention should, over time, reduce its stressors, for States will be far less likely to make or enforce ocean claims beyond those permitted by its provisions. After all, treaties are more stable than customary international law, which is often vague, difficult to enforce, and malleable. The rules are easier to identify than with customary law's constant evolution through claim and counterclaim. (Indeed, the U.S. position that the LOS Convention represents customary law has been questioned by some nations.) In addition, the Convention provides more detail and clarity than customary law. The listing of activities permitted and not permitted during innocent passage is one of many examples.

Ultimately, the Convention regime provides the best avenue to order and stability in the law of the sea. Its navigation and overflight provisions provide a solid oceans framework for the execution of military strategy and a clear legal framework for the execution of the FON Program, while its dispute resolution mechanism is generally less politically and practically costly than confrontation or acquiescence.

Freedom of Navigation Operations in Practice

FON assertions are directed in operation orders that specify procedures and approval authority for the commander. The orders generally delineate when the participating ship or aircraft will enter and exit the area of the excessive claim and when the unit will enter and exit the U.S.-recognized territorial sea or other ocean zone involved in the assertion. FON assertion tracks are then plotted on charts and reviewed for accuracy by navigation specialists. Operation orders may also provide detailed guidance on how to respond to coastal State queries concerning the ship's or aircraft's presence.

Rules of engagement (ROE) provide guidance on the use of force in self-defense in the unlikely event a coastal State responds by force to the assertion. Intelligence estimates of threats, to which the ROE are tailored, are included in the order. The DoD *Maritime Claims Reference Manual* provides commanders a detailed listing of the maritime claims of all coastal nations.[23] The *Manual* also lists many instances in which the United States has protested excessive claims or conducted operational assertions against them. Particularly useful is *The*

Commander's Handbook on the Law of Naval Operations,[24] which provides commanders and staffs a ready reference concerning the legal divisions of oceans and airspace and the corresponding rights and duties of the coastal and other States therein.

Effective operations require comprehensive training and a multidisciplinary approach. Fleet units must conduct routine training and exercises that include law of the sea and rules of engagement concepts to ensure compliance with international law and U.S. oceans policy. Thereafter, operators, planners, intelligence specialists, and legal advisors must work together to ensure that operations are conducted in an efficient, effective, and safe manner, consistent with international law.

To document the operation, each unit provides an after-action report to superiors in the chain of command. Subsequently, the Secretary of Defense publishes an unclassified annual report of assertions conducted during the previous fiscal year.[25] It is this listing which places the international community on notice of U.S. actions demonstrating non-U.S. acquiescence in excessive claims.

With diplomatic protests of excessive claims, one might query why operational assertions are needed at all. After all, in strict legal terms, timely diplomatic protests might suffice to protect against technical legal acquiescence in an illegal claim. Nevertheless, there are compelling policy reasons for conducting operational assertions.

First and foremost, protests without operations give the coastal State exactly what it wants—restrictions on our mobility and a change in our behavior consistent with the illegal claim. For example, North Korea purports to exclude foreign military forces from its 50-nautical-mile security zone. The U.S. has protested the claim, but failure to operate within the zone would play into North Korea's hands by effectively respecting the claim. Similarly, the Government of the Philippines claims that all waters within its archipelagic baselines are internal waters not subject to archipelagic sea-lanes passage. Again, protest alone is not enough. An illegal claim cannot be permitted to deny U.S. forces the ability to transit critical sea-lanes that have been used by mariners for centuries. Of course, operational assertions send an even stronger signal than diplomatic protests, for protests alone seldom provide a sufficient incentive to impel relinquishment of the claim. Moreover, if assertions or routine exercises of rights are not conducted in normal times, the political cost of an assertion during a crisis is likely to be far higher. For instance, failure to regularly transit the Taiwan Strait would complicate the ability to operate there in times of crisis.

Frustrations, Challenges, and Successes

While policy guidance is published in the Pentagon and at senior military commander headquarters in traditional top-to-bottom fashion, the FON Program is implemented using a reverse, bottom-up procedure. Periodically, higher authority will issue a letter or message that encourages the operating forces to conduct assertions. Rarely, if ever, is a specific assertion directed.[26] On the contrary, most assertions by Navy ships or aircraft begin with a proposal developed by a numbered fleet commander or a subordinate command. Many are later canceled by higher authority for reasons impossible for the subordinate command to have foreseen, often after the operating forces command has expended great energy in planning the assertion. Understandably, frustration results. To help alleviate this problem, Pentagon policy makers should direct assertions from time to time, particularly in the case of long, unchallenged claims; those who direct cancellation of an assertion must also provide the earliest possible notice and share their rationale with those in the field.

More significantly, one or more of the players in a FON assertion will misunderstand the program and oppose it as provocative. The nay-sayers at times include U.S. embassy officials, military commanders, staff officers, and DoS and DoD officials—many of whom have had no previous experience with the program. The only answer is education and training. The program merits and requires continuous explanation.[27]

At times, assertion opportunities are missed due to erroneous perceptions that the coastal State will use force to prevent it or take other retaliatory action. In fact, rarely is there any type of response. FON action officers must study the historical record of assertions to ascertain the likely response. Intelligence officers and country specialists can serve as important sources of information concerning coastal State sensitivities.

The high tempo of current operations and the shrinking numbers of available ships and aircraft are practical impediments to some assertions. The challenge for the action officer is to know all of the excessive claims in the area of responsibility, and to take advantage of any units that might be operating in the vicinity of such a claim. Generally, given the worldwide operation of U.S. ships and aircraft, at some point in time, a ship or aircraft will be close enough to conduct the assertion with little or no additional costs in time or money.

In the end the frustrations and challenges are outweighed by the success stories. As a result of the routine and frequent exercise of navigation and overflight rights around the world, law of the sea concepts such as innocent passage of warships, transit passage, and archipelagic sea-lanes passage are well

established in customary international law, a number of coastal States have withdrawn excessive claims,[28] and the right to conduct military operations with due regard for resource related activities in the EEZ of coastal states is widely understood and respected. The returns benefit not only the U.S., but all nations interested in promoting maritime mobility.

Even the instances of friction may prove beneficial. Recall the Black Sea "bumping " incident of February 1988, when two U.S. ships entered the Soviet territorial sea in the Black Sea during a FON operation. The subsequent "shouldering" by two Soviet warships led to a U.S. diplomatic protest. Ultimately, the two governments reached a consensus[29] that the law of innocent passage is expressed in the LOS Convention, that all ships, including warships, enjoy the right of innocent passage, that neither prior notice nor authorization is required prior to innocent passage, and that internal coastal State laws should conform to this uniform interpretation of the applicable legal regime. Optimally, future assertions will produce similar results.

The FON Program has provided one clear benefit to the operating forces and operational commanders and their staffs. Planning and conducting the assertions have caused a greater understanding of law of the sea principles and their effect on military operations. When conducting or approving the assertions, operators and their legal advisors must know with specificity in which ocean zone the ship or aircraft will be operating, and understand its corresponding rights and duties. Real world operations demand a much more intense focus than that needed in training or academic environments; mistakes can be politically embarrassing for the United States.

Future

There was no question as to the need for a FON Program in an international environment that lacked a widely accepted law of the sea treaty. But as the LOS Convention becomes widely accepted, will a FON Program still be needed? The answer is "yes."

First, excessive jurisdictional oceans claims will likely always exist. Even parties to the Convention may enact domestic legislation or regulations inconsistent with its provisions. Such threats to the Convention regime should remain a focus of the FON Program.

Second, the U.S. is not yet a party to the Convention. Some States persist in their position that certain navigation and overflight rights articulated in the Convention are available only to parties. An active FON Program is necessary to preserve those rights for the U.S. in the face of that position.

Third, while the Convention is the result of remarkable efforts, it is, nevertheless, a product of committees and compromises. There are ambiguities and gaps—some unintentional, some intentional, some creative, and some the product of a lack of agreement. Such ambiguities and gaps, coupled with pressures for restrictive changes, particularly in the environmental arena, mandate a continuation of the program in some form. In that regard, consider the following:

- Marine scientific research (MSR) is subject to coastal state jurisdiction in the EEZ, but the LOS Convention fails to define the term, a particular problem because hydrographic surveys and the collection of marine environmental information for military purposes are considered by the U.S. to be high seas freedoms that are not subject to coastal state jurisdiction, even when conducted in the EEZ.[30]

- The Convention does not address flight information regions (FIRs) or air defense identification zones (ADIZs). Coastal States sometimes demand prior notice or prior permission for U.S. military aircraft transiting these zones—even if an aircraft is flying under due regard vice ICAO procedures, will not enter territorial airspace, or is in transit passage or archipelagic sea-lanes passage.[31] To provide advance notice under these circumstances would create an adverse precedent for restrictions on mobility and flexibility.

- There are several U.S. interpretive positions applicable to the transit passage regime that are not specifically addressed in the Convention. For example, it is the U.S. position that transit passage extends not only to the waters of the straits, but also to the normally used approaches; that transit passage applies to a corridor that extends from shore to shore; and that the regime applies to all straits capable of being used for international navigation.[32] While these interpretations are reasonable and tend to promote navigational safety and efficiency, they are not necessarily accepted by all coastal States.

- If an archipelagic State designates sea-lanes or air routes, the Convention requires that "all normal passage routes" be included. Coastal and maritime States tend to disagree on designations. Routine use of these routes and operational assertions against excessive claims will preserve flexibility.

- The transit passage and archipelagic sea-lanes passage regimes permit ships and aircraft to operate in their normal mode. While not specifically spelled out in the Convention, the U.S. position is that submarines may transit submerged. Further, all ships and aircraft may transit in a manner consistent with sound navigational practices and the security of the force, to include formation steaming and the operation of radars and other sensors, as examples. Again, the Convention does not specifically articulate these rights.

• Consistent with the LOS Convention (Articles 42, 95, 96, 110, and 236), U.S. military ships and aircraft enjoy sovereign immunity.[33] Nevertheless, they are often subjected to demands or requests to submit to searches or inspections. The FON Program can demonstrate a clear sovereign immunity policy needed to ensure these demands are resisted to avoid erosion of this principle.

A widely ratified Convention represents the best available path to oceans stability. All nations should carefully balance any objections to the reformed Convention against the significant gains that would be achieved through acceptance. The FON Program has served and will continue to serve U.S. interests well. In the future, an effective FON Program will have U.S. forces exercise their rights to ensure that practice under the LOS Convention is consistent with customary international law and operational requirements. Other maritime States which have benefited from the U.S. program, should consider the adoption of such a program—modified to meet their specific needs—to ensure their law of the sea rights are preserved. States with similar maritime interests could clearly benefit from a coordinated FON program.

Notes

1. J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS (66 INTERNATIONAL LAW STUDIES, 1994) [hereinafter ROACH & SMITH] is an excellent reference that provides a detailed description of "diplomatic and military efforts undertaken by the United States Government to preserve and enhance navigation and overflight freedoms worldwide." The second edition of the book was published as UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (1996).

2. *See* U.S. DEP'T OF STATE, GIST, U.S. FREEDOM OF NAVIGATION PROGRAM, Dec. 1988.

3. Though other U.S. government agencies do participate in some of these consultations; the Department of State is generally in the lead, with the Department of Defense being the major supporting player.

4. *See* WILLIAM S. COHEN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS (1997), at I–1.

5. Detailed descriptions of the legal divisions of oceans and airspace and the rights of navigation and overflight can be found in THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS. The Handbook was published jointly by the Navy, Marine Corps, and Coast Guard in 1995 as Naval Warfare Publication (NWP) 1–14M/MCWP 5–2.1/COMDTPUB P5800.1 [hereinafter NWP 1–14M]. It sets out fundamental principles of international and domestic law that govern naval operations at sea during peacetime and during periods of armed conflict. It was previously published as NWP 9 (Rev. A)/FMFM 1-10 in 1989 and as NWP 9 in 1987. The ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS was published on November 15, 1997. Prepared by the Oceans Law and Policy Department, Center for Naval Warfare Studies, Naval War College; it is a footnoted version of NWP 1–14M with numerous references to sources of legal authority.

6. *See* NWP 1–14M, *supra* note 5, para. 1.5.

7. ROACH AND SMITH, *supra* note 1, provides a detailed discussion of many excessive claims.

8. *See* NWP 1–14M, *supra* note 5, para. 2.6; and ROACH AND SMITH, *supra* note 1, at 5.

9. NATIONAL MILITARY STRATEGY was published in 1997 by the Chairman of the Joint Chiefs of Staff (CJCS) to articulate the strategic direction U.S. Armed Forces should take. In formulating the document, CJCS derived guidance from A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY, which was published by The White House earlier in 1997.

10. NATIONAL SECURITY AND THE CONVENTION ON THE LAW OF THE SEA is a U.S. Department of Defense position paper that analyzes DoD interests in having the United States become a party to the 1982 United Nations Convention on the Law of the Sea. The Second Edition was published in January 1996.

11. *Id.* at 10.

12. ...*FROM THE SEA* is a Navy and Marine Corps White Paper that outlines a new strategic direction for naval forces in the 21st century. It was published in 1992, and updated by *FORWARD . . . FROM THE SEA* in 1994.

13. The LOS Convention, U.N. Doc. A/CONF.62/122 (1982).

14. 18 WEEKLY COMP. PRES. DOC. 877 (Jul. 9, 1982).

15. 19 WEEKLY COMP. PRES. DOC. 383–385 (Mar. 10, 1983).

16. *Id.*

17. *See* LES ASPIN, SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS (1994), at G-1.

18. Statement on the Signing of an Agreement on the U.N. Convention on the Law of the Sea, Office of the Assistant Secretary of Defense News Release, July 29, 1994.

19. The agreement was adopted by the U.N. General Assembly on July 28, 1994. It is to be applied with the LOS Convention as a single agreement. *See* U.N. DOC. A/RES/48/263, Aug. 17, 1994 and accompanying "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982."

20. *See* Letter of Transmittal, S. TREATY DOC. 103–39, (1994).

21. *See* Cohen, *supra* note 4, at H-1.

22. *Id.* at I–1.

23. The manual is prepared by the Department of Defense Representative for Oceans Policy Affairs and is published as DoD Directive 2005.1-M, January 6, 1997. Earlier versions were published in 1987 and 1990.

24. NWP 1–14M, *supra* note 5.

25. This report is included in SECRETARY OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS. As reflected in the April 1997 report (Appendix I), from 1 October 1995 to 30 September 1996, FON assertions were conducted against the following countries with excessive maritime claims: Bangladesh (excessive straight baselines, claimed security zone, and claimed territorial airspace beyond 12 NM); Burma (excessive straight baselines, claimed security zone, and claimed territorial airspace beyond 12 NM); Cambodia (excessive straight baselines, claimed security zone, and claimed territorial airspace beyond 12 NM); China (prior permission for warships to enter the territorial sea); Egypt (excessive straight baselines and prior permission to enter the territorial sea); India (prior permission for warship to enter the territorial sea); Iran (excessive straight baselines and prior permission for warship to enter the territorial sea); Maldives (excessive straight baselines and prior permission to enter the territorial sea); Oman (excessive straight baselines and prior permission to enter the territorial sea); Pakistan (prior permission for warships to enter the territorial sea); Philippines (excessive straight baselines and claims archipelagic waters as internal waters); Sudan (prior permission for

warship to enter the territorial sea); Vietnam (excessive straight baselines and claimed security zone); and Yemen (prior permission for warship to enter the territorial sea). *See* Cohen, *supra* note 4, at I–1.

26. In multiple tours as a FON action officer, I do not recall a single instance of a directive to conduct a particular FON assertion emanating from Washington, D.C.

27. THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS is a useful tool for teaching law of the sea principles and for sharing U.S. views on oceans policy. I personally have provided copies to military commanders and staff officers, U.S. embassy officials, and foreign counterparts. The publication has always been well received.

28. *See* ROACH & SMITH, *supra* note 1, at 255–56.

29. On September 23, 1989 at Jackson Hole, Wyoming, U.S. Secretary of State James Baker and Soviet Foreign Minister Eduard Shevardnadze signed the Uniform Interpretation of Rules of International Law Governing Innocent Passage, 28 I.L.M. 1444–7 (1989).

30. NWP 1–14M, *supra* note 5, para. 2.4.2.1-2.

31. For a discussion of due regard, ICAO procedures, and air navigation, *see* NWP 1–14M, *supra* note 5, para. 2.5.

32. *See generally* NWP 1-14M, *supra* note 5, para. 2.3.3.1.

33. For a brief discussion of sovereign immunity principles, *see* NWP 1-14M, *supra* note 5, para. 2.1.2 and ROACH & SMITH, *supra* note 1, at 263–264.