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[H.A.S.C. No. 114–140]

SEAPOWER AND PROJECTION FORCES IN THE SOUTH CHINA SEA

HEARING

BEFORE THE

SUBCOMMITTEE ON SEAPOWER AND PROJECTION FORCES

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

HEARING HELD
SEPTEMBER 21, 2016

U.S. GOVERNMENT PUBLISHING OFFICE
22–458 WASHINGTON : 2018

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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SEAPOWER AND PROJECTION FORCES IN THE SOUTH CHINA SEA

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON SEAPOWER AND PROJECTION FORCES,
Washington, DC, Wednesday, September 21, 2016.

The subcommittee met, pursuant to call, at 3:55 p.m., in room 2212, Rayburn House Office Building, Hon. J. Randy Forbes (chairman of the subcommittee) presiding.

OPENING STATEMENT OF HON. J. RANDY FORBES, A REPRESENTATIVE FROM VIRGINIA, CHAIRMAN, SUBCOMMITTEE ON SEAPOWER AND PROJECTION FORCES

Mr. FORBES. Today this subcommittee convenes to receive testimony on seapower and projection forces in the South China Sea. Providing testimony today are Ms. Bonnie S. Glaser, Senior Adviser for Asia and Director, China Power Project, Center for Strategic and International Studies [CSIS]. Thank you so much for being with us. Also, Dr. James Kraska, Professor of Oceans Law and Policy, U.S. Naval War College. Thank you for joining us, James. And also, Dr. Andrew S. Erickson, Professor of Strategy, China Maritime Studies Institute at the U.S. Naval War College. And, Andrew, we thank you for being here as well.

Our topic today is the South China Sea and the role that America's seapower and projection forces can play in maintaining peace, prosperity, and the rule of international law in that critical body of water. Like Berlin in the Cold War, the South China Sea has become a symbol and a flashpoint of the increasingly competitive relationship between two great powers, a place of both inherent and symbolic importance.

Over the last few years, it has become the place that the world is watching to see how the balance of power in Asia is changing and to measure America's willingness and ability to deter coercion and aggression in that important region. While I approve of very few of this administration's foreign policies, I do believe that their early instinct to devote more resources and attention to the Indo-Asia-Pacific region was correct. That said, more than rhetoric is required to counterbalance China's growing military power and assertiveness. Last year, myself, Chairman Thornberry, and 27 other members of this chamber signed a letter to the President and the Secretary of Defense, calling upon them to take a stronger stance in the South China Sea, to increase U.S. military presence in this critical region, and ramp up our freedom of navigation [FON] operations in disputed waters. I have been pleased to see that some of

that has occurred, especially in the sensitive period around the U.N. Law of the Sea ruling.

At the same time, however, I think it is clear that more is needed to defend our allies and our interests in the region. Despite the ruling, Beijing is still laying claim to almost all of the entire sea. Work on China's artificial features continues apace, with much of it clearly military in nature. China's military and paramilitary forces continue to wage a campaign of gray-zone aggression and increase their presence and activity in the region. All in all, the trends seem to be toward China's de facto control of this vital body of water.

With the end of the Obama administration approaching, I believe we are entering a time of both vulnerability and opportunity. I am concerned that China's president and the Chinese Government may see President Obama's last few months as a window of opportunity for establishing an air defense identification zone [ADIZ], expanding reclamation activities to Scarborough Shoal, accelerating the militarization of the artificial features or some move that will test our resolve. I think it is critically important that we deter such activities in the months ahead.

At the same time, I also see an opportunity for a new administration to take a new and stronger stance on the South China Sea, and redouble our efforts to maintain peace and stability in the Asia-Pacific region. I have my own thoughts on what we must do as a nation, but I look forward to hearing from our witnesses how we can better deter Chinese aggression, reassure our allies and partners, and maintain a stable military balance in the Asia-Pacific region going forward.

When Mr. Courtney gets here, if he has any opening remarks, we will defer to him at that particular point in time. But now we would like to hear from our witnesses. As Mr. Courtney and I mentioned to you at the outset, your written testimony will be made part of the record. We look forward to any comments that you might have, and we would love to get your thoughts at some point throughout this hearing on just why it is important that we even look at the South China Sea for individuals living in States across our country who may say, why are we even concerned about it? And the second thing, we always know that there are risks if we have the wrong actions, but what risks are there if we have no actions as we see in many situations in the South China Sea, if you could elaborate on those.

With that, Ms. Glaser, we would love to have you start us off and love to hear any comments that you might have.

[The prepared statement of Mr. Forbes can be found in the Appendix on page 31.]

STATEMENT OF BONNIE S. GLASER, SENIOR ADVISER FOR ASIA AND DIRECTOR, CHINA POWER PROJECT, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES

Ms. GLASER. Thank you, Chairman Forbes, Ranking Member Courtney, members of the House Subcommittee on Seapower and Projection Forces. I appreciate the opportunity to testify before you today.

The United States has a great deal at stake in the South China Sea. We have a national interest in freedom of navigation, particularly open access to Asia's maritime commons. We have an abiding interest in the compliance with international law, including the July 12 UNCLOS [United Nations Convention on the Law of the Sea] tribunal ruling. We certainly have an interest in the peaceful resolution of disputes and the lack of coercion by big powers against smaller powers. And, of course, we have a very important interest in ensuring the security of our allies and our partners. All of these interests that I have enumerated I see as under challenge today from China. Chinese statements and actions in the South China Sea suggest that China seeks to, over time, gain control over the waters and the airspace in the South China Sea. After the tribunal issued its ruling, the Chinese Government issued what is a very highly authoritative and unusual statement that cited a series of claims, including to historic rights in all of the waters, but also to internal waters. And a few days after that, the commander of the PLA [People's Liberation Army] Navy, Admiral Wu Shengli, told CNO [Chief of Naval Operations] Admiral John Richardson that the South China Sea is a Chinese core interest. That indicates that Beijing will resist making concessions, and it is a warning to the United States to tread carefully. That is the first time that that statement has been made very openly and clearly and reported in the Chinese media.

Acquiring greater control over the South China Sea may well be a key step in a long-term Chinese strategy to constrain, or even block, the U.S. Navy's access to the region and to maneuverability within the waters of the first island chain. If this is Chinese objectives, and we don't know for sure because Beijing has not made its goals clear, this is very worrisome.

So I agree with you, Congressman Forbes, that there is a potential of China taking advantage of the final months of the Obama administration, or maybe even the transition, the upcoming election, and the first few months of a new President. The Chinese are known to test the resolve of American Presidents in the early months. We have already seen some potential evidence that the Chinese may dredge on Scarborough Shoal. A military outpost on that feature would enable China to deploy radar, aircraft, cruise missiles within range not only of Manila, but also of several Philippine bases to which the United States has recently gained access under EDCA [Enhanced Defense Cooperation Agreement].

Up until now, we have seen a dynamic where China has been careful to avoid directly challenging the United States in the South China Sea. It has rather used, you know, incremental actions, what could be referred to as a salami slicing, which had not provoked a U.S. military response. I think it is uncertain whether China will continue this strategy going forward. Xi Jinping could decide to proceed with construction at Scarborough Shoal to bolster his domestic political position in advance of the 19th Chinese Communist Party National People's Congress, which will be held in November 2017.

So I believe and share your views, Congressman, that the Obama administration's rebalance to Asia has been important. It has achieved some success. There is, of course, much more that we can

do. Steps to bolster U.S. diplomatic engagement and military presence have been welcomed throughout the region, but wherever I go in Asia, I hear in every capital, not only our allies, but our partners, that American will and ability to sustain its commitment going forward is questioned. The region is highly uncertain about what the United States is going to do, in part because of the uncertainty of who will be President, but also because they worry that we may be distracted by crises elsewhere.

So I have enumerated in my testimony a number of things that I think the U.S. should do going forward. I will just enumerate a couple here, and we can discuss them in greater detail if you wish. The U.S. should continue to publicly and privately call on Beijing to comply with this tribunal award and encourage countries to do the same. We should continue to warn Xi Jinping that land reclamation on Scarborough Shoal, declaration of an air defense identification zone in the South China Sea, or other destabilizing behavior, will be viewed with grave concern and result in a very strong U.S. response.

We should resume our freedom of navigation operations in the South China Sea. We should conduct them regularly. Such missions should be carried out, I think in the future, quietly and without fanfare.

The Maritime Security Initiative is very, very important. We need to provide more funding. I would advocate that the full request of $60 million for the Maritime Security Initiative be granted and that the members here support the Senate's State Foreign Operations Appropriations Bill, which has called for increasing the appropriation for the Department of State's FMF [Foreign Military Financing Account] and IMET [International Military Education and Training Account] for Asia.

I support ratification of UNCLOS. I think that it is no longer sufficient that the United States adheres to UNCLOS as customary law. If the principles and practices that are embodied in the Convention on Law of the Sea are critical to American interests, then the U.S. should ratify the treaty. So I will stop there and look forward to your questions. Thank you.

[The prepared statement of Ms. Glaser can be found in the Appendix on page 35.]

Mr. FORBES. Thank you so much. Dr. Kraska.

STATEMENT OF DR. JAMES KRASKA, S.J.D., PROFESSOR OF INTERNATIONAL LAW, OCEANS LAW AND POLICY, STOCKTON CENTER FOR THE STUDY OF INTERNATIONAL LAW, U.S. NAVAL WAR COLLEGE

Dr. KRASKA. Thank you very much, Chairman Forbes and Ranking Member Courtney, and members, for the opportunity, the invitation, to speak about the rule of law in the oceans, which I believe are the normative basis for seapower and projection forces globally. In the South China Sea, we face strategic risk, a military threat, and political challenge, and there is a legal dimension to all of these issues, which is a continuous struggle to shape and form the rules and the regimes, the laws and the norms, in the global commons. So I would encourage people to view the problems, the issues in the South China Sea, as a Chinese dimension of a global issue,

which is that the rules for navigation and overflight are essential for the primacy of American power, and it is really the key enabler for U.S. grand strategy. This is why I believe that the issues in the South China Sea matter for the United States, and should matter for people in the U.S. everywhere.

It is because the United States is connected to its friends and allies and partners throughout the world through the oceans and the airspace, and so the rules that apply to the maritime zones are critical for the U.S. position in the world. In fact, it has always been this way. The first war that the United States fought as an independent country was the Quasi-War with France in 1798 to 1800. It was over the issue of freedom of navigation and unimpeded access to the global commons. The second war that the United States fought was the First Barbary War. It was also over freedom of navigation. The third war that the United States fought as an independent country was the War of 1812 over, again, freedom of navigation and the impressment of American sailors from U.S. ships. The fourth war that we fought was the Second Barbary War when we put a stop to the odious practice of slave trafficking off the North African Coast.

And it goes on and on. Of course, in World War I and World War II, these wars were principally about whether a hegemonic power would emerge in Europe or in Asia, and the maritime space was the lifeline for the United States to be able to maintain connectivity and prevent the emergence of a hegemonic power.

So I view the South China Sea today as the fulcrum, not just of power in East Asia, but really a fulcrum of freedom of navigation throughout the globe. So there is no national security issue in my view that is more important.

I have provided written testimony that contains a number of recommendations on strengthening the U.S. resolve in freedom of navigation and overflight throughout the global commons, and, in particular, in the South China Sea, and what I describe are four lines of efforts. The first is that there is already a governing U.S. policy on freedom of navigation in the oceans. It is a 1983 Ocean Policy Statement by President Reagan, which was made on March 10 of that year, which says that the United States does accept all of the navigational principles that are included in the U.N. Convention on the Law of the Sea, and that we will recognize that all countries have those rights. But there is a part of that that has been forgotten, which is that the Reagan statement says we will recognize other countries' rights so long as they respect American rights and American freedoms that are reflected in that convention.

My view is that the United States should be more true to that policy and when appropriate, implement countermeasures, lawful countermeasures, against countries such as China to induce compliance with international law, meaning that I would recommend not recognizing Chinese rights to operate in the American territorial sea or in the U.S. exclusive economic zone with military warships and aircraft if China tries to deny that right to the United States. The U.S. should inform Chinese warships and military aircraft that they are no longer entitled to conduct innocent passage in the U.S. territorial sea, as they did through the Aleutian Islands last year, or conduct military activities in the United States exclu-

sive economic zone, as they now routinely do off the coasts of Hawaii and Guam, and inform them that this is not a reciprocal or a tit-for-tat, but, rather, that this is a lawful countermeasure in international law.

I would also bolster the FON program, and a couple of the things that I would recommend is to conduct combined FON operations with other countries, such as Japan, because freedom of navigation is not just a American issue; it is a global, it is a multilateral issue, and all countries that are peace-loving and trade freely have an interest in freedom of navigation in the global commons.

I would also prioritize for the FON program the many, many illegal claims that have never been challenged, to my knowledge, such as the straight baselines that cut off the Hainan Straits, which China purports to view as internal waters, and that challenge has never been conducted, as far as I know, or at least most likely since the Vietnam war.

The third thing is I would leverage the arbitration award, the July 12 arbitration under the U.N. Convention on the Law of the Sea, and in particular, that 500-page award delineates a number of illegal actions by China that ought to be considered by multilateral organizations that are in charge of those issue areas. For example, there are numerous violations by China of the Collision Regulations [COLREGS], which is under the auspices of the International Maritime Organization. There is also violations by China of the International Civil Aviation Organization rules that flow from the 1944 Chicago Convention on Civil Aviation.

Similarly, there is misuse of fishing vessels as a maritime militia, which ought to be discussed before the Food and Agricultural Organization of the United Nations. So there are multilateral efforts that we have not taken advantage of that we could.

And the fourth thing, I would join my colleague, Bonnie Glaser, and say that I believe that the United States should join the U.N. Convention on the Law of the Sea because ultimately, of course, the United States relies on its Armed Forces, including its naval forces especially, to ensure that it has freedom of navigation in the global commons. But I believe that we operate stronger under the color of law, and with greater legal and moral authority and clarity if we were to join the Convention. In particular, although I understand and accept that the Convention reflects customary international law and is binding on all states, nonetheless, it resonates with our friends and allies and partners around the world. That is, they very much are interested in us doing so, and in my view, as a champion of the rule of law, in international law, this affords the United States a unique locus of power, which we have not yet leveraged.

I don't expect that China will suddenly begin to comply with the Law of the Sea Convention if the United States becomes a party to it, and I would view that as not the end of the process, but, rather, just a continuation of the struggle to shape the law in the oceans, and in particular, in the South China Sea. Thank you.

[The prepared statement of Dr. Kraska can be found in the Appendix on page 46.]

Mr. FORBES. Thank you. Dr. Erickson.

STATEMENT OF DR. ANDREW S. ERICKSON, PH.D., PROFESSOR OF STRATEGY, CHINA MARITIME STUDIES INSTITUTE, U.S. NAVAL WAR COLLEGE

Dr. ERICKSON. Chairman Forbes, Ranking Member Courtney, members. In the South China Sea, Beijing is employing not one, but three major sea forces, fleets of navy gray hulls, coast guard white hulls, and maritime militia blue hulls. Today, I want to tell you why so much is at risk if more isn't done to address China's maritime militia, China's third sea force. So much is knowable about this third sea force through open sources alone. I have got a stack of my publications on the subject here of my colleague Conor Kennedy, at the Naval War College. So much is sayable if only U.S. Government officials would do so. And so much is preventable, but only if U.S. officials act soon.

These forces operate together, with blue hulls forward and white and gray hulls backstopping them. These are gray-zone operations conducted to alter the status quo in China's favor regarding disputed claims, employing coercion as necessary, but ideally without escalating to war.

Nevertheless, leading elements of China's third sea force have already played frontline roles in manifold Chinese incidents and skirmishes with foreign maritime forces throughout the South China Sea. These include China's 1974 seizure of the Western Paracels from Vietnam; its 2009 harassment of U.S. Navy surveillance ship USNS *Impeccable*; its 2011 sabotage of two Vietnamese hydrographic vessels; its 2012 seizure of Scarborough Shoal from the Philippines; and its 2014 repulsion of Vietnamese vessels from disputed waters surrounding its oil rig, including by ramming and sinking them.

In recent years, China has used its maritime militia against military and civilian ships and crews of its immediate neighbors, as well as the U.S., with no direct public response from any of them. So there is an important reason for their current lack of light and attention on China's third sea force. Despite a deluge of Chinese language evidence of its development and activities, no U.S. Government report, to my knowledge, or Washington-based executive branch official, has publicly mentioned China's maritime militia at all. As a result, I would submit to you, U.S. policy is underinformed. U.S. regional allies and partners are confused, and Beijing is emboldened. But make no mistake. These are state-organized, -developed, and -controlled forces operating under a direct military chain of command.

Now, China is generating a worrying new wave of the future in leading-edge maritime militia development. Headquartered on Woody Island in the Paracels, the Sansha militia was established to be a professional paramilitary force, first and foremost, with fishing a secondary mission at best. Several dozen large new Sansha maritime militia vessels boast reinforced hulls, external rails to mitigate collision damage to the ships themselves, and water cannons, features not common to normal fishing trawlers, but highly useful for ramming and for spraying.

Now, as Beijing seeks to punish the Philippines for petitioning the arbitral tribunal that Professor Kraska has mentioned, dissuade Vietnam and others from following suit, and demonstrating

its longstanding opposition to U.S. freedom of navigation efforts, China's third sea force likely appears a tempting tool.

The next President, or even the current President, but especially the next President, given past patterns, may well face a fast-breaking maritime militia-related challenge, just as he or she is getting started in office. This is because, as Bonnie Glaser pointed out, Chinese leaders have a history of testing their American counterparts shortly after they assume office. And we see some worrying signs here. On 27 October of last year, when USS *Lassen* sailed near artificially augmented Subi Reef, small commercial craft with the hallmarks of maritime militia vessels approached it provocatively, having apparently anticipated its presence. Who knows what contingencies they might have been practicing for or what footage they might have been capturing for later misuse.

So before China is able to put the United States or one of our regional allies or partners in a misleading but precarious position of appearing to confront innocent civilian fishermen, American officials must finally publicly reveal the third sea force's true nature and deeds. China's maritime militia can only be as deceptive and plausibly deniable as we allow it to be through our own silence and our own inaction.

So here is what I think American policy makers need to do now. First of all, emphasize three principles. One, China's maritime militia is a military force, often in disguise. Number two, China's maritime militia forces don't deserve civilian protections in the unfortunate event of conflict. And number three, uncovering the truth about China's maritime militia is the best way to deter it and to deter its use in the first place.

I also think we need to engage in three actions. One, call out China's maritime militia officially in public. Failure of the Pentagon's 2016 report to mention China's maritime militia at all was a major missed opportunity. Congress should mandate detailed coverage in next year's report. And meanwhile, Congress should publicly address this critical subject and ask senior administration officials to do so as well. Two, share information with countries at risk. Provide American leadership and strategic reassurance. And as part of this, to bring all this action together, I believe that the next U.S. President needs to issue a public, whole-of-government Asia-Pacific strategy to coordinate policy, reassure allies and friends, and deter destabilizing behavior. Three, communicate clearly with Chinese interlocutors. Make it plain that any elements that ignore repeated warnings by U.S. vessels to desist from disruptive activities will be treated as military controlled, and dealt with accordingly. To ensure self-defense and unobstructed mission accomplishment, we need to impose clear consequences for any use of maritime militia against U.S. vessels.

In sum, the U.S. faces growing challenges in the South China Sea. In many ways, China's maritime militia is one of the simplest to begin to address. Its plausible deniability is one of its greatest strengths, and yet it has many vulnerabilities. We can quickly unmask it by putting a clear U.S. Government stamp of authority on already available information. It is high time that we did so before things take a turn for the worse in a time and a way that is not of our choosing.

Thank you very much, and I am happy to address any questions that you might have.

[The prepared statement of Dr. Erickson can be found in the Appendix on page 74.]

Mr. FORBES. Thank you, Dr. Erickson. The Chair now recognizes the ranking member, Mr. Courtney, for any opening remarks he may have.

STATEMENT OF HON. JOE COURTNEY, A REPRESENTATIVE FROM CONNECTICUT, RANKING MEMBER, SUBCOMMITTEE ON SEAPOWER AND PROJECTION FORCES

Mr. COURTNEY. Thank you, Mr. Chairman, and I apologize for not being here at the outset. Actually, I have written remarks which to keep the hearing moving along, I am just going to ask that they be admitted to the record.

Mr. FORBES. Without objection, all the written remarks for all of the members will be made a part of the record.

[The prepared statement of Mr. Courtney can be found in the Appendix on page 33.]

Mr. COURTNEY. And, again, also to supplement those, some of us may recall—probably most of us don't—but when we did the markup last May, or at the end of April, one of the report requests that HASC [House Armed Services Committee] included in the markup was, in fact, a report from the Department of Defense regarding U.S. accession to the Law of the Sea Convention. And the request had a deadline of September 15, and believe it or not, they actually submitted the report on time. And so Navy Commander Jason Levy, of the Oceans Policy Adviser, Office of the Secretary of Defense, submitted his report. It is a 6-page report. Very powerful argument. Again, totally in sync with the three witnesses that the advantages far outweigh the status quo in terms of the U.S., again, becoming a full signatory. And, again, I would ask that it be made part of the record.

Mr. FORBES. Without objection, it will be made part of the records.

[The information referred to was not available at the time of printing.]

Mr. COURTNEY. I would yield back to questions.

Mr. FORBES. Well, once again, thank you all for your comments and your thoughts. Dr. Kraska, I would like to ask you, U.S. naval policy to date has been the infrequent application of innocent passage to seek and challenge unlawful maritime claims in the South China Sea. In the South China Seas, have any of the claimants formally established a territorial sea that would provide a 12-nautical mile baseline?

Dr. KRASKA. Thank you very much for the question. Sir, in answer to the question, my view is that in Article 3 of the U.N. Convention on the Law of the Sea, it says that states may establish baselines from which a territorial sea is measured, and, therefore, there are no territorial seas unless those baselines are established. They have not been established in the Spratly Islands. There are illegal straight baselines that China has purported to establish around the Paracel Islands. So, my view would be that there are no lawful territorial seas around any of those islands.

Furthermore, I would say that there is no resolution on title to those features. And that is the features may be entitled to a territorial sea and baselines assuming that they are under the sovereignty of a state, but if they are not under the sovereignty of the state, then it is impossible for there to be any sort of baseline or territorial sea. For example, if a country claims to have a territorial sea around Antarctica, the United States would not recognize a putative or theoretical territorial sea there, so why would we then recognize a putative territorial sea around a rock just because some other country claims that they happen to own it?

Mr. FORBES. Do you have any opinion as to why the U.S. policy has been to apply our military forces in the pursuit of innocent passage and not a more rigorous military application that would serve to rebuke any unlawful claimant's claims?

Dr. KRASKA. I am not—I don't have a view on what the considerations were within the U.S. Government. I just think that it is the wrong decision, that is, that I would not have selected innocent passage, which is the most restrictive navigational regime in the Law of the Sea in order to challenge unlawful claims. In particular, we have done so around some features which are, even if they are, they are not subject to appropriation by any state, for example, submerged features or low-tide elevations, which can never, even if they were claimed by a state, they could never generate a territorial sea, so it would not make any sense to observe a territorial sea around a feature such as that.

And the arbitration tribunal brought some clarity to the Spratly Islands by identifying a number of features, including several features that China has turned into artificial islands that could never be considered to have a territorial sea, in particular, Mischief Reef, for example. So I would recommend that Mischief Reef be overflown by aircraft. There is no national airspace above it, no matter which country tries to claim it, and there is no territorial sea around it. High seas freedoms and full overflight rights apply on those features.

Mr. FORBES. Ms. Glaser, the Center for Strategic and International Studies has found that Chinese maritime law enforcement ships were involved in over 70 percent of the major incidents in the South China Sea since 2010, including aggressive harassment, ramming of foreign coast guard ships and fishing boats. What steps do you believe the U.S., our partners and allies, should take to dissuade China's use of maritime law enforcement ships in an aggressive manner contrary to international norms that further China's unlawful claims?

Ms. GLASER. Congressman, this issue that you raise is really quite worrisome. I think it doesn't get enough attention. China is now building exceedingly large white-hulled ships. Some of them used to be navy ships. They are painted white. They have larger numbers than others. They use these ships, vessels, to harass neighbors, whether it is through water cannons or rammings. When the Chinese had positioned a large oil rig off of Vietnam's coast in 2014, the activity between both sides' coast guards was really quite worrisome. I believe, although our data is from public sources, and, yes, we have found that in 70 percent of the instances, China is involved.

Nevertheless, if you were to talk to fishermen in the region, particularly those Filipinos who make their living from fishing around Scarborough Shoal and have been unable to fish there since 2012, those who have tried to go back have been harassed and have put their own lives at risk, and many of them are waiting for the implementation of the ruling which has found that the Philippines has traditional historic fishing rights in those waters.

So I think that the United States needs to—first, we are already negotiating in our Coast Guard with the Chinese some procedures that really draw from the COLREGS as to what is legal and illegal in terms of interactions when coast guard ships, white-hulled ships, encounter each other at sea, but this is less important between the United States and China than it is between China and the coast guards that are immediately, of course, in the South China Sea, as the U.S., of course, operates many Navy ships, but our Coast Guard is really not very active and present in the South China Sea.

So I believe it is imperative that we strongly encourage this kind of agreement between ASEAN [Association of Southeast Asian Nations] and China that is ultimately drawing from what is already existing in the COLREGS, because China is violating these laws on a daily basis. Thank you.

Mr. FORBES. And, Dr. Erickson, in addition to the use of their navy and maritime law enforcement vessels, the Chinese appear to increasingly rely on their robust fishing fleet as a third sea force, and you mentioned that in your comments. It appears that the United States has limited recourse when these vessels are employed. Do we have a strategy for countering this kind of gray-zone aggression, and do we need one, and what steps should the U.S. be taking to deter or defeat this kind of activity?

Dr. ERICKSON. Well, Congressman Forbes, I applaud your attention to this important but under-considered issue. Clearly how to address American interests and regional stability in the South China Sea is a challenging problem, but as a start, we have to understand it fully in order to formulate the right policy. And heretofore, not publicly focusing on one of the three major sea forces is an issue. As you correctly point out, China has the world's largest fishing fleet, and a small elite within that fishing fleet is brought into the maritime militia. A small elite within that maritime militia is charged and entrusted with participation in international sea incidents, including harassment of our vessels.

So I think we need to start by calling them out on this, make it clear that we are wise to Beijing's game. I think we need to find some way to communicate to China that we will not be stymied by harassment from these vessels. I am not a maritime lawyer, and I am not going to play one in a hearing or on TV, but for me, the bottom line is clear: We need to be in the solutions business regarding U.S. policy, and there is no way we should allow even the possibility in a future U.S. freedom of navigation operation, one of our mighty destroyers to become a Gulliver surrounded by Lilliputs by comparison of Chinese maritime militia forces. There has to be some way that we can avoid being Gulliverized in this fashion, and I think we need to find it soon and communicate that clearly.

Mr. FORBES. My last question, and this isn't a surprise to you. Mr. Courtney and I talked to you about this. But we have members

from all across the country in here. Some from Indiana, Missouri, Texas, not exactly surrounded by oceans in their districts.

Why is the South China Sea important to any of those individuals? When we hear of middle America and we go talk, you know, to those individuals, why do they care about this and why should they care about this whole issue?

Ms. Glaser, we can start with you, but each of you, give me your best 60-second shot to explain that to them.

Ms. GLASER. Well, Congressman, I have already addressed this to some extent in my remarks. But I do think that the issue is really about having a rules-based order; that if there are no international rules that everybody agrees to and abides by, then you have chaos and anarchy in a region where we have enormous interest. So this is a major strategic waterway. Everybody quotes the figure of $5.3 trillion in trade that passes through those waters. I am actually trying to update that figure. It is from 2011, so I am gathering data.

There is the issue of a potential internal sea that the Chinese could declare there that ultimately would oust countries that occupy those features, so that countries in the region that feel United States is an unreliable partner, and they then have to accommodate to China, and they lose their autonomy. I think that that is a world in which the United States would suffer, because this would have implications for other interests, economic realm, in the trade area. For example, the Chinese would be greatly emboldened if they achieve the goal of gaining effective control over the waters and the airspace of the South China Sea.

Mr. FORBES. Dr. Kraska.

Dr. KRASKA. Thank you, Mr. Chairman. The oceans and the airspace above them provide the connection between the United States and our friends and allies throughout the world, and so the ability to operate freely in this global domain is the cornerstone of American power and American position in the world. It has been so for at least 100 years, and our connection with other countries is important to inoculate those countries from would-be hegemonic powers, such as China in East Asia or Russia in Europe, that might come to dominate those areas. And the only way that those countries can stand is with a connection—stand independently, is with a connection to the United States.

The United States has gone to war numerous times to vindicate its right of freedom of navigation because we understand that we are essentially a hemispheric island nation, and we care very much about whether Europe or Asia is dominated by an emerging challenger.

I would end with saying that the Vietnam war, for example, one of the major instigations was the Gulf of Tonkin incident, and a challenge to U.S. ability and rights and freedoms to operate in the global oceans. So the South China Sea is a dangerous flashpoint, one of the most dangerous in the world, and the United States has to be steadfast in order to maintain its rights and freedoms in this area because there is one rule set that applies throughout 70 percent of the planet. And if there is a different set of rules that are going on in the Persian Gulf or in South China Sea, then it puts at risk freedom of navigation anywhere else in the world.

Mr. FORBES. Dr. Erickson.

Dr. ERICKSON. You have all called us here today because you have been entrusted with representing the jobs and the values of the people in your district. And where that all comes together is in an open and rules-based international system underwritten, in part, by American seapower. It doesn't just sustain itself. Now a critical part of that international system, a critical part of the global commons is being challenged in a new way because China is trying to carve out the South China Sea as a zone of exceptionalism where those open and free and productive and prosperous rules and norms don't fully apply, where they are subordinated to Beijing's political priorities.

If we allow that to happen, it is not just going to have an impact on our friends and allies in the immediate region. It is going to reverberate across the world in terms of economic growth and trade and factors that will ultimately make it back to everybody's district. So I think we have a strong shared interest in upholding that freedom and that openness in the South China Sea.

Mr. FORBES. Thank you. Mr. Courtney is recognized for any questions he may have.

Mr. COURTNEY. Thank you, Mr. Chairman. And thank the witnesses for your testimony and all your hard work over the years on this issue which, obviously, with recent events, is something that really more Members need to listen to and focus on. I just want to, again, follow up on some of the testimony regarding the whole process that the tribunal just went through in terms of reaching its decision.

And Ms. Glaser, again, just can I ask a couple quick questions. Because of the fact that we never became a full signatory, the U.S. actually was shut out in terms of being a party or any kind of participant in that process. Is that correct?

Ms. GLASER. Yes, it is. The United States, I believe, was barred from sending an observer to the proceedings because it is not a signatory to UNCLOS.

Mr. COURTNEY. So even though we obviously have a national interest, which all of the witnesses have talked about in that part of the world—we are a Pacific nation—the fact of the matter is is that we, again, couldn't file a complaint. We could not appear even as an observer and, really, we just had to kind of rely on the kindness of strangers in terms of advancing our interests. Is that correct?

Ms. GLASER. Yes. My understanding is that we did get back briefs from our allies. I think the Australians did send an observer, of course, several other nations, but there is no substitute for having the United States and its own person having somebody present in the room. So we do not—we are unable to avail ourselves of really all of the benefits of UNCLOS, but we do really have to share the burden of undertaking the obligations.

Mr. COURTNEY. Correct. So, again, in your testimony and the other witnesses' testimony in terms of the follow-on to the tribunal's decision, I mean, inevitably, the question of a remedy or enforcement in terms of, again, protecting the tribunal's decision, which the U.S. agrees with, is going to inevitably require U.S. Navy assets, you know, interaction with our allies in that region. I mean, it has an impact in terms of, you know, the work of this

committee, in terms of, you know, the Navy's resources and policies.

Ms. GLASER. Yes. I agree. I think there has long been concerns and some of them, perhaps, very legitimate about the price or costs that the U.S. would have to bear if we ratify UNCLOS. But as time has gone on, as I have observed, the maritime issues and challenges that we face around the world in the areas that I focus on really are East China Sea and South China Sea. We are just paying an enormous price in terms of American credibility, moral authority, and our ability to act in the region effectively. So we are constantly criticized not only by China, but by our friends in the region for not taking that step when, in fact, we were deeply involved, of course, in the negotiations which produced the treaty.

Mr. COURTNEY. And so looking at your suggestions about what should the U.S. do going forward, I mean, persist in calling for compliance with the ruling, warn China against taking actions contrary to the ruling. I mean, the fact is is that we are in a somewhat conflicted position about pointing to a ruling that, again, we are not a full-bodied participant in terms of that process. And as you say, it just sort of undercuts, certainly, the moral standing of defending the rule of law, and kind of demoralizes our friends in that part of the world in terms of our ability to assert it.

Ms. GLASER. I hear this from our allies, our friends in the region quite frequently when I travel to the region, when diplomats from those countries visit Washington, DC, they do not understand why the United States has left itself open to such criticism, particularly by the Chinese who say, Well, the United States hasn't ratified and become a signatory, so why should we even listen to U.S. objections about Chinese behavior and so-called, what they would say so-called lack of compliance with the arbitral tribunal.

So this is a huge challenge for the United States to deal with going forward. I think that it is long overdue for the United States to become a signatory to the Convention.

Mr. COURTNEY. Thank you. And Mr. Kraska, you mentioned President Reagan's statement of principles back in 1983. Again, included in that whole sort of series of decisions or announcements was also sort of the problems that existed at that time in terms of objections to the language of the treaty as it was crafted at that point. Can you just kind of fast forward us a little bit in terms of whether or not President Reagan's concerns still stand unchanged, or whether or not there actually has been some intervening events?

Dr. KRASKA. Thank you, Congressman, for the question. So the ocean policy statement did object to one provision, one part, actually, to be more accurate, of the U.N. Convention on the Law of the Sea which was part 11 on seabed mining. And the Reagan statement says that the other portions of the Convention reflect customary international law and the norms in the United States would comply and expected, actually, other countries to comply as well.

Part 11 underwent a transformation between 1982 when the Convention was adopted by the U.N. Third Conference and 1994, mostly through the efforts of the United States, as well as some other countries, because the United States was not the only industrialized country that declined to sign the Convention. And the

major intervening event was, of course, the fall of the Berlin Wall and the, sort of, lack of respect for socialist models.

And part 11, the original part 11 was based on a socialist sort of redistribution of wealth type of model, and after the Berlin Wall came down and it became apparent that no industrialized countries were going to sign the treaty, it was revised through an amendment, an implementing agreement for part 11. The implementing agreement has a number of—it reflects a number of positive developments. The first is that the United States is guaranteed a position on the Council for the International Seabed Authority. And the Seabed Authority is the authority that grants seabed licenses for areas beyond national jurisdiction. The United States has a guaranteed seat on that Council, and that Council is run through consensus, which means the United States has an effective veto over the decisions of the Council as well the distribution of funds.

One of the Reagan objections was that the International Seabed Authority could take the royalties from seabed mining and transfer those to countries for development as well as national liberation movements. And the national liberation movements was taken out and the United States, again, placed with a permanent seat on the Council. Those were the major features. There are some other tertiary benefits, such as marine technology, in the first or original version, was going to be transferred through mandatory means. In the revised version, marine technology is to be transferred on a market basis. And so part 11 underwent an entire transformation to sort of update and modernize it from a 1970s socialist construct to a 1990s capitalist economic and more liberal construct.

Mr. COURTNEY. Great. Thank you. And I think that is really important to flesh out that record because, again, we still sort of hear the same objections that really, I think, have become outdated because of the modifications that took place, and, obviously, the events of the last year or so show that this is no longer an academic debate over UNCLOS. I mean, we really need to get off the bench and get into the arena in terms of having an impact on critical decisions.

Again, House Resolution 631 is out there for Members if they wanted to sign on calling on the Senate to move forward. And with that, I yield back.

Mr. FORBES. Chairman Wittman is recognized for 5 minutes.

Mr. WITTMAN. Thank you, Mr. Chairman. I would like to thank our witnesses for joining us today. I wanted to get each one of your perspectives on where we are now in the Chinese effort of using essentially incrementalism to move the international norm. They continue to profess that things aren't happening. They don't intend to militarize the area. We saw in September 2015, President Xi Jinping stated that they had no intention to militarize the Spratlys, yet, having visited there, and seen a hardening of those islands, airstrips being built, antiaircraft batteries being put in, clearly an effort to militarize those areas.

It is concerning to me that we see this effort to delay negotiations. You know, don't negotiate, don't negotiate. Talk about, let's continue to push things down the road, while at the same time, moving the norm. And then the United States is put in the position to either have to take aggressive action to try and stop that, or we

find ourselves in a new, less acceptable international norm. And let's face it, we get to a certain point and then that is going to become the reality.

The question I have is, are the current U.S. freedom of navigation operations [FONOPs] and the effort to enforce the U.N. Convention of Law of the Seas ruling, is that enough by itself to reassure our allies? And should we be doing more to pull our allies in to be part of this freedom of navigation operation so that there is more than just a U.S.-China scenario here, where other nations or folks in the region say, listen, this is Japan that is part of this, this is Australia that is part of this, pursuing these FONOPs in the area. Because short of that, if this continues, it will get to a point where China says, listen, we know the United States is not going to take action to try to reverse any of this. And we even hear that from our naval leaders in the area. So I would love to get your perspective about China pushing this effort of incrementalism, creating, essentially, these unilateral actions that create a new norm and really kind of daring us to do anything other than the current freedom of navigation operations and try to change the status quo.

Ms. GLASER. Thank you very much, Congressman. You refer to Chinese President Xi Jinping's statement, which he made in the Rose Garden, that China doesn't have the intention to militarize the Spratlys. I believe that Xi Jinping probably had a very different definition in mind of militarization. I think the Obama administration tried to hold his feet to the fire, but, clearly, militarization continues. And we have seen recent satellite imagery made public by our Asia Maritime Transparency Initiative at CSIS which has shown that there are hardened shelters on at least three of these islands capable of accommodating about 24 fighters; what looks like that they are building is emplacements for surface-to-air missiles. They could be putting in cruise missiles in the future. So, it is hard to state any more clearly that militarization is underway.

The United States, I think, must stop any further land reclamation. This is essential.

There were some signs that the Chinese may have been moving earlier this year to start dredging at Scarborough Shoal. If they were, perhaps the United States did deter them. It is critically important that our President has told Xi Jinping personally, "Do not go forward and do that, or there is going to be a U.S. response."

We have to be able to be willing, not just able but willing, to put the United States on the line here and incur some risk. And if we are willing to incur some risk, then I think the Chinese will take us more seriously.

One of the problems in this regard is that, because the United States has prioritized cooperation with China on a vast number of issues, some of which are very important—climate change, the agreement with Iran to prevent Iran from going nuclear—there has been, I think, a belief in the administration that we can't have those and at the same time put pressure on China to stop taking destabilizing actions in the South China Sea. But I think we can do both. And we have to be willing to very clearly tell the Chinese that their behavior is unacceptable.

I would agree with you, I guess with a bit of a caveat, on the question of whether we should be conducting FONOPs with allies,

because I would distinguish between Japan and Australia. And, ultimately, this is a sovereign decision for our allies to make.

I think that Australia is very like-minded with the United States on this issue. If they were to conduct their own patrols, I would be quite supportive of that. Maybe they would be willing to do that jointly with us; I personally don't think it is necessary.

Japan is a bit of a different case. As I am sure you know, the Chinese are putting a great deal of pressure on Japan in the East China Sea. And the day that they sail a navy ship inside 12 nautical miles of a Chinese-occupied territory in the Spratly, I worry that the Chinese are going to sail a navy ship inside the 12 nautical miles around the Senkaku [Islands]. And that would be a very big price, I think, for Japan to pay.

Having said that, there is a lot that the Japanese can and are doing in the South China Sea.

Mr. WITTMAN. Thank you, Mr. Chairman. I yield back.

Mr. FORBES. Mr. Larsen is recognized for 5 minutes.

Mr. LARSEN. Thank you, Mr. Chairman.

Dr. Erickson, good to see you again.

For those who have not traveled to China with Andrew, where he speaks fluent Chinese, and you are hanging around talking to officers in the PLA, it is very valuable to have Dr. Erickson in the room with you. So I will note that.

And my first question is for you, Dr. Erickson. I think you are the one who mentioned whole of government. I am sure all of you have some concept of what that might mean. But how would you define or redefine a whole-of-government approach on this, with regards to this particular issue?

Dr. ERICKSON. Well, Congressman, it is great to see you again. And it was a great pleasure to be with you in China. And I knew we could always find Starbucks coffee in the morning with you there. That was part of your trademark. And I think it is well-recognized in your home district.

Mr. LARSEN. For a while, it used to be part of Starbucks' trademark until it went to China.

Dr. ERICKSON. Excellent.

So I think there is a lot that needs to be done in implementation. This is an evolving effort, but the starting point is very simple. The next U.S. administration needs to issue a comprehensive strategy. It is extremely viable; it is extremely doable.

I think it could be drafted in a fairly short period of time. There are numerous documents to draw on. The last two U.S. maritime strategies have had a lot of positive and robust language about the importance to the U.S. of maintaining the global system. We do not seek enemies and monsters to destroy, but, nevertheless, we are committed to the support and maintenance of that system. If another state decides to try to disrupt that, let's say in the South China Sea, in our effort to secure that system, we would then need to push back and handle that issue as necessary. Lots of great language right there.

In the Clinton administration in the 1990s, the Pentagon issued a series of regional policy statements. That offered a good series of examples. And during this current administration, there have been a smattering of documents, from a White House statement regard-

ing the rebalance—which I agree with everything that has been said; that is a good overall initiative—to a brief State Department glossy.

The point is this needs to be taken all together, under the stamp of a President, the next President, and this will lay a powerful basis for further action.

In the absence of that, I have heard from many interlocutors in allied countries. There is confusion as to what the real policy is. There is uncertainty as to what the rebalance means in practice. And there has been frustration when people have been directed to read a bunch of different documents and various media statements by different spokespeople that we all know, in this busy town, no one who is doing an active leadership job has the time to sit down and put all together.

So there is a lot that needs to be done, but I think there is a very good and positive place to start. And I am optimistic that the next President will see move to do just that.

Mr. LARSEN. Thanks.

And I think it does—this is not a question, but it does beg the question of, with all these statements, with all these policy statements already made and these other actions being taken, why hasn't there been the momentum to keep a consistent or a comprehensive strategy going? And that is, I think, a legitimate question. I am not asking folks to answer that right now.

Dr. Kraska, can you expand a little bit on the point about a comprehensive strategy, but specifically with regards to use of multilateral venues to essentially enforce UNCLOS even though we are not signatory—or we have not enforced it, we are not enforced to it. I think it is an interesting idea you mentioned in your testimony. I would like to hear a little more about it.

Dr. KRASKA. Thank you very much for the question.

I would suggest it wouldn't be an enforcement mechanism, but, rather, there are multilateral institutions that are stakeholders in the Law of the Sea as well as other international instruments or conventions, such as the Collision Regulations or the Chicago Convention on Civil Aviation, and these institutions have not been utilized by the United States or adequately by other countries.

The United States, for example, to my knowledge, has not partnered with Vietnam when Vietnam complained that Chinese aircraft are not complying with ICAO air traffic control regulations over the South China Sea. The United States should use the venue of the International Civil Aviation Organization and join Vietnam in the effort to do that.

The same with the International Maritime Organization. The United States is a member. It doesn't actually require us to be a member of the U.N. Convention on the Law of the Sea, but both the United States and China and numerous other countries are members of the international convention on the Collision Regulations. And so that is a binding treaty commitment that has been violated, that the arbitration found was violated by Chinese vessels.

China also has flag state responsibilities, not just for its government ships such as coast guard vessels but to maintain certain

standards for its fishing vessels, including the vast maritime militia that Professor Erickson described.

So I think that there are a number of venues that we haven't fully utilized that could be brought to bear, including, ultimately, the U.N. Security Council. Sure, China has a veto in the Security Council, but, nonetheless, the Security Council is the primary organ for international peace and security. And I think we are all here deeply concerned about the threats to international peace and security in the South China Sea, and so there ought to be some way to use that institution as well, if nothing else, just to make a statement. It will project to other countries, as well as to China, the seriousness with which we take what is going on in the area.

Mr. FORBES. Mr. Russell is recognized for 5 minutes.

Mr. RUSSELL. Thank you, Mr. Chairman.

There is no doubt that, with a third of the world's commerce flowing through this body of water, it has everybody's interest. You know, I have even proposed, if China's statements are truly about rescue operations, aid and navigation, aid and communication, then let's take them at their word and assist, like Antarctica. I mean, we have international use there, right? For studies, for scientists, everything else. And if it is truly a third of the world's commerce that is flowing through the South China Sea, then, well, why don't we all roll up our sleeves and go out there and we will put our Coast Guard helicopters and our everything else? I mean, we are all in it together.

I think there is a diplomatic path for that, by the way. But that ought to be our first and chief aim, rather than putting ourselves on a bumper car—you know, rather than lanes of competition, economically, we are putting ourselves on the smash-up derby over pieces of coral. Imagine what would happen in the world if the world's two largest economies went at war. It would be devastating.

And I don't see a lot of diplomatic effort in that way. But no one loves peace more than those that have helped preserve it. I guess there has to be a comprehensive solution rather than just militarily or economically. It has to be all of the instruments of national power and international power.

You know, will China be unforgiving? Well, you know, I don't know. Since the Treaty of Wangxia, we have been friends, since 1744. Our entire World War II policy has been about—we entered the war largely over Chinese interests and sovereignty interests for China. With the exception of the 3 years we fought each other in the Korean war, you know, we have managed to somehow make it work. I have faith enough in the two great nations that maybe there is still some opportunity to do that. And I know you feel those same convictions.

With that said, I am a little concerned about the Treaty of the Sea because some things haven't changed. Great, we are making progress on the deep, you know, mining on the continental shelf. And those are—especially the continental shelf is extraordinarily important to the resources of the United States. With $18 trillion in debt, we could use some good news on mineral development.

Would any of you care to address—there are provisions that are against intelligence and submarine maneuvers in the Treaty of the

Sea. That would have a material impact on the one nation that possesses a great capacity in that area.

Submitting to international sovereignty jurisdictions also could weaken our argument on the International Criminal Court arguments, where we don't want to submit to International Criminal Court positions because of our U.S. sovereignty. Signing up for Treaty of the Sea sovereignty disputes could also spill over into that.

And, again, this is open discussion. If there are some brilliant minds sitting at the table, I would really like your thoughts on some of those issues.

Dr. KRASKA. I am not a brilliant mind, but I am a lawyer.

Mr. RUSSELL. Well, you had me until you said that, you know.

Dr. KRASKA. And, in fact, I wrote an article just on this topic, on submarine operations.

So it has been discussed by administration officials, both in the former as well as the present, that the Law of the Sea Convention affords the privilege or the right of innocent passage in the territorial sea that is within 12 miles. In order to invoke that right, a ship must be on the surface—a submarine must be on the surface and show its flag.

That doesn't, however, say that the submarine must do so. In other words, the submarine, if it wants to have the right of innocent passage, would be on the surface and show its flag and, therefore, would be cloaked in the color of law with that. If the submarine is not on the surface and within an area that is the territorial sea, there is nothing in international law that says it can't be there. It just says it doesn't have a privileged status or a right to be there.

So, in general, espionage goes on all the time among states, and it is not contrary to international law. There are rules, for example, of collecting intelligence within certain countries, but there is no international law that forbids the collection of intelligence. And so a submarine within 12 nautical miles of a shoreline is presumably not in innocent passage, but it is not patently unlawful per se.

With regard to intelligence operations and military activities generally, of course, the United States has already indicated that it would invoke the declaration under article 298 of the Convention and exercise an optional exception, which then forecloses any sort of arbitration or International Tribunal for the Law of the Sea from second-guessing U.S. military operations.

The United States is not alone in doing so. Numerous other countries have done so—France, the United Kingdom. And China has done so. In fact, China probably would have been better served and maybe would have suffered, I still think, a big loss with the arbitration, but probably a narrower award if it had invoked article 298, as was its right to do so. And I would expect the United States would do so.

And once a country invokes article 298, then it is not reviewable by any sort of arbitration or any tribunal. The country invoking article 298 also specifies the scope of what the content of that is. So, assuming that we have faith in U.S. leaders to exercise the optional exception, then there would not be any sort of ability of a tribunal to second-guess U.S. military or intelligence collection.

Mr. RUSSELL. Well, thank you.

And thank you, Mr. Chairman.

Mr. FORBES. The gentlelady from Hawaii, Ms. Gabbard, is recognized for 5 minutes.

Ms. GABBARD. Thank you. Thank you, Mr. Chairman.

Ms. Glaser, I wanted to follow up on your response to Mr. Larsen about the scenario of a Chinese naval ship entering within the 12 nautical miles of the Senkakus. And it was the last thing that you said. You spoke about this being a very big price to pay, but that Japan is already kind of taking proactive actions in preparation should that scenario play out.

Can you expand on that, both the price—you know, what the most likely versus most dangerous courses of action would be if that scenario played out?

Ms. GLASER. Well, thank you for the question.

First of all, I think my last point was that Japan is doing a great deal in the South China Sea even though it is not conducting, as far as I know, patrols itself or jointly with the United States inside the 12 nautical miles around particular features.

So it is providing coast guards, aircraft to individual countries like the Philippines, Vietnam, Malaysia to enhance maritime domain awareness and coordinating with the United States in that regard, as well as with Australia—South Korea is also taking some very important measures—so that countries can actually know when there are actions being taken by other nations inside their exclusive economic zone.

So this is, I think, a very important program and enables those countries, or will over time, to contribute more to their regional security. So Japan is very actively involved in this.

But, of course, their main concern, their priority security concern is the East China Sea. And we see, of course, Chinese operations continuing on a daily and weekly basis, where there are mostly white-hulled ships, maritime militia probably as well, that are operating inside 12 nautical miles. It is approximately three times a month. Recently, they have been using more ships each time they send ships. It used to be two or three; now it is three or four. And, recently, we saw a very large number of these government-owned ships that were inside the 12 nautical miles around the Senkakus.

China's naval ships have been operating closer to the 12 nautical miles and really the contiguous zone outside of that 12 nautical miles, but they have not yet entered into the 12 nautical miles, which I think would be extremely dangerous.

The Japanese are taking measures to deter China from continuing to put pressure on the Senkakus, which, of course, they administer. I think that the Chinese have been, to some extent, deterred not only by what the Japanese are doing but by the fact that President Obama, this administration and also prior administrations, although not at the Presidential level, made it quite clear that the Senkakus are covered under article 5 of the U.S.-Japan Mutual Security Treaty.

But, by contrast, of course, in the South China Sea, we have not made very clear statements, and I think this has created this gray-zone area where the Chinese have taken advantage. And it is a difficult challenge for the United States and other countries to deter

Chinese activity in the South China Sea, whether it is dredging or further militarization.

Ms. GABBARD. Yeah. Thank you.

Thank you, Mr. Chairman.

Mr. FORBES. And, Dr. Kraska, could I just follow up just a little bit on perhaps my friend from Oklahoma's questioning about the U.N. Convention on the Law of the Sea?

Before this convention—and since you wear the taint of being a lawyer, you are on there to do that—we had customary international law. And there was a body of international law, which people studied and nations complied with or didn't comply with as they saw fit. If there was a dispute, how was that resolved?

Dr. KRASKA. Thank you for the question.

Just as in national law or in every jurisdiction that I am aware of, the later in time prevails if there is a dispute between two bodies of law.

Mr. FORBES. No, I meant what body would actually decide that dispute. So, in other words, two countries differ on—when ordinary international law, it is floating out there, and China takes one position, the Philippines take another position. Before you had the U.N. Convention on the Law of the Sea, who was the arbiter of what that law was?

Dr. KRASKA. States can only be adjudicated under their consent, so it would have to be the International Court of Justice [ICJ] or some sort of ad hoc arbitration.

Mr. FORBES. So they would have to agree to who that was.

Dr. KRASKA. That is right.

Mr. FORBES. Under the U.N. Convention on the Law of the Sea, who would that arbiter be?

Dr. KRASKA. There are four different mechanisms under the U.N. Convention on the Law of the Sea. And if the parties can't agree on which mechanism—it could be the ICJ, it could be the International Tribunal for the Law of the Sea—and there are two types of arbitration. It would be an annex 7 arbitration, just as the China-Philippines—China did not appear, and so that was the default mechanism, which is an annex 7 arbitration.

Mr. FORBES. And I guess one thing, just to put it out on the record as a little counter to the push to sign this treaty, is that it is not like there is no customary international law out there. That law is out there. It exists. You could look at a treaty like this, even if you didn't sign it, and incorporate that as part of that body of international law.

But I think one thing that there are some people concerned about is the United States has a culture that, when it signs a treaty, it will comply with that treaty, and, therefore, if it had a ruling go against it, it would comply with it. But there is some concern that when you get a China that is a signer to the treaty but then says it is not going to comply with it, that maybe there is a question as to why the United States would want to submit its sovereignty to that type of process.

And, you know, I would just throw that out as another part of that debate which I think is out there as well.

With that, gentlemen, ladies, we also had told each of you that we were going to allow you to have any follow-up comments you

had, clarifications, things that we didn't cover that maybe you would like to.

Dr. Erickson, why don't we start with you this time, and we will end up where we started, with Ms. Glaser.

Dr. ERICKSON. Absolutely.

Well, thank you very much, Mr. Chairman, Ranking Member Courtney, members, for this opportunity to call attention to China's third sea force in the context of South China Sea operations.

There are many things we need to do to further U.S. interests and uphold the international system in the South China Sea, but I think we need to start with an honest and open discussion and understanding of what China is actually doing there. And it has been far too long that we have ignored or not adequately paid attention to the existence of this other sea force that is on the front lines.

Just a couple quick additional thoughts on what we can do about this.

First of all, this is a force that thrives in the shadows of plausible deniability. And I have tried to make the case today that it is well within our power to shine enough light to dispel a lot of those shadows. Thus exposed, this is in many ways a very limited, weak, and vulnerable force. And I believe that we can inject enough doubts into the minds of China's leaders about its use in the scenarios we worry most about that we can change their decision-making calculus and make it much less likely that we would have to be confronted by elements of this force in a difficult, disorienting, or sort of CNN effect publicly—a public optically bad kind of way.

There is also an additional source of leverage I would like to suggest. I am proud that I have had a chance to be involved in naval relations between the U.S. and China, but I think we need to make it clear in our policies toward China that we look at their three sea forces comprehensively.

We cannot tolerate a situation in which their navy bear-hugs our Navy in search of best practices and diplomatic cameo ops as a kind of a good cop while their other two sea forces, the coast guard and the maritime militia, play the role of bad cops doing the dirty work in the South China Sea.

So I think, by looking at this issue comprehensively, by raising attention to it in Congress and asking the administration to do the same, by communicating all of this clearly with resolve to our Chinese interlocutors, I think we can create a much better baseline and understanding in the South China Sea. It won't solve all the problems, but it will reduce risks, put us in a much better position.

Thank you.

Mr. FORBES. Thank you.

Dr. Kraska.

Dr. KRASKA. Thank you, Congressman.

I would close by underscoring the importance of force structure and forward presence in the South China Sea and in East Asia generally. International law and particularly customary law is built upon state practice, and a virtually present force that is tethered in San Diego or somewhere else, a notional force that can arrive

in a crisis, frankly, does not build the state practice. And so a virtual presence is an actual absence.

And hulls in the water matter. In the warfighting context, it matters, perhaps, that a modern destroyer has the capability of 10 warships in the past, but it doesn't matter for international law. And so I think that, for example, having the LCS [littoral combat ship] vessels operate from Singapore is a big step forward and greater presence. I think more hulls are needed, more hulls in the water.

I also think we should talk plainly about the issues. I have mentioned some of the multilateral institutions that we can approach and make it a priority within the U.S. delegation to bring these issues up.

And it begins even with the nomenclature that we use for China's claims, which in the U.S. Government we call them "excessive claims." I would suggest that they are not excessive claims, they are unlawful claims. And we ought to just speak plainly. There is no legal authority to draw a big circle in the water a thousand miles long and then claim it as some sort of special zone or internal waters. And so we should get rid of these euphemisms, which I think raise doubt and ambiguity and play into China's hands. These are unlawful claims.

I also would recommend that we link our policies, global oceans policies, in particular the South China Sea, to other issues of bilateral relationships. This is what we did during the Cold War with the Soviet Union, I think to great effect, and we should be willing to do it in the South China Sea. The threats to freedom of navigation that emanate from the South China Sea and reverberate globally are a great enough threat to the United States and place enough of our core interests, our national interests at stake that we ought to be willing and able to link Chinese conduct to other aspects of the relationship.

And, finally, in respect of your comment about noncompliance, this is always something that is faced in international law, and that is why I mentioned it. I don't expect that China will suddenly comply with the Law of the Sea Convention.

I think reasonable people can have different views on it. My perspective is that the benefits of the Law of the Sea Convention do outweigh any sort of perceived risks. We encounter the same sort of thing with the U.N. Charter, for example, which countries violate sometimes with impunity; China, in fact, violated it in 1974 when it seized the western Paracel Islands from Vietnam, violating article 2, paragraph 4. And yet we are still a member of the United Nations because we believe that it is better to be within the tent than outside of the tent. The same with the World Trade Organization; it has a mandatory dispute resolution process.

So there are risks of noncompliance, and that is why I would say that joining the Law of the Sea Convention is not the end of the process. And I think some advocates may view it as the end of the process. I view it as just one point on the way station to continue the struggle to shape the law. And so the problems will not go away when we join the convention; I just think we will be in a better position.

Mr. FORBES. And Ms. Glaser.

Ms. GLASER. Thank you, Congressman Forbes. It is a privilege to be here today, and I want to thank you for especially convening this hearing on a very important set of issues.

I would like to underscore or pick up on what Andrew Erickson referred to as influencing China's calculus and shaping China's choices. I believe that there are ongoing debates in China about how to best proceed on this issue of the South China Sea and others. And the Chinese may well conclude that there is too high a cost to pay if the United States and other countries take actions to impose greater costs.

And so I think that that is really what is incumbent upon us, that we create an environment in the South China Sea using our whole-of-government approach—our military, our diplomacy, and our economic engagement as well.

And there I would say that I believe, if we are to maintain our credibility in the region, if we are to sustain confidence in the rebalance to Asia, that it is extremely important for the Trans-Pacific Partnership to be ratified. This is seen by every country in the region as a litmus test of whether or not the rebalance is going to survive this administration. So I think that that should be a very high priority.

So I would endorse the recommendation, we need to have a clear strategy, a report that comes from high levels in the administration, and then coordination of the various agencies and elements of the U.S. Government in support of the implementation of that strategy.

And particularly in the military realm, we have to send clear signals. And we have to sometimes be willing to incur risk. I believe that the Chinese respect strength and they will take advantage of weakness.

So I do not see it as inevitable that we will have a confrontation with China in the South China Sea if we have the correct strategy to avoid such confrontation and potential conflict.

Thank you.

Mr. FORBES. On behalf of all of our members and our subcommittee, we want to thank all of you for taking your time to be here.

And, with that, we are adjourned.

[Whereupon, at 4:33 p.m., the subcommittee was adjourned.]

A P P E N D I X

SEPTEMBER 21, 2016

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

SEPTEMBER 21, 2016

Opening Remarks of the Honorable J. Randy Forbes,
Chairman of the Seapower and Projection Forces Subcommittee,
for the hearing on
Seapower and Projection Forces in the South China Sea

September 21, 2016

Today the subcommittee convenes to receive testimony on Seapower and Projection Forces in the South China Sea.

Providing testimony today are:

- Ms. Bonnie S. Glaser, Senior Adviser for Asia and Director, China Power Project, Center for Strategic & International Studies;
- Dr. James Kraska, Professor, Oceans Law and Policy, U.S. Naval War College; and
- Dr. Andrew S. Erickson, Professor of Strategy, China Maritime Studies Institute, U.S. Naval War College.

I want to thank you all for being with us today.

Our topic today is the South China Sea, and the role that America's seapower and projection forces can play in maintaining peace, prosperity, and the rule of international law in that critical body of water. Like Berlin in the Cold War, the South China Sea has become a symbol and a flashpoint of the increasingly competitive relationship between two great powers, a place of both inherent and symbolic importance. Over the last few years, it has become the place that the world is watching, to see how the balance of power in Asia is changing, and to measure America's willingness and ability to deter coercion and aggression in that important region.

While I approve of very few of this administration's foreign policies, I do believe that their early instinct to devote more resources and attention to the Indo-Asia-Pacific region was correct. That said, more than rhetoric is required to counterbalance China's growing military power and assertiveness.

Last year, myself, Chairman Thornberry, and 27 other Members of this chamber signed a letter to the President and the Secretary of Defense calling upon them to take a stronger stance in the South China Sea, to increase U.S. military presence in this critical region, and ramp up our Freedom of Navigation Operations in disputed waters. I have been pleased to see that some of that has occurred, especially in the sensitive period around the UN law of the sea ruling.

At the same time, however, I think it is clear that more is needed to defend our allies and our interests in the region. Despite the ruling, Beijing still is laying claim to almost all of the entire sea. Work on China's artificial features continues apace, with much of it clearly military in nature. China's

military and paramilitary forces continue to wage a campaign of "gray-zone" aggression and increase their presence and activity in the region. All in all, the trends seem to be toward China's de-facto control of this vital body of water.

With the end of the Obama administration approaching, I believe we are entering a time of both vulnerability and opportunity. I am concerned that Xi Jinping may see President Obama's last few months as a window of opportunity for establishing an Air Defense Identification Zone, expanding reclamation activities to Scarborough Shoal, accelerating the militarization of the artificial features, or some other move that will test our resolve. I think it is critically important that we deter such activity in the months ahead.

At the same time, I also see an opportunity for a new administration to take a new and stronger stance on the South China Sea, and redouble our efforts to maintain peace and stability in the Asia-Pacific Region. I have my own thoughts on what we must do as a nation, but I look forward to hearing from our witnesses how we can better deter Chinese aggression, reassure our allies and partners, and maintain a stable military balance in the Asia-Pacific region going forward.

I now turn to my good friend, the ranking member of the subcommittee, Mr. Joe Courtney of Connecticut.

Ranking Member Courtney's Opening Remarks for House Armed Services Subcommittee on Seapower and Projection Forces Hearing on "Seapower and Projection Forces in the South China Sea"
(As Prepared For Delivery)

September 21, 2016

Thank you Mr. Chairman, and thank you to our witnesses for testifying before this subcommittee today. I look forward to your candid remarks, and we can use this opportunity to take a hard look at the difficult choice our country faces in this critical region of the world.

This subcommittee has met several times over the last year to discuss the unique challenges the South China Sea poses for U.S. foreign policy and power projection. Given the importance of this region, not just to our allies, but to U.S. interests and the global economy, our attention to developments there has not waned – and should remain a top priority for our government. Our military, and in particular the Navy, has played a leading role in pressing our nation's interest in the region. These include military-to-military engagement with China and others, building maritime capacity with our partners, freedom of navigation operations, and rebalance of our force structure to the Pacific.

The Permanent Court of Arbitration's July ruling on China's maritime claims in the South China Sea was a landmark decision for the region, and a very promising development for U.S. interests and those of our partners. While I believe the Court got the decision right in this case, I remain deeply concerned that the United States was relegated to watching these proceeding from the outside, given our lack of approval of U.N. Convention on the Law of the Sea (UNCLOS).

Moving ahead, it is clear that the United States needs to work on all levels to engage our interests in the region. One of those areas is the ratification of UNCLOS. Countless military leaders, including Chairman of the Joint Chiefs of Staff General Joe Dunford, Chief of Naval Operations Admiral John Richardson, and PACOM Commander Admiral Harry Harris have all publicly stated their belief that the U.S. must ascribe to the same rule book that we expect other countries to follow. Presidents of both parties have supported ratification of UNCLOS. I firmly believe that supporting this agreement is in the best interest of our nation, and would provide a powerful sign that we are joining both competitors and partners in the same set of rules moving forward.

That said, UNCLOS alone will not resolve the various and complex challenges we face in the region. The arbitration ruling, combined with the impending transition to a new administration here at home, makes this a critical time for our interests in the South China Sea. More than ever, we need to be vigilant for any efforts to further destabilize the situation in the region,

and that is why sessions like this are so important. Thank you in advance to our witnesses for your experience and guidance on this issue.

With that, Mr. Chairman, I yield back the balance of my time.

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Statement before the

House Armed Services

Subcommittee on Seapower and Projection Forces

"Seapower and Projection Forces in the South China Sea"

A Testimony by:

Bonnie S. Glaser

Senior Adviser for Asia and Director, China Power Project

Center for Strategic and International Studies (CSIS)

September 21, 2016

2212 Rayburn House Office Building

Chairman Forbes, Ranking Member Courtney, and members of the House Subcommittee on Seapower and Projection Forces, thank you for the opportunity to testify before you today.

The South China Sea and U.S. Interests

Growing tensions in the South China Sea are not simply a result of sovereignty disputes over rocks and reefs. They arise from differences over the future international order in Asia and the rules that undergird that order. The United States has an abiding interest in shaping those rules along with our partners in the region and beyond. At stake is peace and stability, and the preservation of a balance of power in the Asia-Pacific that benefits the United States, as well as its allies and friends.

American interests in the South China Sea are unambiguous. The United States has a national interest in freedom of navigation and open access to Asia's maritime commons, including the South China Sea. Freedom of navigation first and foremost applies to military ships, including the right of innocent passage within territorial seas. Since 1979, the U.S. Freedom of Navigation Program has asserted the navigation and overflight rights and freedoms of all nations around the world, challenging efforts by states to restrict these rights and freedoms. Maintaining open shipping routes for commerce is also a vital U.S. national interest. The South China Sea is a major strategic waterway through which more than $5 trillion of world trade and energy is shipped annually. Unimpeded navigation is essential for the U.S. economy, as well as the economies of countries in the region.

Second, the United States has an interest in the peaceful resolution of disputes and in ensuring compliance with international law in the South China Sea. The U.S. doesn't take sides on the competing disputes over land features, but insists that these disputes be addressed peacefully, without intimidation, coercion or use of force, and in accordance with the U.N. Convention on the Law of the Sea (UNCLOS). The July 12 ruling by an arbitral tribunal constituted under UNCLOS in the case brought by the Philippines against China is a milestone that presents an opportunity to manage differences over resources even as disputes over territory persist. A particularly noteworthy finding is that there is no legal basis for China to claim historic rights to resources within its nine-dash line in the South China Sea. Despite Beijing's refusal to participate in the proceedings, the decision is binding on both China and the Philippines.

Third, the United States has a strong national interest in the security of its treaty allies in the region. Among those allies, the Philippines is the only state with territorial and maritime claims in the South China Sea. Japan, Australia, and South Korea also have direct interests in the South China Sea. Many observers in Tokyo and Canberra in particular increasingly view U.S. handling of the South China Sea as a test of the sustainability of the U.S. rebalance to Asia. In addition, the U.S. has an interest in the security of Taiwan, which is also a claimant. Three other countries with direct interests in the South China Sea—Vietnam, Indonesia, and Malaysia—while not U.S. allies are nevertheless increasingly important U.S. partners.

China's Claims, Strategy and Objectives in the South China Sea

In recent months, China has been more forthright in stating its interests in the South China Sea. After the UNCLOS Tribunal issued its ruling, the Chinese government issued a highly authoritative statement that provided the clearest exposition to date of China's territorial and maritime claims in the South China Sea. The statement explicitly cites claims to historic rights, territorial sea and contiguous zone, an exclusive economic zone and continental shelf, and internal waters.[1] A week later, Commander of the People's Liberation Army Navy Wu Shengli told Chief of Naval Operations Admiral John M. Richardson that the South China Sea is a "core interest" that involves "the foundation of the Party's governance, the country's security and stability and the Chinese nation's basic interests."[2]

Chinese actions in recent years are consistent with the objective of gaining effective control over the waters and airspace in the South China Sea, and possibly seizing control over land features occupied by other claimants. China has warned ships and aircraft to stay out of its undefined "military alert zones" around its artificial islands, which appear to go beyond the maritime entitlements allowed under UNCLOS. Contrary to President Xi Jinping's public statement in September 2015 that China has no intention to militarize the Spratly Islands, the building of installations for military purposes on the seven features China occupies has continued apace. Satellite imagery made public by the Center for Strategic and International Studies' Asia Maritime Transparency Initiative reveals the construction of military aircraft hangars and the likely presence of structures for radar and surface-to-air missiles on Mischief, Subi, and Fiery Cross Reefs.

Gaining control over the South China Sea may be a key step in a Chinese strategy to constrain or even block the U.S. Navy's access to and maneuverability within the waters of the first island chain, which stretches from southern Japan in the north to the Philippines, Borneo, and southern Vietnam in the south. If this is China's objective—and we do not know because Beijing has not made its goals clear—it is worrisome.

There were signs last March that China was preparing to begin dredging sand at Scarborough Shoal, although if there were such a plan, it was not implemented. Commentaries in the Chinese media have advocated for construction of another military outpost on Scarborough Shoal. One such article, published in the Beijing-owned Hong Kong media outlet *Wen Wei Po* maintained that when construction work at Scarborough Shoal is completed, China will have "a compressive defense system" in the South China Sea. The article stated that "developing Scarborough Shoal

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[1] Full text of Chinese government statement on China's territorial sovereignty and maritime rights and interests in S. China Sea," Xinhua, July 12, 2016, http://news.xinhuanet.com/english/2016-07/12/c_135507754.htm.

[2] "PLA Navy Chief urges China-U.S. Cooperation in handling South China Sea," Xinhua, July 19, 2016, http://english.chinamil.com.cn/news-channels/china-military-news/2016-07/19/content_7162158.htm.

is a task that must be done."[3] A military outpost on that feature would enable China to deploy radar, aircraft and cruise missiles within range of not only Manila, but also of several Philippine bases to which the United States recently gained access. Together with China's military outpost at Woody Island in the Paracel Islands and the three Spratly outposts, Scarborough Shoal would provide China with a "strategic triangle" that could give it sufficient capability to enforce an Air Defense Identification Zone (ADIZ) over most of the South China Sea.

There is much speculation that China will take advantage of the final months of Obama's presidency to start dredging on Scarborough Shoal. Alternatively, Beijing could seek to test a new American president by beginning land reclamation during the presidential transition or in the early months after the inauguration. Up until now, China has been careful to avoid a direct military confrontation with the United States in the South China Sea. It has used small, incremental actions, none of which by itself would provoke a U.S. military response. It is uncertain whether China will continue this strategy going forward. Xi Jinping could decide to proceed with construction at Scarborough Shoal to bolster his domestic political position in advance of the 19th Chinese Communist Party (CCP) National Party Congress in November 2017. This decision could be based on an assessment that the United States will not put bilateral relations at risk over rocks in the South China Sea.

U.S. Policy Response

The Obama administration's rebalance to Asia has included a series of diplomatic, military and economic policies designed to strengthen U.S. ties with regional partners and signal U.S. commitment to the preservation of a rules-based international order. Its most significant achievement has been bolstering engagement with Southeast Asia. President Obama joined the East Asia Summit, which is hosted by the Association of Southeast Asian Nations (ASEAN), and inaugurated a U.S.-ASEAN summit. Relations have improved and cooperation expanded with virtually every Southeast Asian country. Particularly notable is the establishment of a comprehensive partnership with Vietnam and the lifting of the U.S. arms embargo. Ties with Malaysia and Indonesia have also been reinforced. The Enhanced Defense Cooperation Agreement between the U.S. and the Philippines is currently being implemented, and although the election of President Rodrigo Duterte has introduced some uncertainty, the U.S.-Philippines alliance is strong. In coordination with Japan, Australia, and South Korea, the U.S. is working to build the maritime domain awareness capacities of several Southeast Asian nations.

The military component of the rebalance has advanced considerably. The U.S. already has 60 percent of its submarines in the Indo-Asia Pacific region and expects to have 60 per cent of U.S. surface ships deployed in the region by 2019. At the same time, the Defense Department has significantly increased U.S. presence operations in the South China Sea. In 2015, the total

[3] Liu Si-lu, Wen Wei Po, July 29, 2016. Such an article is not authoritative, but likely represents a strand of influential thinking in China.

number of U.S. ship days in the South China Sea exceeded 700. That number will rise this year. This past June, two U.S. aircraft carrier strike groups conducted joint drills in the South China Sea. Since resuming Freedom of Navigation Operations in the South China Sea in October 2015, the U.S. Navy has conducted three operations, two in the Spratly Islands and one in the Paracel Islands. The U.S. is flying reconnaissance missions over the South China Sea with P-8 Poseidon spy planes operating from bases in Singapore and the Philippines. All these steps have sent a strong signal of American commitment to regional security.

The economic pillar of the rebalance to Asia has made some progress, especially in Southeast Asia. In February, U.S.-ASEAN Connect was established as a framework for U.S. economic engagement with ASEAN and its member states. It brings together resources and expertise from the U.S. government and private sector to create a synergistic approach to economic engagement in the region. However, the Trans Pacific Partnership (TPP) remains the most important step in the economic component of the rebalance to Asia strategy. Ultimately, the success of the rebalance may hinge on whether it is realized.

What should the U.S. do going forward?

Persist in Calling for Compliance with the Ruling. The U.S. should continue to publicly and privately call on Beijing to comply with the Tribunal's ruling. U.S. allies and like-minded countries with a stake in the perpetuation of a rules-based order in the Asia-Pacific should be encouraged to do the same. China's vigorous diplomacy both before and after the ruling that was designed to persuade countries to side with its position that the Tribunal was illegitimately constituted attests to the fact that the Chinese care deeply about their international reputation and do not want to be seen as an outlaw. Even if Beijing does not openly reverse its position on the ruling, with sufficient and sustained pressure from a considerable portion of the international community, China may eventually come into compliance with at least a portion of the decision.

Continue FONOPS. Freedom of Navigation Operations (FONOPS) in the South China Sea should continue, but such missions should be carried out quietly and without fanfare. If the details of a U.S. FONOP are leaked to the media, the Pentagon should simply state that the operation was a routine enforcement of freedom of navigation and overflight, and was not intended to challenge the sovereignty claims of any state. With the determination of the Tribunal that Mischief Reef is a Low Tide Elevation inside the Philippines' EEZ, the U.S. Navy should conduct a FONOP inside the 12nm around that feature, which includes a military activity such as turning on radar or flying a helicopter, rather than conduct innocent passage as it did around Subi Reef (which lies within 12nm of a feature classified as a rock and thus arguably entitled to its own 12nm territorial sea under UNCLOS). If China issues statements or engages in behavior that is inconsistent with the ruling, Washington should use FONOPS to contest its spurious claims without delay. If Chinese rhetoric and actions over time indicate that Beijing is not making "excessive claims" to maritime jurisdiction that are inconsistent with high seas freedoms under UNCLOS, such FONOPS may no longer be necessary.

Warn China against Taking Actions Contrary to the Ruling. U.S. officials must continue to warn Beijing that declaration of an ADIZ, land reclamation at Scarborough Shoal or another land feature, or other destabilizing behavior will be viewed with grave concern and result in a strong U.S. response. If the U.S. learns that China plans to undertake a destabilizing action, it should move swiftly to deter its implementation. In doing so, the U.S. may have to accept some risk in order for its threat to be seen as credible.

Ratify UNCLOS. The next U.S. administration should make it a priority to seek Senate ratification of UNCLOS. Centering U.S. policy toward the South China Sea on a rules-based order has proved correct. The contradiction, if not hypocrisy, of the U.S. insistence that China abide by the Convention while the U.S. refuses to accede to it is evident, and undermines U.S. moral authority. The fact that the U.S. adheres to UNCLOS as customary law is not sufficient. If the principles and practices embodied in UNCLOS are critical to American interests, then the U.S. should ratify the Treaty.

Encourage ASEAN to press China to Apply CUES to Coast Guards. In April 2014, the Code of Unplanned Encounters at Sea (CUES) was signed by 21 Pacific navies. Earlier this month, ASEAN and China signed a joint statement reaffirming their shared commitment to comply with CUES in the South China Sea in order to enhance operational safety of naval ships and naval aircraft in the air and at sea. While this agreement is a welcome step, the vast majority of incidents that take place in the waters of the South China Sea involve coast guards and other maritime law enforcement vessels. Our research at the Center for Strategic and International Studies has found that Chinese maritime law enforcement ships were involved in over 70 percent of the major incidents in the South China Sea since 2010, including aggressive harassment and ramming of foreign coast guard ships and fishing boats.[4] The U.S. should therefore urge ASEAN to press Beijing to agree to expand CUES to cover non-military ships. Agreement on rules of engagement for unexpected encounters at sea between all vessels will likely reduce the incidents in which "white hulled" ships are used for intimidation and coercion. It will also be a useful interim tool to help manage rising tensions while negotiations for a binding China-ASEAN Code of Conduct continue.

Urge Other Claimants and Interested Parties to Seek Arbitration. The impact of the Tribunal ruling will be amplified if it is followed by other cases. Washington should discuss the legal implications of the decision with claimants Vietnam and Malaysia, as well as with non-claimant Indonesia, and encourage them to weigh the pros and cons of filing arbitration cases to secure their own maritime claims. The State Department should be charged with writing another paper in its Limits on the Seas series that examines the implications of the Tribunal's ruling and explores how future arbitration cases might proceed.

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[4] "Are Maritime Law Enforcement Vessels Destabilizing Asia?" http://chinapower.csis.org/maritime-forces-destabilizing-asia/.

Task the Administration to Issue an Interagency Report on U.S. Responses to Developments in the South China Sea. To ensure that the U.S. is pursuing a coherent, whole of government approach, Congress should task the executive branch with providing an annual reporting requirement on how it is using diplomatic, military and economic power to protect and advance U.S. interests in the South China Sea. In addition, Congress should require the next administration to issue a report on its maritime security strategy, which should update and detail U.S. strategy in the South China Sea, East China Sea and Indian Ocean. Such reports would enable better Congressional oversight over the implementation of U.S. policy on these critically important issues.

BONNIE S. GLASER
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BONNIE S. GLASER is a senior adviser for Asia and the director of the China Power Project at CSIS, where she works on issues related to Chinese foreign and security policy. She is concomitantly a non-resident fellow with the Lowy Institute in Sydney, and a senior associate with CSIS Pacific Forum. From 2008 – mid-2015 Ms. Glaser was a Senior Adviser with the Freeman Chair in China Studies, and from 2003 to 2008, she was a senior associate in the CSIS International Security Program. Prior to joining CSIS, she served as a consultant for various U.S. government offices, including the Departments of Defense and State. Ms. Glaser has written extensively on various aspects of Chinese foreign policy, including Sino-U.S. relations, U.S.-China military ties, cross-Strait relations, China's relations with Japan and Korea, and Chinese perspectives on missile defense and multilateral security in Asia. Her writings have been published in the Washington Quarterly, China Quarterly, Asian Survey, International Security, Problems of Communism, Contemporary Southeast Asia, American Foreign Policy Interests, Far Eastern Economic Review, Korean Journal of Defense Analysis, New York Times, and International Herald Tribune, as well as various edited volumes on Asian security. Ms. Glaser is a regular contributor to the Pacific Forum quarterly Web journal Comparative Connections. She is currently a board member of the U.S. Committee of the Council for Security Cooperation in the Asia Pacific, and a member of both the Council on Foreign Relations and the Institute of International Strategic Studies. She served as a member of the Defense Department's Defense Policy Board China Panel in 1997. Ms. Glaser received her B.A. in political science from Boston University and her M.A. with concentrations in international economics and Chinese studies from the Johns Hopkins School of Advanced International Studies.

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COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

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Federal Contract or Grant Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, please provide the following information:

2016

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2015

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant
	Department of Defense	$771,250	Asia Rebalance Project

2014

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant
	Department of Defense	$74,779	Asia Rebalance Project

Foreign Government Contract or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts or payments originating from a foreign government, please provide the following information:

2016

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
	Total 2016 Foreign Gov't Funding	$600,500	
(Governments of Japan, Vietnam, & Taiwan)			

2015

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
	Total 2015 Foreign Gov't Funding	$550,500	
	(Governments of Japan & Vietnam)		

2014

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
	Total 2014 Foreign Gov't Funding	$588,500	
	(Governments of Japan & Vietnam)		

STATEMENT OF

PROFESSOR JAMES KRASKA

BEFORE THE SEAPOWER AND PROJECTION FORCES SUBCOMMITTEE

HEARING ON SEAPOWER AND PROJECTION FORCES

IN THE SOUTH CHINA SEA

21 SEPTEMBER 2016



The Struggle for Law in the South China Sea

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Seapower and Projection Forces in the South China Sea

The views expressed are my own and do not reflect the official policy or position of the Department of the Navy, Department of Defense, or the U.S. Government. This testimony does not contain any information above "unclassified" and all sources are in the public domain.

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Introduction

Chairman Forbes, thank you for the invitation to speak today. And I want to thank you personally for your interest and support for the rule of law in the oceans, which provides the normative basis for Seapower and force projection throughout the world. There is a continuous struggle to shape and maintain the norms and rules in the global commons, and your support is vital.

Ranking Member Courtney, Chairman Forbes, distinguished committee members, thank you for the opportunity to have me appear today to discuss Seapower and projection forces in the South China Sea.

The South China Sea presents several issues of vital importance to U.S. national security, including strategic risk, military threat, and political challenge. There is also an important international law dimension to these issues. As a retired U.S. Navy judge advocate and international law professor, I focus on the law of the sea and maritime security. In my view China's expansive maritime claims present the greatest test to the rules based order of the oceans and freedom of navigation since the unrestricted U-boat campaign of World War II.

It is a vital U.S. interest to promote and strengthen the rules, norms, regimes and laws that support an open order of the oceans, and these standards are formed by and reflected in customary international law and the United Nations Convention on the Law of the Sea (UNCLOS).[1] The rules undergird freedom of navigation and overflight in the global commons, which is essential for the primacy of American military power and a key enabler of U.S. grand strategy.

For more than one hundred years, the cornerstone of U.S. national security strategy has focused on preventing the rise of a hegemonic power in Europe or Asia. Freedom of the seas is essential to this strategy because the seas connect the United States with its allies, friends, and partners in both regions.

The South China Sea is the maritime fulcrum in East Asia, where the United States has treaty commitments to Japan, Korea, Thailand, Australia, and the Philippines, and legislative obligations to Taiwan. The rule of law in the oceans provides an important force multiplier for U.S. military operations and diplomacy. Consequently, the navigation and overflight rules accepted in the region have great strategic consequence.

This testimony provides analysis of U.S. Freedom of Navigation Operations (FONOPS) and the impact of the South China Sea tribunal award on U.S. force projection policy and strategy in the region, and ventures a few suggestions in light of recent developments. U.S. FONOPS are an important component for building the rule of law in the oceans because they shape interpretations of UNCLOS and the law of the sea, and guide the development of associated norms and legal regimes.

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[1] United Nations Convention on the Law of the Sea, Montego Bay Dec. 10, 1982, entered into force Nov. 10, 1994, 1833 U.N.T.S. 397(1982).

Likewise, the July 12, 2016, Arbitration Award for China and the Philippines under Annex VII of UNCLOS brought greater clarity to the situation in the South China Sea. The findings and decision of the Arbitration Tribunal promote the rule of law in the oceans, and undergird a rules-based order in East Asia that enhances international security and stability. As the principal security provider in East Asia, the United States has a profound interest in supporting international laws and institutions that provide greater stability and predictability.

No national security issue today is more important. Freedom of movement on, above, and below the seas has been a core national security interest since the founding of the Republic. Disputes over freedom of navigation and overflight have been a principal driver of conflict between the United States and other states. The United States has gone to war to vindicate its rights in the global commons.

The first four wars that the United States fought as an independent country were largely over the right of freedom of navigation – the Quasi War with France (1798-1800), the First Barbary War (1801-05), the War of 1812 and the Second Barbary War (1815-16). In 1917, President Wilson proclaimed, "The freedom of the seas is the *sine qua non* of peace, equality, and cooperation."[2] In his January 8, 1918, speech on peace terms to end World War I, he declared freedom of the seas as the second of his Fourteen Points.

In a 1941 radio address, President Franklin Roosevelt captured most eloquently the importance of freedom of navigation to the United States, exclaiming:

> Yes, all freedom—meaning freedom to live, and not freedom to conquer and subjugate other peoples—depends on freedom of the seas. All of American history—North, Central, and South American history—has been inevitably tied up with those words, "freedom of the seas.[3]

President Roosevelt and Prime Minister Churchill signed the Atlantic Charter on the war aims of the Allied powers and the basis for a new peacetime order. The seventh of eight principles states that all nations enjoy the right to traverse the high seas and oceans without hindrance. This principle was explicitly endorsed in the Declaration of the United Nations of January 1, 1942, which was signed by 25 nations, including China, and subsequently incorporated into article 3 of the Charter of the United Nations in 1945.

Freedom of navigation was also an element of the Cold War. The Gulf of Tonkin incident on August 2, 1964 and the Cambodian seizure of the SS Mayagüez, May 12-15, 1975, serve as bookends for U.S. involvement in the Vietnam War. The prospects for war between China and the United States, although remote, increase each time Beijing attempts to impede U.S. naval and air operations at sea.

International law, including customary law, the Arbitration Award under UNCLOS and the U.S. Freedom of Navigation (FON) program offer some of the best tools for averting

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[2] Woodrow Wilson, Address to the Senate of the United States: A World League for Peace, Jan. 22, 1917.

[3] Franklin Delano Roosevelt, Dep't of State Bull. IV Bull. No. 101 647-650. (May 31, 1941), reprinted in Whiteman 4 Dig. Int'l L. 507-08 (1963).

conflict in the South China Sea. It appears China is on an inexorable march to try to subdue the area and dominate the sea.

This testimony suggests four major lines of effort to better ensure a liberal order of the oceans, and advocates a recalibration of FON operations to improve U.S. foreign policy.

First, the United States should implement lawful countermeasures against China as a means to induce Chinese compliance with its duties under UNCLOS and other international instruments.

Second, the United States should implement changes to the Freedom of Navigation (FON) program that will magnify its effect.

Third, the United States should incorporate the salient findings of the Philippine-China Arbitration Award into U.S. policy.

Fourth, the United States should join UNCLOS, which undergirds all of these efforts.

* * *

1. Implement U.S. Policy on Countermeasures to Induce Compliance

The first recommendation is for the United States to implement lawful countermeasures against states that violate the rules reflected in UNCLOS, as envisioned by President Reagan in 1983.

In the aftermath of the U.S. decision not to ratify UNCLOS in 1982, President Reagan issued a U.S. Statement on Oceans Policy. That policy has stood the test of time and remains in effect today. While objecting to the 1982 framework for seabed mining in Part XI (which was restructured in 1994 to accommodate President Reagan's objections), the President announced three decisions "to promote and protect the oceans interests of the United States in a manner consistent" with what he called the "fair and balanced" rules reflected in UNCLOS.

Reagan's 1983 three decisions still resonate. First, the United States would accept the rules reflected in UNCLOS as a restatement of the law relating to the traditional uses of the oceans, such as navigation and overflight and other internationally lawful uses of the sea associated with the operation of ships and aircraft. Second, the United States stated that it would exercise its rights of navigation and overflight on a worldwide basis in accordance with UNCLOS. Third, the United States proclaimed a 200-mile Exclusive Economic Zone (EEZ).

Of these three pronouncements, the first is the most critical. The provision is important to reproduce in its entirety, because it contains a caveat that has been lost on recent U.S. administrations:

> [T]he United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans – such as navigation and overflight.

> *In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in [UNCLOS], so long as the rights and freedoms of the United States and others are recognized by such coastal states* [italics added].[4]

Reagan's policy reflects a classic quid pro quo – the United States agrees to respect other states maritime claims only if they respect U.S. claims. This statement expresses a willingness to invoke countermeasures against states that are not in compliance with UNCLOS. Although the Reagan policy was never renounced, in practice it has fallen into desuetude. The caveat is an important, but unutilized tool of U.S. global oceans policy and a potential key enabler of U.S. grand strategy.

The United States should adhere to the 1983 Statement on Oceans Policy and withdraw recognition of coastal state rights under UNCLOS to the extent that they do not respect reciprocal U.S. rights in international law. Instead, the United States has afforded all other states, including China, their full rights to operate freely on the oceans, and in the U.S. territorial sea in innocent passage and in the U.S. EEZ without restriction, while the same states dangerously impede and hamper U.S. warships and military aircraft operating in their claimed maritime zones.

Chinese warships, for example, conducted innocent passage in the U.S. territorial sea in the Aleutian Islands, and have engaged in maritime intelligence operations inside the U.S. EEZ off the coast of Guam and Hawaii. In September 2015, a flotilla of five PLA Navy warships transited through the Bering Sea north of the Aleutian Islands, and then headed south to conduct innocent passage between two of the Aleutian Islands.[5] A Pentagon spokesperson stated that the operation "…was a legal transit of U.S. territorial seas conducted in accordance with [UNCLOS]."[6]

Chinese warships have also conducted military activities, including intelligence collection, in the U.S. EEZ near Guam and Hawaii. In the aftermath of a 2015 Chinese maritime intelligence operation near Hawaii, a Pacific Fleet spokesperson stated, "… it is a fundamental right of all nations for military ships and aircraft to operate in international waters and airspace in accordance with well-established international law."[7] The view that ships of all states enjoy full rights under UNCLOS, however, does not reflect the 1983 U.S. policy that indicates that the United States will only recognize those rights to the extent that other countries respect U.S. rights.

Although the United States recognizes China's navigational rights and freedoms, China routinely purports to deny U.S. warships and military aircraft those same rights. These acts by China constitute a breach of legal obligations under UNCLOS and customary international law, and are internationally wrongful acts within the law of state responsibility.

In the maritime domain, an internationally wrongful act can arise from a violation of UNCLOS, such as denial of high seas freedoms for warships in the EEZ, or from the

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[4] Statement by the President, 19 Weekly Comp. Pres. Doc. 383 (Mar.10, 1983).
[5] Page and Lubold, Chinese Navy Ships Came Within 12 Nautical Miles of U.S. Coast, Wall St. J., Sept. 4, 2015.
[6] Page and Lubold, Chinese Navy Ships Came Within 12 Nautical Miles of U.S. Coast, Wall St. J., Sept. 4, 2015.
[7] Wyat Olson, Report: China dispatching surveillance vessels off Hawaii, Stars and Stripes, Sept. 4, 2015.

customary norms that are reflected in the treaty, or from a violation of other accepted rules, such as the 1972 International Regulations for Preventing Collisions at Sea (COLREGS).[8]

The United States should take lawful countermeasures to induce compliance against states that violate U.S. maritime rights by denying them that same right. This is not a "tit-for-tat" or demand for reciprocal treatment, but rather a lawful measure short of coercion or the use of force to induce compliance on the part of a state that has breached its legal obligations.

Countermeasures flow from the customary international law of state responsibility, as reflected in the International Law Commission's Articles of State Responsibility.[9] States bear responsibility for acts that are attributable to them under international law, and that constitute a breach of an international obligation under either treaty law or customary law.[10] The injured state may invoke countermeasures against the responsible state to induce compliance. The situation involving China presents a classic model of countermeasures, since countermeasures must be proportionate,[11] not affect the rights of third states,[12] and not involve violation of preemptory norms, such as basic standards of human rights.[13]

The United States should act true to its 1983 Oceans Policy of observing and respecting foreign maritime claims only to the extent that other coastal states respect U.S. rights at sea. In particular, since China does not respect UNCLOS rules governing innocent passage of warships in its territorial sea or high seas freedoms of navigation and overflight of military vessels and aircraft in its EEZ, the United States should withhold those rights from Chinese military ships and aircraft until such time as China conforms its policy to UNCLOS. Such U.S. action constitutes lawful countermeasures in international law, and serves an instrumental function to induce compliance by China.[14]

The United States should also work with allies, friends and partner states in East Asia to encourage them to adopt similar countermeasures. These countermeasures could have a real and even dispositive impact on Chinese maritime behavior because China lacks access to the open ocean, except through transit of its neighbors' EEZ. In particular, China may enter the Pacific Ocean through the Sea of Japan and East China Sea only by transiting Japan's EEZ, which stretches from Hokkaido to Okinawa and the Ryukyu Islands in the South. Chinese warships are unable to read the Pacific Ocean without traversing the Japanese EEZ. Japan and the United States would regain diplomatic initiative if they denied Chinese naval and air forces the legal right to traverse their EEZ as a temporary measure to induce China to restore freedom of navigation and overflight to foreign warships and military aircraft in its EEZ.

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[8] 1972 Convention on the International Regulations for Preventing Collisions at Sea, 1050 U.N.T.S. 16.
[9] International Law Commission, Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 annex, U.N. Doc. A/RES 56/83 (12 Dec. 2001).
[10] Articles on State Responsibility, Arts. 1-2.
[11] Articles on State Responsibility, Art. 59.
[12] Articles on State Responsibility, Art. 47(3).
[13] Articles on State Responsibility, Art. 50.
[14] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Rep. 1997, p. 7, and pp. 56-57, para. 87.

2. Bolster the FON Program for U.S. Forces Projection

The second set of recommendations suggests reforms to the U.S. approach to freedom of navigation and overflight in the global commons.

In 1979 President Carter initiated the Freedom of Navigation (FON) program to formally create an interagency process to take action to actively resist illegal claims by states seeking to impair the rights and freedoms of navigation and overflight. The FON program consists of three elements: (1) diplomatic demarches to protest unlawful maritime claims and illegal conduct at sea; (2) bilateral military-to-military engagement to provide greater clarity and understanding among armed forces; and (3) freedom of navigation operations (FONOPS) as a tangible expression of U.S. rejection of unlawful maritime claims. It was clear from the very beginning that diplomatic demarches would not be sufficient to contain unlawful claims, and that actual FONOPS would be necessary to demonstrate U.S. resolve.[15]

With the end of the Cold War, the number of U.S. FONOPS declined precipitously, from about 35 per year in the 1980s to as few as five or six in the early- and mid-2000s. Meanwhile, the United States failed to counter Chinese interference with foreign civilian vessels and warships in the South China Sea. Beginning in the late-1990s, China began to harass U.S. military survey ships, but it was not until the aggressive interception of a U.S. EP-3 aircraft in April 2001 that it was clear that China was intent on controlling the South China Sea. The EP-3 incident should have been a wake-up call, but the number of FONOPS continued to stagnate due to the focus on the wars in Iraq and Afghanistan and the declining Naval force structure. Only in the past several years with the Pacific pivot has the number of FONOPS crept higher.

Just as the assertions of freedom of navigation and overflight in the Gulf of Sidra in 1981 and 1989, and the Black Sea Bumping incident in 1988 elevated tension to preserve an open order of the oceans, FONOPS in the South China Sea may generate blowback from Beijing that worsens the U.S.-China relationship, at least temporarily. Accepting such costs and weathering Chinese criticism are essential if the United States seeks to preserve the rule of law and maintain strong links to friends and allies in the Indo-Asia-Pacific region.

The United States can take additional steps to bolster U.S. FONOPS: (A) increase the type and number of FONOPS; (B) conduct combined FONOPS with other states; (C) prioritize challenges to illegal claims that have been long ignored; (D) observe only lawfully declared territorial seas, rather than putative or theoretical territorial seas; and, (E) synchronize interagency effort for a more effective FON program.

A. Increase the Type and Number of FONOPS

First, not all U.S. warship transits and military overflight in areas subject to unlawful maritime claims are recorded as FONOPS, even though by their very presence they promote and strengthen international norms and challenge unlawful maritime claims. These operations occur, but are absent from the record. The operations should be counted as

[15] Elliott Richards, Power, Mobility, and Law of the Sea, 58 Foreign Affairs 902, 902 (1979-1980).

FONOPS – otherwise, they are legally nugatory even if they generate strategic benefits by virtue of the assurance value U.S. forces.

Second, more FONOPS should be conducted. More FONOPS require more ships present forward. Over the past two decades the number of U.S. ships in the region declined from 192 to 182, while China's force expanded to some 300 surface ships and submarines.[16] The fact that one U.S. warship today has the war-fighting capability of ten warships of the past is immaterial in international law, which requires actual physical presence to contest unlawful claims. The decline in U.S. force structure jeopardizes the forward fleet presence to demonstrate such state practice.

The United States should maintain a force level in the region that is not just lethal, but with sufficient numbers of warships and aircraft present to be legally material and relevant. From 2011 through 2015 the United States conducted only seven FONOPS in the South China Sea.[17] Two more FONOPS were conducted in 2016.[18] Although there is no single metric for the number of operations to satisfy the legal element of state practice in customary international law, it is doubtful that this number is sufficient. Even quarterly operations in my view are below the threshold sufficient to maintain legal rights and freedoms in the face of daily assertions of sovereignty by China.

Third, U.S. forward naval operations should become routinized, and include the full range of platforms individually, in squadrons, and in joint and combined formations. FONOPS should be conducted not only by single ships and individual aircraft sorties, but also by squadrons, such as surface action groups and aircraft carrier and expeditionary strike groups or their components. For example, in 2015 China sent a flotilla of five warships through the Aleutian Islands.

Fourth, U.S. Coast Guard and U.S. Army assets can join the Navy and Air Force effort to maintain forward presence in East Asia. The U.S. Coast Guard has been particularly absent in a theater that favors deployment of white-hulled law enforcement assets as a means of signaling national resolve without ratcheting up military risk. The Coast Guard has not attempted a FONOP since the 1960s. Likewise, the eight U.S. Army logistic support vessels have a range of 5,500 nm and can deploy worldwide. All five branches of the armed forces should be afforded the resources to participate in the FON program.

B. Conduct Combined FONOPS with Like-minded States

Like all military operations that generate international public goods, burden sharing among U.S. allies, friends, and partner states should be assessed. Other states should be encouraged to conduct their own freedom of navigation assertions, either independently, in collaboration with other states or international organizations, or in combined operations with the United States.

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[16] Audrey McAvoy, US Pacific Fleet Smaller, Even as China's Military Grows, Associated Press, Jan. 5, 2016,
[17] Secretary Ash Carter letter to Senator John McCain, Dec. 21, 2015.
[18] On January 30, USS Curtis Wilbur transited within 12 nautical miles of Triton Island in the Paracel Island and on May 10, USS William P. Lawrence conducted innocent passage within 12 nautical miles of Fiery Cross Reef.

Japan and India, for example, have large maritime forces capable of conducting these types of operations. Foreign freedom of navigation assertions are an unleveraged force multiplier waiting to be tapped more effectively.

Just as the European Union (EU) and NATO contributed to counter-piracy operations in the Indian Ocean, they have capability to conduct FONOPs independently or in collaboration with the United States or other regional states. The United States should NATO and the EU to do so.

In 2014 the United Kingdom expressed a willingness to conduct "demonstrations of UK counter-practice" against illegal maritime claims.[19] In July 2016, France urged its allies in the European Union – and in particular Germany and the United Kingdom (despite Brexit) – to maintain a "regular and visible" naval presence in the South China Sea to defend freedom of navigation against Chinese encroachment.[20]

Furthermore, naval forces of the states situated on the South China Sea – Vietnam, Malaysia, Indonesia, Singapore, and the Philippines – have an interest in the maintenance of freedom of navigation in the region. These states should be invited to conduct FONOPs with the United States and other partners as well. Broadening the pool of forces that conduct FONOPS contributes to the CNO's fourth line of effort to expand maritime partnerships, enhance interoperability, and develop new opportunities for forward operations.

Combined FONOPS remove the optic that freedom of the seas is about a U.S.-China major power dispute, and converts the issue into one of China standing against the rights and freedoms of the international community. Furthermore, state practice by several states or many states reinforces customary international law more powerfully than state practice by a single state.

C. Prioritize Illegal Claims that Have Been Long Ignored

The United States appears largely self-deterred in challenging some of China's most egregious maritime claims. The United States should prioritize FONOPS that challenge unlawful claims that have not been subject to recent assertions. China purports to close off Hainan Strait with strait baselines, for example, and this claim has not been challenged.

The right to transit through some Asian littoral areas is being effectively abandoned out of concern that China will react and create an incident. But forgoing the right to be present in these areas makes it more likely that it will be impossible to reenter them later. Indeed, the cost of doing so now is higher than it would have been had the United States continuously exercised its rights; the cost tomorrow will be even greater unless action is taken now. China's expectation and sense of entitlement to "own" parts of the global commons increases each year they remain unchallenged.

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[19] UK National Strategy for Maritime Security, para. 3.4.

[20] David Roman, France to Push for Coordinated EU Patrols in South China Sea, Bloomberg News, June 5, 2016.

D. Observe Only Lawfully Declared Territorial Seas

The United States should not observe theoretical or putative territorial seas that have not been lawfully established by a coastal state.

First, only a coastal state with lawful title over territory, such as a rock, may establish a territorial sea. No nation, for example, could establish a territorial sea from Antarctica.

Second, even when a state has lawful title to an oceanic feature, a territorial sea must be affirmatively established through promulgation of baselines, which normally run along the low water line along the coast. Under article 3 of UNCLOS states may establish a 12 nm territorial sea measured from properly designated baselines, but such baselines must be established – they are not automatic. Yet neither China nor any other claimant has established baselines in the Spratly Islands.

The absence of baselines in the Spratly Islands is not a mere oversight. China's territorial sea law provides that the 12 nm territorial sea will be "designated with the method of straight baselines."[21] China has declared straight baselines along its mainland coast and Hainan Island,[22] as well as around the Paracel Islands and portions of Japan's Senkaku Islands.[23]

Since neither China nor any other claimant has taken the requisite affirmative action under international or domestic law to establish baselines and a territorial sea around any of the features they claim, no territorial seas exist in that region. U.S. warships err when they observe requirements of innocent passage during transits within 12 nm of features that lack an established territorial sea.

E. Synchronize the Interagency FON Effort

From its inception, the FON program was idealized as a partnership between Department of Defense and Department of State. In reality, however, the two institutions were not synchronized.[24] Nearly forty years later, the FON program still suffers from a lack of shared vision and priority within the U.S. government interagency community.

The original FON program afforded the Department of Defense the lead role for FONOPS, and required it to submit to the National Security Council plans for exercises, transits, and overflight by U.S. naval and air forces. The Pentagon led the interagency effort on FONOPS, subject to an obligation to "consult with the State Department on how this objective can be

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[21] Article 3, Law on the Territorial Sea and the Contiguous Zone, Feb. 25, 1992.

[22] Maritime Zone Notification 7, July 1996, Geographical coordinates as contained in the Declaration on the Baselines of the Territorial Sea of the People's Republic of China of May 15, 1996.

[23] Statement of the Government of the People's Republic of China On the Baselines of the Territorial Sea of Diaoyu Dao and Its Affiliated Islands, Sept. 19, 2012, transmitted by Note verbale Sept. 13, 2012 from the Permanent Mission of the People's Republic of China to the United Nations addressed to the Secretariat of the United Nations, 80 Law of the Sea Bull. 30 (2013).

[24] National Security Council Memorandum for David Aaron from Thomas Thornton, Navigational Freedom and LOS, June 25, 1979 (Confidential; declassified Aug. 22, 2000).

most effectively attained."[25] The Department of Defense and the Department of State, however, emphasize different and sometimes competing aspects of bilateral relations with states that have unlawful claims.

Furthermore, the country desks within the departments have too much sway over decision making on actual FONOPS, and they often have a parochial view of U.S. global strategic interests. When the issue of freedom of navigation is viewed as a bilateral problem managed by the country desks in Washington, D.C. and the U.S. embassy country teams, it typically becomes subordinate to other issues in the bilateral relationship. Ambassador Elliott Richards, for example, recalled constant pressure and pleas from within the Department of State to forgo FONOPS to avoid the repercussions with the claimant state.[26] The long-term cumulative impact of the reticence to exercise navigational freedoms is inimical to U.S. global interests.

3. Leverage the South China Sea Arbitration for U.S. Force Projection

The third set of my recommendations flow from the Philippines-China Arbitration Award announced on July 12, 2016.

China's expansive and unlawful claims over the South China Sea were challenged by the Philippines under the mandatory dispute resolution procedures in Part XV of UNCLOS. Mandatory or compulsory dispute resolution procedures are legally binding on China and the Philippines by virtue of their accession to UNCLOS, and the dispute resolution procedures are one of the greatest benefits of the treaty. The Arbitration Award fulfills the mandate of UNCLOS to resolve disputes peacefully and in accordance with universal standards that apply equally to states large and small.

The July 12, 2016, Arbitration Award rejected China's outlandish claims to the South China Sea. Presidential press secretary Josh Earnest and Secretary of State Kerry have stated that the decision is "final and binding" on the parties.[27] Although China has stated that it would not comply with the decision, the Award has permanently changed the legal and political seascape of the South China Sea. Over time, I believe the normative force and authority of the Award decision and UNCLOS will grow. The United States should facilitate that process by promoting the Award decision and UNCLOS as a matter of policy.

The Arbitration Award is comprised of four main elements, and each element affects the U.S. freedom of navigation and overflight and regional security.

To get greater mileage from the Award, the United States should: (A) amplify the Tribunal's rejection of the Nine-dash Line; (B) adjust FONOPS based on the legal status of the features, as clarified by the Tribunal; (C) engage multilateral institutions on specific Chinese violations; and (D) understand that China's aggravation of the dispute pending the outcome of the Arbitration Award suggests it is a revisionist power.

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[25] Zbigniew Brzezinski, The White House, Memorandum Navigational Freedom and U.S. Security Interests, Mar. 20, 1979 (Confidential; declassified Jan. 17, 2001).
[26] Elliott Richards, Power, Mobility, and Law of the Sea, 909.
[27] The White House, Press Briefing by Press Secretary Josh Earnest, July 13, 2016.

Each of the four elements should inform U.S. policy, and are assessed, below.

A. Amplify the Tribunal's Rejection of the Nine-dash Line

First, the tribunal decision struck down China's Nine-dash Line, rejecting *in toto* Beijing's vast and illegal claims over some 90 percent of the South China Sea.

In 2009 China issued a Note Verbale to the Secretary-General of the United Nations in which it claimed "indisputable sovereignty" over the islands in the South China Sea, and the "adjacent waters," as well as "sovereign rights and jurisdiction over relevant waters" and the "seabed and subsoil thereof." As these areas overlap Philippines claims, the Philippines brought an arbitration case against China under mandatory dispute settlement procedures in Part XV of UNCLOS.

Previously China had exercised an optional exception for compulsory dispute resolution in article 298 for disputes concerning "historic bays or titles." But the tribunal ruled that China's claims, even if accepted as completely true, were evidence only of historic fishing in the region, and did not assert a claim of historic title. China's historical navigation and fishing in the Spratly Islands were determined to be merely an exercise of high seas freedoms and produced no basis for historic title.[28] By joining UNCLOS, China relinquished its former high seas freedom to fish in areas now enclosed within other states EEZs, while it acquired exclusive rights in its own EEZ.[29]

Moreover, China's claim of historic title does not meet the three-part test contained in customary international law and promulgated by the Secretary-General of the United Nations in 1962, to wit: (1) exercise of authority over the area, (2) continuity of such exercise of authority, and (3) acquiescence of neighboring states.[30]

The tribunal found that UNCLOS contains a comprehensive system of maritime zones, which does not accommodate any external type of zone, such as a zone of historic waters.[31] If there were any preexisting or earlier rights or agreements concerning historic rights to the waters, they were superseded by UNCLOS if they are incompatible.[32] Similarly, the legal regimes of the continental shelf and the EEZ are incompatible with another state enjoying historic rights to the same resource.[33] This finding simply reflects a longstanding norm in

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[28] In the Matter of the South China Sea Arbitration, PCA Case N° 2013-19, July 12, 2016 (Arbitration Award), para. 270.

[29] Arbitration Award, para. 271. The Tribunal followed previous international cases in distinguishing between historic fishing rights and historic titles. Arbitration Award, para. 224, Qatar v. Bahrain (historic pearl fishing was not the same as quasi-territorial right to fishing grounds themselves or superjacent waters) and para. 224, Continental Shelf Tunisia v. Libya (historic rights were not equivalent to the continental shelf regime).

[30] Juridical Regime of Historic Waters, including Historic Bays UN Doc. A/CN.4/143 (1962) and Memorandum from Bernard H. Oxman, Dep't of State Ass't Legal Adviser for Ocean Affairs (Sept. 17, 1973), excerpted in Digest of U.S. Practice in International Law 1973, at 244 (A.W. Rovine ed.).

[31] Arbitration Award, para. 231.

[32] Arbitration Award, para. 246-47.

[33] Arbitration Award, para. 243, para. 244.

international law, indeed in all legal systems, that the later legal authority prevails over earlier laws or treaties.[34]

As a matter of statutory construction of UNCLOS, the origin and purpose of the treaty suggests that outside states may not encroach on the EEZ or continental shelf of a coastal state.[35] Also, China's negotiating behavior is consistent with this finding. Both preceding and during the negotiations for UNCLOS, China never advanced a claim of historic rights to the waters of the South China Sea, even as it contested Philippine and Vietnamese claims over the Spratly Islands.[36] In fact, during the debates over UNCLOS, Japan and some other distant water fishing nations sought to retain a right of historic fishing in the EEZ – a position resolutely opposed by China.[37]

All coastal state rights over adjacent waters may be generated only from islands or a mainland. The arbitration tribunal upheld the ancient proposition of international law that "the land dominates the sea," and rejected the Nine-dash Line. Consequently, the tribunal's decision should be referenced in U.S. bilateral and multilateral diplomatic venues and channels, military engagement, and communications with China. In particular, the United States should integrate the Arbitration Award into its responses to challenges by authorities of the People's Liberation Army Navy (PLAN) concerning alleged encroachments on "Chinese sovereignty" or "Chinese waters" in the South China Sea. The United States should also encourage other states to promote the decision through diplomatic engagement and naval responses to challenges by Chinese authorities.

By pressing the importance of the Award and UNCLOS as a key foundation of a rules-based international order, the United States and other states can magnify its normative force, much as the repeated references to liberty and freedom in the 1990 Copenhagen Document of the Helsinki Process outlined norms of a free society that helped to transform Soviet bloc states.

B. Adjust FONOPS Based on the Status of the Features

Second, the tribunal determined the legal status of some of the most important features in the South China Sea, seven of which have been converted by China into massive artificial islands. These determinations are based on objective criteria rather than outcome-based decisions rooted in the power disparity between China and the Philippines.

The natural features of the Spratly Islands are minuscule – comprising only 2 km^2 (490 acres) of land area spread over 425,000 km^2 (164,000 sq. mi) of ocean space.

The legal status of the features is important to determine whether an entitlement exists to a maritime zone of sovereignty, or sovereign rights and jurisdiction, and therefore the navigational regime for U.S. warships and military aircraft. In particular, the legal status determines whether a feature is submerged or a low-tide elevation (LTE), and has no

[34] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980., Art. 30.
[35] VCLT Art. 30(2).
[36] In challenging the Philippines claim to the Spratly Islands in the UN Seabed Committee, and in similar discussions with Vietnam during the UNCLOS negotiations, China never advanced a claim of historic rights. Arbitration Award, para. 252.
[37] Arbitration Award, para. 251.

maritime entitlement to a territorial sea, a "rock" entitled to a territorial sea only, or an "island" that can "sustain human habitation" and entitled to an EEZ and continental shelf.

There are only three types of features in the Spratly Islands, each with distinct legal and political consequences that affect U.S. FON:

(1) Submerged features are always underwater. As part of the seabed or continental shelf, they are incapable of appropriation by any state, and are never a basis for a maritime zone, such as a territorial sea.

(2) Low-tide elevations (LTEs) are underwater at high tide, but above water at low tide.[38] Such features also are incapable of appropriation by any state, as they are also part of the seabed. Low-tide elevations normally do not generate a maritime zone, unless they are situated within the territorial sea of an island or mainland.

(3) Rocks are features above water at high tide, and may generate a territorial sea of up to 12 nm. The territorial sea is under the sovereignty of the coastal state, and sovereignty extends to the airspace above the territorial sea, on the surface of the water and in the water column, and on the seabed. Foreign warships may exercise innocent passage in the territorial sea. There is no right of over flight, and submarines that operate in innocent passage must travel on the surface and show their flag.[39]

Islands that can sustain human habitation are entitled to a territorial sea, as well as an EEZ of up to 200 nm and continental shelf. The tribunal determined, however, that there are no such features in the Spratly Islands. In doing so, the tribunal provided greater clarity on what constitutes "human habitation or an economic life of their own," in a way that makes it much more difficult for a coastal state to claim an EEZ or continental shelf. The tribunal reasoned that "human habitation" does not mean occasional visits by fishermen from distant ports. [40] Military personnel stationed on a feature also do not constitute "human habitation."[41] The tribunal relied heavily on historical evidence, and found that there was no history of sustained human habitation or an independent economy in the Spratly Islands.[42]

The tribunal decision promotes freedom of navigation and overflight in two major ways.

First, it invalidates the idea that LTEs have any entitlement to generate a territorial sea or territorial airspace.

Second, the decision provides greater fidelity to the test in UNCLOS Article 121(3) concerning what types of features may generate an EEZ. The tribunal determined that no feature in the region is an island that can sustain human habitation.

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[38] Arbitration Award, para. 280.
[39] Article 19(2), UNCLOS. Foreign states also may enjoy a right of assistance entry into the territorial sea in response to cases of force majeure. See Commander's Handbook on the Law of Naval Operations (U.S. Naval War College July 2007), para. 2.5.2.1.
[40] Arbitration Award, para. 618.
[41] Arbitration Award, para. 620.
[42] Arbitration Award, para. 616-623.

Consequently, regardless of which state has lawful title to the territorial features in the Spratly Islands, none of them generate an EEZ. About half of the features occupied by China are LTEs that are not entitled to a territorial sea, and about half are rocks entitled to a territorial sea.

China has built transformed seven features into artificial islands.

Rocks occupied by China. The tribunal determined that (1) Cuarteron Reef, (2) Fiery Cross Reef, (3) Johnson Reef, and (4) Gaven Reef (North) are "rocks" that may be used to claim a territorial sea.

LTEs occupied by China. The tribunal also determined that (1) Hughes Reef, (2) Subi Reef and (3) Mischief Reef are LTEs.[43] LTEs are not entitled to a territorial sea and are not subject to appropriation or territorial title by any state.[44]

Under Article 13 of UNCLOS, LTEs normally cannot independently generate a territorial sea.[45] Some of the LTEs, such as Mischief Reef and Second Thomas Shoal, for example, are solely within the Philippine EEZ.

In the special circumstances when an LTE lies within the territorial sea of the mainland or an island it may be used to establish a 12 nm territorial sea, so long as the LTE and the mainland or island are owned by the same state.[46] For example, Subi Reef may acquire a territorial sea by virtue of its position within the territorial sea of Sandy Cay, but only by the state with lawful title to Sandy Cay.

China has unlawfully converted Mischief Reef into a massive naval airbase complex with 5.58 million m^2 of land, complete with a runway, radar, and loading piers. As there is no basis as a matter of law for China to make any maritime claims on or from Mischief Reef, the United States should exercise its right of high seas freedoms and freedom of overflight within 12 nm of the feature. The tribunal determined Chinese activities and construction at Mischief Reef were illegal. In doing so, the tribunal bypassed China's presumptive optional exclusion of military activities since these were only tertiary or secondary to the overall dispute, and China had claimed on numerous occasions that Mischief Reef was not developed for military purposes.

China has also impeded Philippine activities at Second Thomas Shoal, an LTE or submerged feature within the Philippine EEZ and on its continental shelf. Like Mischief Reef, Second Thomas Shoal is incapable of appropriation by China or any other state.[47] In 1999, the Philippines grounded the warship BRP *Sierra Madre* on Second Thomas Shoal, located just 21 nm from Mischief Reef.[48] Chinese Coast Guard ships have maintained a continuous patrol around the BRP *Sierra Madre* since 2013, and even intercepted supply ships carrying

[43] Arbitration Award, para. 1203(6)(B)(3)(c).
[44] Arbitration Award, para. 1203(6)(B)(3)(b). As a subset of islands, rocks are not entitled to an EEZ.
[45] Arbitration Award, para. 1203(6)(B)(3)(c) and para. 1203(6)(B)(4).
[46] Arbitration Award, para. 1203(6)(B)(5).
[47] Arbitration Award, para. 1025.
[48] Jeff Himmelman, A Game of Shark and Minnow, New York Times Magazine, October 27, 2013.

provisions for the Philippine Marine Detachment stationed on the stranded vessel in March 2014.[49]

The arbitration tribunal declined to assert jurisdiction over Chinese military activities surrounding Second Thomas Shoal to prevent resupply of the BRP *Sierra Madre*. In doing so, the tribunal presumed that China's optional exception for military activities applied since the clashes at sea between China and the Philippines were "quintessentially" military in nature.[50]

The upshot of the tribunal's decision is that even if China were to own every island in the South China Sea, it would be restricted to territorial sea claims based upon them. The restriction of rocks to only a 12 nm territorial sea is important because it vastly limits the area over which a claimant state may assert some form of jurisdiction. While a rock generates a maximum territorial sea of 452 nm^2, an island that can sustain human habitation generates the same territorial sea, plus a potentially massive EEZ of 125,664 nm^2.

China has stated that military activities in its EEZ require its permission, but after the tribunal Award, no feature in the Spratly Islands generates an EEZ. Since there are no natural land features capable of sustaining human habitation in the Spratly Islands, there are no EEZs based upon the Spratly Islands.

C. Engage at Multilateral Venues on Specific Chinese Violations

The third set of issues addressed by the tribunal examined China's unlawful maritime activities in the South China Sea in violation of UNCLOS and other international legal obligations. The United States should raise the diplomatic costs of Chinese misconduct in the South China Sea by pursuing U.S. complaints, either individually or in concert with other states, in multilateral institutions.

China's violations undermine international peace and security, and therefore are appropriate agenda items at the United Nations Security Council, NATO and the European Union (EU).

The United States should raise the issue of freedom of navigation and overflight at the UN Security Council as one of the most compelling threats to international peace and security. Even if other members decline to join the United States in this effort, doing so conveys to other states the gravity of the issue. Similarly, the United States should seek NATO and the EU diplomatic and operational support to uphold norms and rules of freedom of navigation and overflight.

The United States should also pursue China's violations of multilateral UN treaties at the appropriate UN organization exercising Secretariat functions or cognizance over the instrument, including:

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[49] Greg Poling, Potential New Runway Presents New Headaches, Asia Maritime Transparency Initiative, Sept. 9, 2015.

[50] Arbitration Award, para. 1161.

Treaty or Instrument	Associated Institution(s)
UNCLOS	International Maritime Organization and UN General Assembly
Convention on the International Maritime Organization[51]	International Maritime Organization
International Regulations for Preventing Collisions at Sea (COLREGS)[52]	International Maritime Organization
Constitution of the UN Nations Food and Agricultural Organization[53]	UN Food and Agricultural Organization
UN GA Resolution 2997[54]	UN Environment Program and UN General Assembly
Convention on International Civil Aviation[55]	International Civil Aviation Organization

Figure: Instruments and Institutions concerning China's violations in the South China Sea

China committed numerous violations Chapter V (EEZ), Chapter VI (Continental Shelf) and Part VII (High Seas) of UNCLOS, and COLREGS,[56] which should be brought before the IMO.

First, China interfered with the Philippine exclusive right to fish and exploit the living resources in the Philippine EEZ.

Second, China purported to establish a fishing ban in the Philippine EEZ around Mischief Reef in 2012 and took control of the Philippine EEZ in the vicinity of Second Thomas Shoal in 2013.[57]

On March 9 2014, two China Coast Guard ships intercepted a Philippine civilian-contracted resupply vessel (AM700), preventing it from reaching BRP *Sierra Madre*, a Philippine warship intentionally grounded on Second Thomas Shoal. China Coast Guard vessels blocked the passage of AM700. Similar incidents occurred on April 28 and May 26, 2012.[58] On April 28 2102, PRC vessel FLEC-310 violated COLREGS when it passed within 200 yards of SARV-

[51] 1948 Convention on the International Maritime Organization, 289 U.N.T.S. 48.
[52] 1972 International Convention for Preventing Collisions at Sea, 1050 U.N.T.S. 16.
[53] I Basic Texts of the Food and Agricultural Organization of the United Nations 3 (2015).
[54] UN General Assembly resolution 2997 (XXVII) of 15 December 1972.
[55] 1944 Convention on International Civil Aviation, 15 U.N.T.S. 295.
[56] Arbitration Award, para. 1123.
[57] Arbitration Award, para. 671-673, and para. 679-680.
[58] Memorial of the Philippines, Republic of the Philippines v. People's Republic of China, Vol. VII, 30 Mar. 2014, Annex 239, (19 Mar. 2014) ("Allen Report").

002 and 600 yards of SARV-003 at a speed of more than 20 knots. Similarly, on May 26 2012, Chinese public vessels CMS/MSV-71, FLEC-303 and FLEC-306 violated COLREGS when they made multiple attempts to cross the bow of Philippine vessel MSC-3008 at a distance of only 100 yards and at speeds of up to 20 knots.[59] These incidents are a violation of COLREGS and should be addressed as such at the International Maritime Organization in London.

Third, China failed to uphold Part VII (High Seas, articles 92-94) of UNCLOS, which requires flag states to ensure that all ships that fly its flag operate in accordance with international rules. China's interference with Philippine rights in the EEZ and on the continental shelf were a coordinated civil-military campaign of direct action by state-sanctioned and directed Chinese fishing vessels and cooperatives operating in conjunction with and under the direction and protection of the Chinese Coast Guard.

The tribunal also ruled that Chinese vessels failed to show "due regard" for the rights of Philippine fishermen, especially at Scarborough Shoal, where both Philippine and Chinese fishermen were found to have a valid right to fish within the territorial sea based upon historic private rights.

China has international legal responsibility for the actions of its civilian fishing fleet and maritime militia. Flag states must exercise effective jurisdiction over their ships, and maintain effective control over their operations. If an incident occurs at sea, such as a vessel mishap or collision, the flag state has a duty to conduct an investigation and cooperate in an investigation with other flag states of affected vessels. The flag state also has a legal obligation to exercise administrative and technical oversight over ships that fly its flag, ensuring that the crews are properly trained and certified to international standards of safe seamanship. China's maritime militia orchestrated numerous violations of flag state rules.

Chinese Coast Guard ships also violated COLREGS, a fundamental norm for safety and security at sea. The IMO has cognizance over COLREGS, and China's dangerous activities should be offered as an agenda item at the Flag State Implementation (FSI) subcommittee of the Maritime Safety Committee of IMO.

China's maritime militia also does not comply with Food and Agricultural Organization (FAO) guidelines for the handling of commercial fishing vessels and illegal unregulated, unreported (IUU) fishing. Flag states have a legal duty to take measures to ensure fishing vessels that fly their flag are not conducting IUU fishing.[60]

The tribunal held that China's fishing techniques and artificial island construction destroyed the fragile marine environment and intentionally killed endangered species of coral, turtles, and giant clams. These issues should be brought before the United Nations Environment

[59] Allen Report, p. 2.
[60] Fisheries Advisory Opinion, ITLOS 2015, para.741.

Program (UNEP) as inconsistent with China's obligations under the East Asian Seas initiative.[61]

Finally, China's commercial aircraft flights to its occupied features in the South China Sea traverse the Ho Chi Minh Flight Information Region (FIR) air traffic control area without proper clearance, endangering civil aviation in violation of the 1944 Chicago Convention and FIR rules set forth by the International Civil Aviation Organization (ICAO). In January 2016, for example, Vietnam complained to ICAO about 46 Chinese flights that failed to obtain proper clearance.[62] The United States and other nations should support Vietnam in this effort at ICAO to protect the integrity and safety of the worldwide civil aviation system.[63]

In each case above, China breaches its legal obligations affecting the global commons. The United States should unilaterally and in concert with other states pursue these violations at the appropriate multilateral venues. China's pattern of activity, however, suggests something greater about the trajectory of China as a state in the international system.

D. Accept that China is a Revisionist Power

Fourth, the tribunal concluded that China had aggravated the disputes in the South China Sea pending a final outcome of the decision in violation of international law. This aspect of the Arbitration Award underscores that not only did China decline to participate in the Arbitration even though it was legally obligated to do so, but that it took concrete action to impede the work of the Tribunal and make the job of rendering a decision more difficult.

While the tribunal stopped short of charging China with bad faith, it nonetheless expressed dismay that China had irreparably changed the physical features in the region in a way that made determination of their natural state more difficult.

This misconduct is tantamount to "tampering with the evidence" during pending litigation, and it calls into question whether China is prepared to act as a responsible stakeholder in the existing international order. The steps taken by China to aggravate the disputes pending legal determination by the tribunal suggests that China is not a status quo power invested in the international system based on universal norms, but rather a revisionist power intent on creating a new maritime order with special exemptions carved out for China.

4. Conclusion

Ambassador John D. Negroponte argued twenty years ago: "The freedom of the seas was not given to mankind. It was won – won through scholarly and legal debate and in naval engagement."[64]

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[61] Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region (1983) and Action Plan for the Protection and Sustainable Development of the Marine and Coastal Areas of the East Asian Region (1994). China and nine other states are members of the East Asian Seas Action Plan.
[62] Vu Trong Khan, Vietnam Says China's Flights to South China Sea a Threat to Air Safety, Wall St. J. Jan. 9, 2016.
[63] Hanoi Slams 'Erroneous Statements' on China Island Flights, Daily Mail, Jan. 13, 2016.
[64] John D. Negroponte, Who Will Protect Freedom of the Seas?, 86 Dep't of State Bull. 41 (Oct. 1986).

The United States should take the lead as champion for the freedom of the seas, and the international laws, rules, norms and regimes that support it.

The instability in the South China Sea is in no small part a symptom of the uneven and sometimes lackadaisical U.S. approach to freedom of the seas. Contemporary challenges and a new Administration provide an opportunity to reconsider past assumptions that freedom of the seas is a cost-free public good that will persevere on the strength of its own logic and without more robust U.S. action.

While some parts of the Department of Defense have promoted freedom of navigation and overflight, principally the Navy leadership and some geographic commanders and component commanders, support elsewhere in Washington, D.C. often has been tepid.

The U.S. Government generally has been reticent to speak plainly and honestly about unlawful coastal state claims, with China being just the most glaring example. To refocus the problem, the United States should change the way it describes and challenges maritime claims that lack a basis in international law. Such claims currently are described as "excessive" maritime claims because they exceed the limits or rules of the law of the sea reflected in UNCLOS.[65] The term "excessive," however is unnecessarily ambiguous and equivocating. The term "excessive" suggests that reasonable people can differ on what is excessive, and that the line between "reasonable" and "excessive" is quite blurred. In reality, the standards for lawful claims in UNCLOS are rather forthright and simple. In any event, while there may be reasonable disagreement about the scope of maritime claims under UNCLOS, most of the disputes, especially concerning China, are not of that type.

In fact, the maritime claims challenged by U.S. FONOPS lack a basis in the law of the sea or UNCLOS and should be characterized as "unlawful," which more concisely and accurately describes the status of the claim and U.S. rejection of it.

Shaping the law of the sea and UNCLOS is a strategic imperative for the United States. The role of international law in the South China Sea is important to the U.S. position in East Asia, and more importantly, to U.S. global strategy because the seas form a single, coherent, inter-connected geography, subject to a single set of norms, rules, laws, and institutions. The global ocean constitutes the world's largest domain of maneuver, and command of the global commons is the linchpin of American military power.[66]

Forty percent of the seas lie under some form of coastal state jurisdiction, so the United States has a critical interest in a rules-based order of the oceans that accommodates global military operations on the surface of the water, in the water column, on the seabed beneath the seas, and in the airspace above it. Nowhere is this interest more apparent than the Indo-Asia-Pacific maritime domain.[67] American grand strategy and the U.S. global security

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[65] See, e.g., Limits in the Seas No: 112: "United States Responses to Excessive National Maritime Claims," U.S. Dep't. of State, Mar. 9, 1992.

[66] Barry Posen, Command of the Commons, 28 International Security 5 (2003).

[67] "The [U.S. Pacific] fleet's vision is one that sustains an Indo-Asia-Pacific maritime domain where the established and enduring framework of international norms, standards, rules, and laws is preserved." Admiral Scott Swift, Commander, U.S. Pacific Fleet, My Guidance to Pacific Fleet Sailors, Aug. 23, 2016.

architecture depend on unimpaired connection to partners, friends and allies around the world that is facilitated by a functional, stable, inclusive, liberal order of the oceans.

The challenges in the South China Sea form an inflection point in the international law of the sea. The rule of law in the oceans has been a source of security, prosperity and stability since UNCLOS entered into force in 1994. If the United States (and other nations) fail to take seriously freedom of navigation and overflight, the liberal order of the oceans will unwind. China will establish hegemony in East Asia, and the implications of a deteriorating maritime order will spread throughout the globe. Nations in other areas of the world are keen to know whether China will persist to redefine the regimes of the law of the sea, or whether the United States and other nations are prepared to protect the contemporary order of the oceans. This is a contest that the United States and the rest of the world cannot afford to lose.

I believe the United States can more effectively counter the challenges to U.S. Seapower and Projection Forces in the South China Sea, and indeed worldwide, through four lines of effort.

First, the United States should implement legal countermeasures against China to induce compliance with international law, as reflected in UNCLOS. These countermeasures were outlined in 1983 by President Reagan, but have not been faithfully implemented, and include denying China the freedom of navigation in water under U.S. jurisdiction. This approach will be especially effective if other states, such as Japan, join the United States in this effort since China is zone-locked and its warships are unable to reach the open ocean without traversing the EEZs of it neighbors.

Second, the United States can take additional steps to strengthen the FON program. These are: (A) increase the type and number of FONOPS; (B) conduct combined FONOPS with like-minded states; (C) prioritize challenge to illegal claims that have been long ignored; (D) observe only lawfully declared territorial seas; and (E) improve U.S. Government interagency synchronization.

Third, the United States should leverage and promote the July 12 Arbitration Award as a powerful and enduring restatement of international norms in the South China Sea. The four major elements of the Award promote international peace and stability in the oceans by restricting unlawful maritime claims and admonishing unlawful and unsafe activities at sea. The United States already has asserted that the Arbitration Award is final and binding between China and the Philippines, and it should now make the tribunal decision a principal component of regional security.

Fourth and finally, the United States should join UNCLOS. While the legal norms of freedom of the seas are derived from customary international law and binding on all states, these rights and freedoms are more recently, clearly and explicitly codified and reinforced throughout the terms of the treaty. If the United States joins UNCLOS, China will not suddenly begin to comply with international norms at sea. However, UNCLOS has had an unmistakably positive effect on restraining states' unlawful claims. The regimes and rules reflected in UNCLOS badly need shoring up, and they would be strengthened greatly by U.S. participation.

Ultimately, the United States relies on its armed forces to guarantee the right to operate in the global commons, but UNCLOS ensures that we do so under color of law, and within an internationally accepted, rules-based order.[68] Like any law, and in particular, any international law, compliance by other states can be problematic. But UNCLOS cloaks U.S. freedom of navigation and overflight in legal and moral authority that reflects our Constitution and resonates with friends, partners and allies, and therefore the treaty affords the United States a unique locus of power that has not been leveraged.

Joining UNCLOS is not the end of the process, but rather one milestone in the long struggle to shape the law. Just as political realists describe a struggle for power in the international system, there exists a corresponding struggle for law.[69] The United States is best positioned to fashion and influence international law of the sea as a member of UNCLOS.

Thank you for the opportunity to present these views.

I especially thank the committee for raising visibility and awareness of the importance of a rules based order of the oceans and freedom of navigation and overflight in American grand strategy, and the critical role of Seapower and Projection Forces to uphold American interests.

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[68] John Norton Moore, The Regime of Straits and the Third United Nations Conference on the Law of the Sea, 74 AM. J. INT'L L. 77, 88 (Jan. 1980).

[69] John Norton Moore, The Law of the Sea Negotiations and the Struggle for Law, in Proceedings of the Conference on Deep Seabed Mining and Freedom of the Seas 21, 23 (F. T. Chen, ed. 1981).

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N/A			

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Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
N/A			

THE SOUTH CHINA SEA'S THIRD FORCE: UNDERSTANDING AND COUNTERING CHINA'S MARITIME MILITIA

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Testimony before the House Armed Services Committee
Seapower and Projection Forces Subcommittee
Hearing on Seapower and Projection Forces in the South China Sea
2212 Rayburn House Office Building
Washington, DC
21 September 2016

****Everything expressed here represents solely the author's personal view. It in no way represents the estimates or policies of the U.S. Navy or any other organization of the U.S. government.****

EXECUTIVE SUMMARY

Critical to understanding and responding to Beijing's actions in the South China Sea is the fact that it is employing *not one but three major sea forces* there.[1] As a *China Daily* article reveals, "a less noticed force, China's maritime militia, is also improving its operational capability."[2]

Bottom line up front—I want to tell you why:

- ***So much is at risk* if more is not done to address China's Maritime Militia.**
- ***So much is knowable* about it, even through open sources alone.**
- ***So much is say-able*, if only U.S. government officials would do so.**
- ***So much is preventable*, but only if U.S. officials act soon.**

China's Maritime Militia is its Third Sea Force of "blue hulls," after its Navy of "gray hulls" and its Coast Guard of "white hulls."[3] Increasingly, these forces operate in concert, with blue hulls operating forward and white and gray hulls backstopping them.[4] The Chinese operational concept entails a "first line of Militia, a second line of Administrative Law Enforcement, supported by a third line of the Military."[5] Collectively, these are "gray zone" operations:[6] conducted to alter the *status quo*, and employing coercion as necessary, but without resorting to war.[7] Chinese sources term such efforts "War without Gun Smoke."[8] Beijing works constantly in peacetime (and possibly in crises short of major combat operations with the United States) to "win without fighting [killing]," and thereby to further its unresolved land feature and maritime sovereignty claims. This is part of Beijing's broader South China Sea strategy:

consolidate disputed claims where it can, delay resolution of issues it cannot yet settle in its favor, and coerce (deter and/or compel)[9] potential opponents while limiting escalation.[10]

In the most probable scenarios concerning Chinese interference in U.S. Freedom of Navigation operations (FONOPs), punishing the Philippines for pursuing international arbitration, or deterring Vietnam and others from following suit, China's irregular but military-controlled Maritime Militia would likely play a frontline role. It has already done so in a range of international sea incidents, including China's 2009 harassment of USNS *Impeccable* and 2012 seizure of Scarborough Shoal. By its very design, this approach is particularly challenging for potential opponents to understand clearly, let alone address effectively.[11]

I therefore offer a summation of my extensive, published research findings with my Naval War College colleague Conor Kennedy[12] concerning:

- **what China's Maritime Militia is,**
- **why it matters,**
- **and what to do about it.**

China's irregular sea force is one of the most important—*yet most under-considered*—factors affecting U.S. security interests in the South China Sea. Many in Washington understand that China has the world's second-largest blue water Navy, some that China has the world's largest blue water Coast Guard. But *almost no one* knows that China—drawing on the world's largest fishing fleet—has deployed the world's largest Maritime Militia; and virtually the only one *charged with advancing disputed maritime claims*. These Chinese "Little Blue Men" are roughly equivalent at sea to Putin's "Little Green Men" on land.

There is an important reason for this lack of light on China's Third Sea Force: despite a deluge of Chinese-language evidence of its development and activities, to the best of my knowledge no U.S. government report or Washington-based executive branch official has publicly mentioned China's Maritime Militia, *at all*! As a result, I submit to you, U.S. policy is under-informed, U.S. regional allies and partners are confused, and Beijing is emboldened. In recent years, it has used its Maritime Militia against military and civilian ships and crews of its immediate neighbors and the United States—with *no direct* public response from *any* of them.

ADVANCING CHINA'S SOUTH SEA CLAIMS

Thousands of personnel and vessels are registered in China's Maritime Militia. What should concern Washington and its regional allies and partners is an *elite subset*, primarily from four locations: Danzhou,[13] Tanmen,[14] and Sanya on Hainan Island; as well as Sansha, the new municipality in the Paracel Islands charged with administering all Chinese claims in the South China Sea. *These* are the forces entrusted with, and trained

for, *participation in international sea incidents*. From a research perspective, that means that the problem is manageable and the main points are knowable: analysts can drill down deeply in a few key areas.

Furthermore, for grassroots forces to function effectively and economically, constant information release is virtually inevitable. Despite incomplete efforts at cover-up and denial[15]—some of which are truly farcical[16]—much can be learned from authoritative Chinese-language open sources,[17] which offer considerable confirmable, conclusive data. Pedigreed, assembled, and compared, they offer deep understanding of many aspects of China's Maritime Militia. Chinese local government websites in particular offer a rich source of specific time-stamped data.[18] Hull numbers contain important information: searching the Chinese Internet for them can generate useful leads. This is not a faceless force; substantial information is available on key leaders' backgrounds, contributions, and current roles.

Leading elements of China's Third Sea Force have already played *frontline roles* in *manifold* Chinese incidents and skirmishes with foreign maritime forces *throughout* the South China Sea. These include China's:

1. 1974 seizure of the western Paracels from Vietnam[19]
2. 2009 harassment of a U.S. Navy (USN) survey ship[20]
3. 2011 sabotage of two Vietnamese hydrographic vessels[21]
4. 2012 seizure of Scarborough Shoal from the Philippines[22]
5. and 2014 repulsion of Vietnamese vessels from disputed waters surrounding its oil rig, *including by ramming and sinking them*[23]

Make no mistake*: these are *state-organized, -developed, and -controlled* forces operating under a *direct military chain of command.[24]

OPEN SOURCES SHOW *IMPECCABLE* LINK

Case in point: In March 2009, USN survey vessel *Impeccable* was surrounded, halted, and harassed by a coterie of five Chinese vessels: one Navy, two Coast Guard, and *two Maritime Militia trawlers*. One trawler approached dangerously close, and a man on deck attempted to snag *Impeccable*'s towed array sonar with a *grappling hook*.[25]

No random patriotic fishermen, these! As one might expect, Beijing would not allow mere civilians to confront a USN vessel. Indeed, running a "VIN number check" in Chinese sources for the hull number produced conclusive documentation that the vessel was registered to a Maritime Militia company in Sanya City, and piloted by a cadre leader from that Militia, Lin Wei.[26] This is an important example of leading Militia units being entrusted with, and capable of, sophisticated frontline involvement in international sea incidents at Beijing's behest. Disturbingly, however, the U.S. government *never said any of this publicly* (if it even *fully* knew), thereby reassuring Beijing that it could continue such malfeasance safely in the shadows.

Tracing Lin's subsequent whereabouts reveals that he has recently acquired a much larger, more capable Militia "mother-ship" that commands and supplies several dozen Militia trawlers on long journeys to the Spratly Islands. This is part of a Militia-wide wave of "mother-ship" buildup. Each 3,000-ton vessel allows several dozen Militia trawlers to operate better, longer, further—*together*.

Additionally, between 27 February and 28 March 2014, Sanya Maritime Militia forces were present near Second Thomas Shoal during China's temporary blockade of it, and the Philippines' consequent inability to resupply its forces stationed on the warship hulk *Sierra Madre* grounded there. Only the day after the Militia was reportedly recalled were Philippine forces able to successfully resume resupply of their outpost.[27] Such activities are likely to recur in the future, perhaps far more serious in their nature and execution.

SCARBOROUGH SHOAL – INSPIRING A NEW OPERATIONAL MODEL

Indeed, in 2012, China's Third Sea Force played a leading role in another international sea incident involving the United States. Twelve Maritime Militia trawlers were netting tons of endangered species at Scarborough Shoal.[28] When a Philippine vessel boarded two of the trawlers, Militiamen onboard radioed for help. China's Coast Guard rode to the rescue.

Chinese Coast Guard ships sealed off the shoal's lagoon, and Maritime Militia vessels screened off the approaches from Filipino fishermen—some of many Chinese actions recently condemned by the Arbitral Tribunal.[29] All told, China *reneged on a U.S.-brokered deal* to return to the *status quo ante*.[30] The incident showcased the use of professional fishermen in China's Maritime Militia who double as support to the People's Liberation Army (PLA) when called upon to do so.

Unfortunately, the U.S. government neither "called out" Maritime Militia involvement, nor imposed any costs for China's seizing the disputed feature. Beijing appears to have taken a lesson, and been emboldened accordingly. Serious Chinese sources have subsequently discussed a "Huangyan [Scarborough Shoal] Model"[31] and concurrent transformation of China's maritime strategy. In an article framed around this very theme, researcher Zhang Jie of the Chinese Academy of Social Sciences writes, "This model… sees non-military conflict as the bottom line to attain effective control over the disputed shoal and its surrounding waters by means of… civilian maritime force, etc. This model suggests that China's maritime policy has shifted fundamentally from keeping a low profile to becoming more proactive." As "the first official use of" the phrase "Huangyan [Scarborough Shoal] Model," Dr. Zhang cites an article in the overseas edition of *People's Daily*, implying that this term has the endorsement of China's government for communication with external audiences, including perhaps for signaling and coercion.[32] "As China's strength increases," she projects, "China will be able to effectively wield more types of non-military instruments to resolve South China Sea disputes." Disturbingly, Zhang emphasizes that the "Huangyan [Scarborough Shoal] Model" has

also been "explored by China" vis-à-vis the "Diaoyu [Senkaku] Islands dispute"[33]—with the subsequently augmented presence of China Coast Guard ships[34] (together with many "fishing boats"[35]) in the islands' vicinity already a tangible result.

TANMEN MILITIA – BECOMING A MODEL UNIT

Helping China seize Scarborough Shoal was the Tanmen Militia, its personnel subsequently lionized and compensated for their contribution. The big prize came a year later, when Chinese paramount leader Xi Jinping visited them. They were declared a "Model Unit" for all to emulate. Community development funds flowed apace. Among the many beneficiaries is a national museum complex to augment the Tanmen Militia's own museum,[36] which Xi had toured. These facilities, and Tanmen's Militiamen, play a special role in underwriting Beijing's powerful but deceptively one-sided historical narrative concerning its South China Sea claims: "Our forefathers fished there."[37]

Now each of the Militia's 29 Party members has his own new 500-ton steel-hulled trawler, or will soon. Neighboring countries' *Coast Guards* would be lucky to have so many well-equipped vessels.[38] This fleet upgrading—part of a major ramp-up of large, new *steel-hulled* Chinese Militia trawlers—appears designed to increase *ramming* capabilities.

Subsequently, officials from other localities have flocked to Tanmen to study its Militia, in order to better develop their own. Local officials elsewhere examine Tanmen to inform their Militias' development, so we too must scrutinize it for clues to larger development trends.

FRONTIER FORCES: MILITIA EXPANSION IN SANSHA... AND BEYOND

Today, two powerful factors are propelling Maritime Militia development:

- it is prioritized in China's latest Five-Year Plan,[39]
- and—as part of Xi's downsizing China's military to make it *leaner and meaner*—experienced veterans are becoming available. Attracted by growing incentives, some are already joining identified Maritime Militia units.[40]

A major beneficiary of resource flows is the Sansha Maritime Militia, responsible for supporting all of Beijing's South China Sea claims. New units are being developed to continue the struggle, both throughout the Paracels and increasingly in dedicated bases in the Spratlys as well. In the 1990s, China's Maritime Militia was a key force in building the first-generation structures on Spratly features that allowed China to occupy them until its recent bout of "island" building.[41] Now, this leading element of China's Third Sea Force is being deployed to new facilities on the tremendously expanded, developed, and fortified reefs. Additionally, to enhance sophistication and technical management, a new specialized elite is now being added atop the old fishermen rank-and-file.

Amid all this, Sansha is taking Maritime Militia development to a dangerous new level of professionalization and militarization. Seven dozen large new vessels constructed and under construction at multiple shipyards boast *reinforced hulls, external rails to mitigate collision damage* to the ships themselves, *and water cannons*—features not common to normal fishing trawlers. An official publication of the PLA's Academy of Military Science contains a photograph of Sansha Maritime Militia members loading 32-kg crates of "light weapons" onto one of the newly-delivered vessels during a widely-reported military exercise. Some vessels reportedly have a "weapons and equipment room" and an "ammunition store."[42]

Military veterans are sought for all positions. Militiamen receive hefty salaries atop an array of generous benefits: a crewman can earn over $13,000 annually, a captain over $25,000 annually. These are princely sums by Chinese standards, and go far in a coastal fishing village. The monies apparently come without actual fishing responsibilities attached: trawling for territorial claims would seem to be the purpose for their payment. Recently-enhanced training includes reconnaissance, "assisting in [maritime] rights protection," and "shooting at sea."[43] While other blue hull units have coordinated effectively with China's white and gray hulls during premeditated international sea incidents, Sansha's Maritime Militia is taking the blue hull role in the aforementioned three-tier Navy-Coast Guard-Maritime Militia "joint defense" to a new level of frontline capability, centered on a $6 million command center.[44]

All told, China is generating a worrying new wave of the future in leading-edge Maritime Militia development. The Sansha Militia was established to be a professional paramilitary force first and foremost, with fishing a secondary mission at best.[45] These are the frontline irregular forces that the U.S. and its allies and partners will most likely encounter in the South China Sea.

There is much more to come. Admiral Wu Shengli, Commander of China's Navy, recently suggested that Spratlys construction is only "halfway" completed.[46] Follow-on moves in the Spratlys will likely at least partially echo development in the Paracels to date. Long a widely-distributed, versatile component of China's reconnaissance-strike complex, China's Maritime Militia will have even more persistent maritime domain awareness when operating from its new bases.[47] Rapid, diverse frontier growth combined with a lack of normal civilian entities in the Paracels and Spratlys makes it even easier for foreign analysts to detect Militia-specific assets and activity.

KEY TAKEAWAYS AND COUNTERMEASURES

Now, as Beijing seeks

- **to punish the Philippines for petitioning the Arbitral Tribunal,**
- **to dissuade Vietnam and others from following suit,**
- **and to demonstrate its long-standing opposition to U.S. FONOPS,**

its Third Sea Force likely appears a tempting tool.

Here's how this could play out in a particularly dangerous way for regional stability and U.S. interests. Even if the current Administration is able to complete its time in office without a major incident, the next President may well face a fast-breaking Maritime Militia-related challenge just as s/he is getting started. The reason: Chinese leaders, fixated on perceived and potential differences in relative power, personalities, and policies, have a history of testing their American counterparts shortly after they assume office. The Chinese-instigated *Impeccable* incident, beginning just forty-four days after President Obama's inauguration, was clearly designed to test his mettle and see if he could be pushed to reduce lawful U.S. surveillance and reconnaissance operations in international waters and airspace. Fortunately, President Obama passed that test.

On 27 October 2015, however, when the USS *Lassen* sailed near the artificially augmented Subi Reef, small commercial craft with the hallmarks of Maritime Militia vessels approached it "provocative[ly], crossing the Lassen's bow and maneuvering around the destroyer," having apparently anticipated its approach.[48] Who knows what contingencies they might have been practicing for, or what footage they might have been capturing for later (mis)use?

President Obama's successor will assume office in a more challenging time for U.S.-China relations, wherein the South China Sea has become a growing arena of contention, and regarding which Beijing expresses growing determination to oppose U.S. FONOPS and related words and deeds. We must immediately support the next U.S. President and his or her freedom of action to defend U.S. interests by airing the facts on China's Maritime Militia officially—long before a disruptive incident occurs and Beijing feeds a misleading pre-gamed narrative to media sources at home and abroad. In doing so, we would do well to take a Chinese saying to heart: "repair the house before it rains," meaning "take precautions before it's too late."[49] And we will make it clear that the American commitment to preserving peace, law, and access in maritime Asia spans two administrations and more; so that Beijing cannot simply denounce the new U.S. President as an inexperienced "China hawk" who will soon revert to a more modest mean.

As for worst-case scenarios for which the U.S. armed forces are duty-bound to prepare, there is further cause for concern. While Beijing seeks to "win without fighting," Maritime Militia use in conflict is not just theoretical. Two vessels from what is now the Danzhou Militia played a central role in China's seizure of the Western Paracels from Vietnam in 1974. In recent years, leading Maritime Militia units have trained with China's Navy and Coast Guard, and have operated in close coordination with them in international sea incidents. They also train for specific wartime roles, including logistics support, reconnaissance, deception and concealment, assertion of presence near and surrounding of disputed claims, as well as interdiction, harassment, and obstruction of foreign ships, including with sea mines.[50]

So, before China is able to put the United States, or one of its regional allies or partners, in a misleading but precarious position of appearing to confront "innocent civilian" fishermen, American officials must *publicly reveal* the Third Sea Force's *true nature and deeds*.[51]

At the end of the day, China's Maritime Militia can only be as deceptive and plausibly deniable as we allow it to be—through our own silence and inaction.

HERE'S WHAT I BELIEVE AMERICAN POLICY-MAKERS NEED TO DO NOW:

Emphasize *3 Principles:*

1. China's Maritime Militia is a *military force—often in disguise.*
2. China's Maritime Militia forces *do not deserve civilian protections* in the event of conflict.
3. *Uncovering the truth* about China's Maritime Militia is *the best way to deter it.*[52]

Engage in 3 Actions:

1. "Call out" China's Maritime Militia officially in public.
a. Failure of the Pentagon's 2016 report to mention China's Maritime Militia *at all* was a *major missed opportunity*. Congress should require detailed coverage in next year's report.[53]
b. Meanwhile, Congress should *publicly* address this critical subject, and ask senior Administration officials to do so as well.

2. Share information with countries at risk, and provide strategic reassurance.
a. Inform our allies and partners on the front lines of keeping the South China Sea peaceful and open to all.[54] If the U.S. government (with all its resources and capabilities) has not yet begun to address this challenge openly and proactively, how can we expect less-advantaged friends to do so?
b. The next U.S. Administration—with Congressional encouragement and support as necessary—should issue a public, whole-of-government Asia-Pacific Strategy to coordinate policy, reassure allies and partners, and deter destabilizing behavior.[55]

3. Communicate clearly with Chinese interlocutors.
a. *Make it plain* that any elements that *ignore repeated warnings* by U.S. vessels to desist from disruptive activities will be *treated as military-controlled* and *dealt with accordingly*, to ensure self-defense and unobstructed mission accomplishment.
b. Impose clear consequences for any use of Maritime Militia against U.S. vessels.

The U.S. faces growing challenges in the South China Sea. In many ways China's Maritime Militia is one of the simplest to begin to address: its plausible deniability is one of its greatest strengths, and it has many vulnerabilities. We can quickly unmask it by putting a clear U.S. government stamp of authority on already-available information. It is high time that we did so, before things take a turn for the worse, in a time and a way that is not of our choosing.

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Thank you! I'm happy to take your questions.

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Erickson has taught courses at NWC and Yonsei University. He advises a wide range of student research and theses at NWC, Harvard, and other institutions; and provides curricular inputs to NWC and other schools. In 2013, while deployed in the Pacific as a Regional Security Education Program scholar aboard USS Nimitz, he delivered twenty-five hours of presentations. Erickson has lectured extensively at government, academic, and private sector institutions throughout the United States and Asia. He has briefed a broad array of senior policy-makers and principals, including the U.S. Chief of Naval Operations, his Executive Panel, the Secretary of the Navy, and U.S. naval leadership throughout the Asia-Pacific; as well as the Deputy Secretary of Defense, other Executive Branch officials, and multiple Members of Congress. He has testified before the House Foreign Affairs Committee, House Armed Services Committee, and U.S.-China Economic and Security Review Commission. Erickson has provided inputs for, and reviews of, multifarious government programs, simulation exercises, and reports.

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Erickson's research—which focuses on Asia-Pacific defense, international relations, technology, and resource issues—has been published widely in English- and Chinese-language edited volumes and in such peer-reviewed journals as China Quarterly, Journal of Contemporary China, Asian Security, Journal of Strategic Studies, Orbis, Asia Policy, Pacific Focus, China Security, and Acta Astronautica; as well as in Foreign Affairs, The Washington Quarterly, The National Interest, The American Interest, Foreign Policy, War on the Rocks, Joint Force Quarterly, IHS Jane's, Geopolitics of Energy, Global Health Governance, RSIS Commentary, and Peking University's China International Strategy Review (Chinese- and English-language editions) and International and Strategic Studies Report. Erickson has also published annotated translations of several Chinese articles on maritime strategy. His coauthored Foreign Affairs.com article, "Not- So-Empty Talk: The Danger of China's 'New Type of Great-Power Relations' Slogan," has been read widely in U.S. and Asian policy circles. Erickson's National Interest article "Showtime: China Reveals Two 'Carrier-Killer' Missiles" received more than 65,000 page views in its first 24 hours online. His RealClearDefense piece "What Sort of Navy America Needs" registered 60,000 page views in its first day online.

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Erickson's work has been cited widely in scholarly publications and reports from the U.S. government and think tanks such as CSIS and RAND. He has been quoted extensively in numerous newspapers, magazines, and online sources, including Science, Wired, The BBC, The Financial Times, Aviation Week & Space Technology, The Nelson Report, Bloomberg, The Economist, Xinhua, China Daily, The New Yorker, Time, Der Spiegel, The Washington Post, Fortune, The Times of India, El País, Newsweek, The Straits Times, Defense News, Le Monde, China Radio International, Aerospace America, and The New York Times. Erickson's work is also featured in a broad range of print, television, radio, and Internet media. Erickson has published op-eds with CBS and the Asahi Shimbun (Japanese- and English-language editions), and has appeared on CNN, C-SPAN, CCTV, NHK, Al Jazeera, Voice of America, Australian Broadcasting Corporation (ABC), and The John Batchelor Show. He tweets via @AndrewSErickson and is listed among The China Studies Twitterati 50.

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Please note: unless otherwise specified, the views posted, reposted, or otherwise expressed on Dr. Andrew S. Erickson's research websites, social media accounts, and other electronic and print sources are his alone and should not be construed to represent the official policies or estimates of the U.S. Navy or any other organization of the U.S. government. Additionally, retweets via Twitter do not imply endorsement in any way. Neither tweets nor retweets should be construed as political statements.

Specialties

- China's military and foreign policy
- Japan/Asia-Pacific security and international relations
- Chinese defense science, technology, and industry
- Maritime and aerospace technology development, history and current status
- Energy, resources, and geostrategy
- Military basing and power projection
- Sino-American relations and contemporary policy issues

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

SEPTEMBER 21, 2016

QUESTIONS SUBMITTED BY MR. LANGEVIN

Mr. LANGEVIN. Japan has recently committed to increasing its patrols and its training activities with the United States in the South China Sea, as well as giving additional military aid to countries such as Vietnam. The Philippines, conversely, have made little public mention of the July tribunal ruling. How are our other allies in the region, specifically Taiwan, reacting to the ruling on the South China Sea territorial disputes?

Ms. GLASER. A total of 7 countries called on the Philippines and China to abide by the ruling, which is final and binding on both parties. Those seven countries are: the United States, the Philippines, Australia, Canada, Japan, New Zealand and Vietnam. Since then, however, the Philippines has downplayed the ruling, especially in its discussions with China.

Taiwan's new government under Tsai Ing-wen found the tribunal award "completely unacceptable." An official statement objected to the reference to "Taiwan Authority of China" in the text of the award; to the finding that Taiping Island is a rock that isn't entitled to an exclusive economic zone; and to the fact that the ROC was not invited to participate in the proceedings. The statement maintained that "the award has no legally binding force on the Republic of China."

It should be noted, however, that Taiwan has only stated that it claims the South China Sea Islands. Taipei has not claimed sovereignty or jurisdiction over waters in the South China Sea that are not associated with land features. Taiwan's official statements do not reference the 1947 11-dash line. Speaking to a crew aboard an ROC frigate the day following the ruling, President Tsai Ing-wen said that Taiwan supports resolving maritime and territorial disputes through negotiations in a peaceful manner. Despite rejecting the ruling, Tsai often references the importance of abiding by international law and UNCLOS in particular in her statements regarding the South China Sea.

Mr. LANGEVIN. Japan has recently committed to increasing its patrols and its training activities with the United States in the South China Sea, as well as giving additional military aid to countries such as Vietnam. The Philippines, conversely, have made little public mention of the July tribunal ruling. How are our other allies in the region, specifically Taiwan, reacting to the ruling on the South China Sea territorial disputes?

Dr. KRASKA. This response provides reaction by Taiwan and the following five U.S. treaty allies to the South China Sea arbitration award of July 12, 2016. In short, Japan and Australia were very supportive of the arbitration award, and their statements mirrored the U.S. position that the award was "final and binding" on China and the Philippines. Korea was somewhat circumspect, and adopted a neutral tone that "took note" of the award, while reiterating support for freedom of navigation. Thailand was even more ambiguous than Korea, and did not even mention the award in an official statement released on the day of the arbitration ruling. Taiwan rejected the award based upon its finding that Taiwanese-occupied Itu Aba, the largest feature in the South China Sea, was determined to not be entitled to a 200 nautical mile exclusive economic zone. Taiwan did not mention the arbitration award's rejection of the Nine Dash Line, which is the most egregious and unlawful claims by China.

Taiwan

The Republic of China (Taiwan) rejected the ruling the arbitration ruling because it held that none of the islands in the South China Sea are entitled to a 200 nautical mile exclusive economic zone. The arbitration panel ruled that all features in the Spratly Islands are either "rocks" that cannot sustain human habitation, or low-tide elevations. Rocks are entitled to only a 12 nautical mile territorial sea. Taiwan occupies and claims Itu Aba, the largest feature in the Spratly Islands. Under the ruling, Itu Aba (Taiping) would not be entitled to a 200 nautical mile exclusive economic zone. The 0.51-square-kilometer Taiping is the largest land mass in the Spratly Islands, and it lies about 1,600 kilometers southwest of Kaohsiung, Taiwan.

Japan

Japan has repeatedly indicated that China should accept the arbitration ruling as "final and binding." On July 26, 2016, for example, Japan Foreign Minister Fumio Kishida urged Beijing to comply with an international tribunal ruling that denied China's sweeping claims in the South China Sea.

South Korea

The Korean government "took note" of the arbitration ruling, and thus adopted a neutral position that avoided a strong signal of support. The Korean government reiterated its support for freedom of navigation and overflight in the South China Sea, and also reiterated that all conflicts should be resolved through peaceful means and in accordance with "relevant agreements, non-militarization commitments, as well as internationally established norms of conduct." The Korean government also stated that it "hopes . . . South China Sea disputes will be resolved through peaceful and creative diplomatic efforts."

Australia

On July 12, 2016, the Australian Government issued a statement that "calls on the Philippines and China to abide by the ruling, which is final and binding on both parties."

Thailand

On July 12, 2016, the Government of Thailand released a rather ambiguous statement that did not either support or condemn the arbitration award. The statement indicated "Thailand attaches great importance to maintaining peace and stability in Southeast Asia and adjacent areas, as well as restoring trust and confidence among countries in the regions, in order to foster an environment conducive to sustainable growth and prosperity through cooperation on all constructive activities."

The situation in the South China Sea should be addressed through concerted efforts and by every means, on the basis of mutual trust and confidence as well as equitable benefit.

Mr. LANGEVIN. Japan has recently committed to increasing its patrols and its training activities with the United States in the South China Sea, as well as giving additional military aid to countries such as Vietnam. The Philippines, conversely, have made little public mention of the July tribunal ruling. How are our other allies in the region, specifically Taiwan, reacting to the ruling on the South China Sea territorial disputes?

Dr. ERICKSON. The answer to your question is beyond my expertise; and therefore I am unable to provide you a response.

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