

The Navy as a Political Instrument: Freedom of Navigation Operations 1958-2013

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Submitted in partial fulfillment of the
requirements for the degree of
Doctor of Philosophy
in the Graduate School of Arts and Sciences

COLUMBIA UNIVERSITY

2016

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ABSTRACT

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Michael P. O'Hara

Through the Freedom of Navigation Program, established in 1979, the United States exercises diplomatic and military options for disputing maritime claims it judges to be inconsistent with customary international law and the United Nations Convention on the Law of the Sea. Yet, despite the United States' universal commitment to freedom of navigation and the law of the sea, it has behaved inconsistently from 1979-2013. This dissertation examines the variation and asks under what conditions the United States demonstrates its refusal to acquiesce to maritime claims—either by issuing a diplomatic protest or driving a warship through the disputed waters. This dissertation introduces a new dataset of every coastal state in the world over this 34-year period, coding each type of maritime claim made by every coastal state in the world, whether the United States disputes that particular claim, and whether the United States takes some kind of diplomatic or operational action to dispute it. The mixed-method analysis proceeds with a large-*n* quantitative analysis that sets up a qualitative case study on the Strait of Hormuz. The dissertation begins and concludes with a discussion of current conditions in the South China Sea and the United States activity in this disputed region.

This study finds that territorial and usage claims are twice as strongly correlated with operational assertions as a response than diplomatic protests. More specifically, coastal states that require foreign ships to obtain permission prior to entering their territorial sea are most highly correlated with operational assertions. When the United States disputes a maritime claim, military powers and wealthy states are no more likely to receive Freedom of Navigation operations (FONOPS) than others. Moreover, bilateral trade relationships and polity type hardly

seem to matter. Similarly, neither the number of ships nor diplomatic representation increases the likelihood of FONOPS. Rather, a coastal state's possession of nuclear weapons significantly increases the likelihood of receiving an operational assertion—especially if that states has made a declaration upon ratification of UNCLOS.

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Acknowledgments

First, I recognize my shipmates who are standing the watch. These women and men are at sea, in the desert, and on watchfloors around the world, sworn to defend the Constitution and working to foster stability and peace. I am grateful for their service and their families' sacrifice.

Thus, it has been a rare privilege to return to graduate school while serving as an active-duty naval officer. For that opportunity, I thank Admirals John Christensen and Phil Wisecup and Captain Russ Knight all at the helm of the Naval War College, who supported my bid, not only to become a Permanent Military Professor, but also to attend a top-tier school like Columbia University. We share a common purpose: to educate our officer corps and to assist in the creation of better strategies for addressing the challenges we and our allies face. They already knew well what I was soon to discover: Columbia University's program in Political Science, and in International Relations specifically, stood among the best in the world. Further, they recognized the experience at Columbia would prepare me best to contribute to the faculty at the Naval War College.

I soon learned why. With an advisor like Bob Jervis and dissertation sponsor like Dick Betts, I experienced the persistent, first-rate intellectual challenge to grow intellectually. Like the best leaders I ever encountered in the fleet, they generously gave their time and attention, provided ever-reliable counsel and mentorship, and led by example by sustaining simultaneously their productivity as scholars and, in the words of John Paul Jones "the nicest sense of personal honor." With Jack Snyder who patiently helped improve my research plan, these giants fostered an environment of excellence and collegiality. These attributes were shared and emulated by professors like Jonathan Bendor (visiting from Stanford), Tanisha Fazal, Page Fortna, Stuart Gottlieb, Austin Long, Matthew Waxman, and the indispensable Tonya Putnam, whose guidance

was always on target. Professors Tim Frye, Don Green, and Bob Shapiro generously offered comments or advice at various stages, and the support from Kay Achar, Ingrid Gerstmann, and Betty Howe was constant.

I would never have arrived in Manhattan were it not for the backing of my Naval War College Professors Tom Culora, John Garofano, Tim Hoyt, John Maurer, and Bill Murray who wrote letters on my behalf along with my Carrier Strike Group Commander, Admiral Kurt Tidd, and Airwing Commanders, “Sterno” Stearney, “Goose” Craig, and “Trigger” Kelley. Professors Rich Flinn, Bob Madison, and Doc White helped me discover and hone a love of teaching. By setting the bar high early, Donald Sprague ensured I was always on my tippy-toes and jumping.

My development as a scholar would have been incomplete and this dissertation lopsided were it not for the daily support from my graduate cohortmates at Columbia University. The common workspace on the 7th floor resembled the “ready room” on the carrier where ideas were tested, humility gained, and jargon regularly fined. As I did at sea, I learned as much from peers as from professors, and I stand in awe of the brilliance of friends like Erica Borghard, Seung Cho, Alex Coppock, Lindsay Dolan, Grant Gordon, Chris Kaoutzannis, Trish Kirkland, Summer Lindsey, Erik Lin-Greenberg, Shawn Lonergan, Nick Lotito, Ryan Luby, Sara Moller, Costa Pischedda, Mira Rapp-Hooper, Mike Rubin, Steph Schwartz, Adam Zelizer, and others who provided feedback, listened to ideas, and kept me from going too far astray.

My colleagues in the Department of Strategy and Policy provided helpful comments and feedback on my work as they guided me in the first steps of teaching in a PME environment. I am especially grateful to Andrew Dew, Peter Dutton, Colin Jackson, James Kraska, Tom Mahnken, Dex Wilson, and Toshi Yoshihara. Among these dedicated scholars and professionals, my teaching partner and friend, Charlie Edel, deserves special thanks for his

support and perspective as a scholar, strategist, teacher, policymaker, and friend. Also, I thank Charlene Hanson and Rick Menard who made the operations all run smoothly.

In the early stages of this project, John Hattendorf and Ash Roach provided helpful guidance, the product of their lifetime contributions to fields of naval history and international law respectively. In the final stages of this project, I was fortunate to have the support of the Watson Institute for International and Public Affairs at Brown University, where I received an appointment to be a National Security Fellow. This experience provided the most crucial ingredients for any scholar: time, space, and feedback. At the Watson Institute, this material support and intellectual sustenance was abundant, but especially from Mark Blyth, Richard Boucher, Sue Eckert, Michael Kennedy, Ed Steinfeld, Nina Tannenwald and participants in the Works in Progress seminar. I thank Mike Pavkovic for the opportunity to spend time at Brown.

And while I was pecking away at the keyboard, countless friends and neighbors pitched in to ease the duties of raising six children while working full-time and writing a dissertation. I have unending gratitude for friends who carpoled, coached my kids' teams, led scouting trips, hosted sleepovers, cooked dinners and poured drinks, plowed my driveway, hosted us at holidays, and performed countless others acts of kindness and generosity that kept our ship afloat.

On a more personal note, I thank my mother and father, Áine and Frank O'Hara. I still marvel at their courage to emigrate from Ireland, and I am eternally grateful for the unending encouragement and affirmation they have given me. In addition to love, their insistence that *anything is possible* fostered an optimism that led me to believe I might be able to achieve something worthwhile someday. "Well, why wouldn't you?" I can hear my mom not quite asking. My efforts here pale next to their feats of raising a family, building a community, and

the back-breaking work of erecting the Chicago skyline one steel beam at a time. Thank you, Mom, for patiently teaching me—sitting at the dining-room table in fifth grade—to write paragraphs. Thank you, Dad, for modeling what good, honest hard work really looks like and helping me believe I could build something, too.

Finally, I thank my wife Nora. I previously was indebted to her for running the family while I was gone on multiple deployments for six months at a time to unfriendly places. (Of course, she runs the family when I'm home, too. My deployment absence only made her life easier!). The dissertation process, however, showed just how loving and committed a spouse I am blessed with, and how much I owe my accomplishments to the strength and steadfastness of this incredible woman who did it all while I researched and wrote. Additionally, I thank her for the doses of humility and motivation she provided daily. When your spouse rises every morning before dawn to train through New England winters for the Boston Marathon, there is no room to complain about how hard it is to write. And when she has just run twenty miles, served breakfast to six children, and made you a pot of coffee before 8:00 AM, that loving smile is really saying, “finish your damn dissertation.” And so I have.

Non sibi, sed patriae.

Dedication

To Nora, Sean, Catherine, Thomas, Michael, Ryan, and Niamh.

Disclaimer

The views expressed in this dissertation belong to the author alone and do not represent intentionally or unintentionally the views of the United States Department of Defense, United States Navy, or the Naval War College.

CHAPTER 1. INTRODUCTION

“The commerce of the United States has become an interesting object of attention, whether we consider it in relation to the wealth and finances or the strength and resources of the nation. With a seacoast of near 2,000 miles in extent, opening a wide field for fisheries, navigation, and commerce, a great portion of our citizens naturally apply their industry and enterprise to these objects. Any serious and permanent injury to commerce would not fail to produce the most embarrassing disorders. To prevent it from being undermined and destroyed it is essential that it receive an adequate protection.”

-President John Adams, Special Message to the Senate and the House; May 16, 1797

“Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war...”

-President Woodrow Wilson, *Fourteen Points*, December 8, 1918

“Navigation we want. Let them fish if they want. That’s my view.”

-President Richard Nixon, White House Tapes, 1971

1.1 Background: Contemporary Illustration of Freedom of Navigation Operations

On 30 January 2016, *USS Curtis Wilbur*, a guided-missile destroyer sailed within 12 nautical miles of the Triton Island, a disputed land feature among the Paracel Islands located in the South China Sea. Months earlier on 27 October 2015, *USS Lassen*, a ship of the same class, had conducted a similar transit inside 12 nautical miles of five islands in the Spratly Islands – including an artificial island recently constructed by China in disputed waters of the South China Sea. In both cases, a warship of the United States Navy conducted an operational assertion under the Freedom of Navigation program. These peacetime deployments of the Navy demonstrate the United States’ refusal to acquiesce to maritime claims that the United States disputes as inconsistent with customary international law as reflected in the United Nations Convention on the Law of the Sea. As a matter of policy, the United States does not take a position on territorial claims, nor does it opine on which nation’s claim is superior when multiple states claim a land feature. Rather, the United States focuses on the sea—specifically, on the navigational rights in

the territorial seas, exclusive economic zones, and high seas surrounding land features of all coastal states. According to Secretary of Defense Ashton Carter, Freedom of Navigation operations are part of a “broader strategy to support an open and inclusive international security architecture founded on international law and standards.”¹

While some may view Freedom of Navigation operations as part of a strategy specific to the United States designed to increase its own security and advantage, a broader view recognizes that navigational freedom—and the international legal regimes pertaining to maritime claims more broadly—represent an important condition for international cooperation in an anarchic international system. This dissertation argues that the Freedom of Navigation program fulfills dual functions for the United States, benefiting itself and others.

Insofar as “international politics is the realm of power, struggle, and accommodation,” it is also the realm of institutions and regimes to minimize the likelihood of armed conflict and to foster cooperation and greater prosperity for all states.² The Freedom of Navigation program does not reflect an exclusively realist view of the world, in which international politics is a struggle for military power dominated by organized violence.³ Neither does the Freedom of Navigation program reflect an exclusively institutionalist view of the world, naïve about power and conflict, in which economic interdependence demands norms, rules, and institutions to facilitate altruistically the Pareto efficient outcome for all states.⁴ Rather, the Freedom of

¹ Ashton Carter, “Regarding U.S. Military Operations in the South China Sea,” December 21, 2015, <http://news.usni.org/wp-content/uploads/2016/01/Sen.-McCain-FONOP-Letter-Response.pdf>.

² Kenneth N Waltz, *Theory of International Politics* (Long Grove, IL: Waveland Press, 1979), 113.

³ Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* (Boston: Little, Brown and Company, 1977), 23.

⁴ Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, N.J: Princeton University Press, 1984), 7–10; Keohane and Nye, *Power and Interdependence*, 23–29.

Navigation program uses military and diplomatic instruments to support and demonstrate its commitment to customary international law as reflected in the United Nations Convention on the Law of the Sea of 1982 in a manner pursuant to both the interests of the United States and the global public good.

Despite this support for the provisions in UNCLOS, the United States has not signed the treaty for a number of reasons related to American domestic politics over the decades since the conclusion of the final UNCLOS conference.⁵ However, insofar as UNCLOS reflects customary law and the law contained in the 1958 Geneva Convention on the Law of the Sea to which the US was a signatory, the US abides by the law of the sea and articulates its commitment to “promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law.”⁶ Upon his announcement of the United States’ decision not to accede to the UNCLOS treaty, President Reagan also his intent to “exercise and assert navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention.”⁷ He concluded the United States will “not acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”

⁵ James Malone, “The United States and the Law of the Sea After UNCLOS III,” *Law and Contemporary Problems* 46, no. 2 (April 1, 1983): 29–36. The primary reason the United didn’t ratify UNCLOS in December 1982 stemmed from its disagreement with provisions on deep seabed mining as articulated in Part XI of UNCLOS. The United States objected to the terms for exploitation of minerals in the seabed and its exclusion from decisionmaking in the International Seabed Authority. The scheme for the distribution of sovereign mineral wealth of the coastal state was seen contrary to United States’ national and commercial interest.

⁶ Ronald Reagan, “Statement on United States Oceans Policy,” accessed March 31, 2016, <https://reaganlibrary.archives.gov/archives/speeches/1983/31083c.htm>.

⁷ Ibid.

The patrols of *USS Lassen* and *USS Curtis Wilbur* demonstrate this refusal to acquiesce to claims of other states it disputes. *USS Lassen*'s patrol entered the territorial seas of "five maritime features in the Spratly Islands [...] which are claimed by China, Taiwan, Vietnam, and the Philippines" to challenge the "policies of some claimants requiring prior permission or notification of transits within the territorial sea."⁸ Similarly, *USS Curtis Wilbur* drove within the 12-nm territorial sea of Triton Island to challenge "the attempts by the three claimants—China, Taiwan, and Vietnam—to restrict navigation rights and freedoms around the features they claim by policies that require prior permission or notification of transit within territorial seas."⁹ In both cases, the United States did not voice opposition to the territorial sovereignty of any land feature. Rather, the United States challenged the restrictions on the freedom of navigation into territorial seas without prior permission or notification. These Freedom of Navigation assertions are finely tuned efforts of the United States to communicate political and legal messages not through words, but through actions—the patrols of warships during peacetime.

In a statement by a spokesperson from the Vietnamese Ministry of Foreign Affairs, Vietnam responded to the patrol of *USS Curtis Wilbur* by reaffirming sovereignty over the Parcel and Truong Sa Islands and restating its respect for "the right of innocent passage through the territorial sea conducted in accordance with relevant rules of international law, in particular the UNCLOS (Article 17). We request all countries to make positive and practical contribution to maintaining peace and stability in the East Sea (South China Sea) and to respect international

⁸ Carter, "Regarding U.S. Military Operations in the South China Sea." According to Carter's Letter to Senator John McCain, *USS Lassen* entered the territorial seas of Subi Reef, Northeast Cay, Southwest Cay, South Reef, and Sandy Cay.

⁹ Full text of the January 30 press statement from the Department of Defense on the *USS Curtis Wilbur*'s freedom of navigation mission is available in Sam LaGrone, "U.S. Destroyer Challenges More Chinese South China Sea Claims in New Freedom of Navigation Operation," *USNI News*, January 30, 2016, <http://news.usni.org/2016/01/30/u-s-destroyer-challenges-more-chinese-south-china-sea-claims-in-new-freedom-of-navigation-operation>.

law.”¹⁰ Freedom of Navigation assertions constitute American efforts to make “positive and practical contribution to maintaining peace and stability” around the world—not only regarding maritime disputes in the South China Sea, but around the “wide common” of all seas.¹¹

1.2 Question: Explaining Variation in Freedom of Navigation Operations

These contributions by the United States Navy, however, do not occur in every case when the United States has a legal disagreement with another coastal state about its maritime claims. Rather, the United States tends to conduct operational assertions rarely—approximately 10% of all country-year-disputes—and in chapter 4, the frequency is explored in greater detail. So why is this activity so rarely undertaken? Under what conditions does the United States assert its freedom of navigation? When does it act to demonstrate its disagreement with disputed maritime claims? Why does it send the navy to demonstrate its refusal to acquiesce to disputed claims against some coastal states and not others? This dissertation examines a particular peacetime use of the United States Navy and considers the political choices made in directing its efforts along one aspect of United States foreign policy. Specifically, this dissertation examines the Freedom of Navigation program and seeks to explain variation of policy implementation from 1958 to 2013.

Relatively little literature exists on the peacetime use of navies. Many studies of naval power in international politics consider the warfighting utility of navies during combat.¹²

¹⁰ Le Hai Binh, “Remarks by MOFA Spokesperson Le Hai Binh on US Navy’s FONOP,” MLNews, *Bo Ngoai Giao Viet Nam: Ministry of Foreign Affairs*, accessed March 20, 2016, http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns160131221102.

¹¹ Alfred Thayer Mahan, *The Influence of Sea Power Upon History, 1660-1783* (Boston: Little, Brown and Company, 1918), 25.

¹² For example, Alfred Thayer Mahan, *The Influence of Sea Power Upon History, 1660-1783* (Boston: Little, Brown and Company, 1918); George W. Baer, *One Hundred Years of Sea Power: The U. S. Navy, 1890-1990* (Stanford, CA: Stanford University Press, 1993); Paul M. Kennedy, *The Rise and Fall of British Naval Mastery*, 2nd edition (Amherst, NY: Humanity Books, 2006); Samuel Eliot Morison, *History of United States Naval Operations in World*

Additionally, the effects of gunboat diplomacy or the use of navies to coerce adversaries in crises have received scholarly attention.¹³ This gap in the literature regarding navies in times of peace is surprising not only because of the expeditionary nature of naval forces, which maintain an active and distributed presence around the world in times of peace and in war, but also because of the relationship between maritime security and international trade. Navies have long deployed to ensure security of seaborne trade, and in 2013 approximately 90% of world trade of merchandized goods (by volume) moves by water (approximately 65% of goods measured by value moves by water).¹⁴ Additionally, interstate disputes over maritime law and maritime claims have raised tensions and increased the likelihood of conflict in places like the South China Sea.

This dissertation contributes to this body of literature by examining one class of operations conducted by the United States Navy in peacetime for political and legal purposes. Formally established in 1979, the Freedom of Navigation Program provides a mechanism with clear processes to protest maritime claims that the United States interprets as being inconsistent with international law. Freedom of Navigation has been a concern of maritime states for

War II: Leyte, June 1944 - January 1945 (University of Illinois Press, 2002); Bruce A. Elleman and Sarah C. M. Paine, *Naval Blockades And Seapower: Strategies And Counter-Strategies, 1805-2005* (Taylor & Francis US, 2006); John H. Maurer, "American Naval Concentration and the German Battle Fleet, 1900-1918," *Journal of Strategic Studies* 6, no. 2 (1983): 147-81.

¹³ For example, James Cable, *Gunboat Diplomacy 1919-1991: Political Applications of Limited Naval Force*, 3rd ed (New York: St. Martin's Press, 1994); James Cable, *The Political Influence of Naval Force in History* (New York: St. Martin's Press, 1998); Henry J. Hendrix, *Theodore Roosevelt's Naval Diplomacy: The U.S. Navy and the Birth of the American Century* (Annapolis, Md: Naval Institute Press, 2009); Joseph F. Bouchard, *Command in Crisis: Four Case Studies* (New York: Columbia University Press, 1991); Brent Alan Ditzler, "Naval Diplomacy Beneath the Waves: A Study of the Coercive Use of Submarines" (Thesis, Naval Postgraduate School, 1989), <http://calhoun.nps.edu/mgmt/handle/10945/27152>; Bradford Dismukes and James M. McConnell, *Soviet Naval Diplomacy* (New York: Pergamon Press, 1979); Ronald O'Rourke, "The Tanker War," *U.S. Naval Institute Proceedings*, May 1988, <http://www.usni.org/magazines/proceedings/1988-05/tanker-war>; Edward N. Luttwak, *The Political Uses of Sea Power*, *Studies in International Affairs* 23 (Baltimore: Johns Hopkins University Press, 1974).

¹⁴ Stephen M. Carmel, "Globalization, Security, and Economic Well-Being," *Naval War College Review* 66, no. 1 (Winter 2013): 45.

centuries, and the United States has asserted its navigational rights through diplomacy and force for as long as it has existed as a republic. Indeed, some of the earliest debates about the utility of an American navy responded to the threats to commerce from piracy and the imperative of free navigation for a commercial trading nation.¹⁵ Moreover, the United States issued diplomatic protests prior to formal establishment of the Freedom of Navigation program in 1979.¹⁶ Through the Freedom of Navigation program, a dual-department program of the United States Government administered by the Departments of State and Defense, the United States uses diplomatic and military mechanisms to demonstrate its refusal to acquiesce to maritime claims with coastal states it interprets as inconsistent with international law.

1.3 Between the Two Poles of Idealism and Realism

The stated objectives of the Freedom of Navigation program are apolitical. According to Department of Defense publications, the program constitutes the United States government's universal commitment to oppose all maritime claims that threaten freedom of the seas. Some may infer that the program is an altruistic American commitment to challenge any disputed claim—anywhere, any time. As such, the United States would seem to assume a role of the global guarantor of freedom of the seas. According to this view, the United States would provide—idealistically and benevolently—the global good of maritime freedom for all to enjoy.

¹⁵ For example: John Jay, "Federalist, No. 4," November 7, 1787, http://avalon.law.yale.edu/18th_century/fed04.asp; Alexander Hamilton, "The Federalist Papers No. 11," November 23, 1787, http://avalon.law.yale.edu/18th_century/fed11.asp; Merrill D. Peterson, "Thomas Jefferson and Commercial Policy, 1783-1793," *The William and Mary Quarterly* 22, no. 4 (October 1, 1965): 584–610; Samuel Flagg Bemis, *John Quincy Adams and the Foundations of American Foreign Policy*, Fourth Ed. (New York: A.A. Knopf, 1969); Charles N. Edel, *Nation Builder: John Quincy Adams and the Grand Strategy of the Republic* (Cambridge, Massachusetts: Harvard University Press, 2014).

¹⁶ From 1958 until the formal establishment of the Freedom of Navigation program in 1979, the United States issued diplomatic 28 diplomatic protests: Algeria 1964, Argentina 1963 1967, Bangladesh 1978, Brazil 1970, Cameroon 1963 1968, Canada 1967 1969, Ecuador 1967, Guinea 1964, Haiti 1973, India 1976, Liberia 1977, Libya 1973 1974, Mauritania 1973, Mexico 1969, Panama 1967, Philippines 1961 1969, Sierra Leone 1973, Soviet Union 1958 1964 1965 1967, Thailand 1963, Uruguay 1970.

Indeed, President Woodrow Wilson articulated this vision in 1918 for “absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war” in his *Fourteen Points*. Today, this message resonates in the United States’ maritime strategy, *Cooperative Strategy for Twenty-first Century Seapower* and even in its recruiting commercials for the United States Navy, portrayed as a “global force for good.”

Wilson’s peace program reflected in his *Fourteen Points* sought a “just and secure peace” to improve the stability and prosperity of the world beyond the former methods of *realpolitik* and balance-of-power politics. Yet, many in the United Kingdom perceived Wilson’s idealistic vision in a more troubling light as the rapidly growing naval power of the United States challenged the Royal Navy’s command of the sea and appeared to some observers to be “‘more ambitious and sensational’ than even the German prewar expansion,” an underlying cause of the First World War.¹⁷

Even after the transition of naval mastery from British to American power after World War II, the prospect of peace through an Anglo-American alliance prompted caution from sympathetic realists. Some rejected the notion that “an Anglo-American policeman wielding a Big Stick in the velvet-gloved hand of the Good Neighbour” could preserve a “fantastical idea” of world peace.¹⁸ Such a dominant force would likely result in a “partition of the world into two antagonistic blocs” and inevitable conflict.¹⁹ Wielding unrestricted power in the Pacific after 1945, some even questioned whether the United States would turn the world’s largest ocean into an “American lake” as officials of the United States Navy and Army revealed plans in late-1945

¹⁷ Bernard Semmel, *Liberalism and Naval Strategy: Ideology, Interest, and Sea Power During the Pax Britannica* (Boston: Allen & Unwin, 1986), 167.

¹⁸ Aylmer Vallance, “The Future of Anglo-American Relations,” *The Political Quarterly* 17, no. 1 (January 1, 1946): 78.

¹⁹ *Ibid.*, 77.

for basing on Pacific islands such as Wake, Midway, and Eniwetok. Debates ensued over whether they would be sovereign holdings of the United States or operated under international trusteeship.²⁰ The Soviets accused Truman of imperialism in the Pacific for military aggrandizement not the creation of a benign buffer zone.²¹ Although the Atlantic Charter had sought “no aggrandizement, territorial or other,” American leaders after 1945 assumed implicitly the role of maintaining peace in the Pacific because it was the only country capable of doing so. Moreover, the pre-war policy statement of the Atlantic Charter extended the Wilsonian vision of the world, characterized by “access, on equal terms, to the trade and to the raw materials of the world” enabled by the ability to “traverse the high seas and oceans without hindrance.”²²

Between such idealistic visions of world peace and realistic suspicions of national interests, the empirical evidence of United States behavior over the last 55 years indicates some interesting variation that suggests the program is neither apolitical and altruistic nor focused on increasing American power. The variation in policy implementation varies in ways that confound clear conclusions that the United States’ motivations are really so altruistic or whether the United States uses freedom of navigation as a fig leaf for maintaining its hegemonic status in the world. Such simplistic descriptions overlook the politics involved in Freedom of Navigation operations, which this dissertation explores.

²⁰ Eleanor Lattimore, “Pacific Ocean or American Lake?” *Far Eastern Survey* 14, no. 22 (1945): 313–314. These concerns echoed statements printed in *Pravda* on 7 November 1945 and later reprinted on 11–12 November 1945 in the *New York Herald Tribune*. Some further discussion of the Pacific as an “American lake” appears in a telegram (12 November 1946) from the U.S. Chargé d’Affairs in Moscow (Durbrow) to the Secretary of State discussion *Pravda*’s descriptions of President Truman’s plan for mandate over Japanese mandates.

²¹ For discussions of the competing grand strategies of the United States and Soviet Union in the post-war period, see: John Lewis Gaddis, *The United States and the Origins of the Cold War, 1941–1947* (Columbia University Press, 1972), 319; Hal M. Friedman, *Creating an American Lake: United States Imperialism and Strategic Security in the Pacific Basin, 1945–1947* (Greenwood Publishing Group, 2001), 90.

²² Winston S. Churchill and Franklin D. Roosevelt, “The Atlantic Charter” (Great Neck Publishing, August 14, 1941).

1.4 Dissertation Plan

This dissertation considers both of these perspectives and introduces a third. First, I examine the variation of the program through the lens of a Liberalism Model. This explanation argues that the United States' Freedom of Navigation program reflects a commitment to increasing peace and cooperation through institutions such as maritime law. The Liberalism Model argues for the pacifying effects of democracy and the economic interdependence. Thus, according to this model, the United States would protest and assert against all claims that are inconsistent with international law. And when resources are scarce and difficult choices need to be made, then the United States would be more likely to use the Freedom of Navigation program to assert against autocratic states and those least engaged in the global economy.

Second, I examine the variation of the program through the lens of a Security Model. This explanation argues that the United States' Freedom of Navigation Program uses international law as a means of increasing its own security and securing relative power worldwide. In a realist world conditioned by anarchy, the absence of a supranational government means that states cannot appeal some top-cop for safety and services, but must provide for their own security. According to this theory of the international system, states will either seek security or strive to maximize power relative to other states. These views suggest the United States would use the Freedom of Navigation program to balance against threats and rising regional powers, or it would use legal action to pick on weaker states to increase its own relative power.

Finally, I consider a third explanation that argues the variation in the Freedom of Navigation program results from the politics within and among the organizations tasked to plan, coordinate, and execute policy. To really understand why the United States acts against some

countries and not others, one must look inside the “black box” of the United States’ Departments of Defense and State to consider the opportunities and challenges, and incentives and constraints, facing those who represent the United States in diplomatic and operational capacities. This Organization Model recognizes that strategy is a bridge linking desired policy ends with available means. Thus, one must be attentive to the resources necessary for implementing the policies reflected in the Freedom of Navigation program and the human organizations, bureaucratic structures, command-and-control configurations, and operationally ready forces who do the work.

Through a nested analysis of large-*n* quantitative analysis that motivates case selection for qualitative analysis, this dissertation demonstrates that no one of these models alone explains the variation observed over the 55 years broadly since 1958 or since the formal establishment of the Freedom of Navigation program in 1979. However, this study calls particular attention the importance of the organizational variables in determining outcomes. These models are indeed interactive, and, taken together, they offer a more complete understanding of the United States’ approach to Freedom of the Seas that ever produced. The selected case in Chapter 5 demonstrates how variation in organizational priorities and resources and bureaucratic tensions between the President and the Department of Defense account for a significant amount of variation under some conditions

Additionally, this dissertation introduces a new dataset comprising 55 years of operations (both before and after the formal establishment of the Freedom of Navigation program). This dataset contains approximately 7,400 observations recording the maritime claims of every coastal state in the world from 1958 to 2013, whether the United States disputes those claims, and whether the United States took diplomatic or operational action to demonstrate their refusal

to acquiesce to those disputed claims. These data are assembled primarily from two primary sources to construct the dependent variable: the Department of State's annual *Digest of United States Practice in International Law* and the Department of Defense's *Maritime Claims Reference Manual* published by the Operational Law Division of the United States Navy Judge Advocate General on behalf of the Under Secretary of Defense for Policy. From these sources and others, the dataset records whether the United States conducted diplomatic protests and/or operational assertions against each coastal state in the world over the entire time period.

The dataset also assembles information on economic, military, political, legal, diplomatic, and other independent variables for every coastal state in the world from 1958 to 2013. It categorizes each maritime legal claim made by the coastal state, whether the United States disputes the claim, and what action (diplomatic or operational), if any, that the United States has taken to demonstrate its refusal to acquiesce to the claim. The dataset also includes information regarding the organizations responsible for acting on behalf of the United States government whether diplomatic or naval the theater and naval component levels during the time period.

This dissertation introduces a specific policy problem to the political science literature and employs theories of international law, diplomatic communication and international signaling, and even coercion and gunboat diplomacy. The goals in doing so are threefold. First, the dissertation asks under what conditions does the United States employ a particular tool of statecraft—diplomatic protests or military assertions under the Freedom of Navigation program—to influence international law? In considering this question, the dissertation makes a theoretical contribution to literature on both a state's ability to coerce another and a state's compliance with international law. This dissertation addresses a gap between the two

fundamentally divergent viewpoints in international law: the utopian view which sees international law as a “branch of ethics” and the positivist perspective which views international law as a “vehicle of power.”²³

Third, this dissertation asks question about signaling. Under what conditions are military forces used to convey political signals to other states? By concentrating on one discrete use of the navy, this dissertation explains the conditions under which a particular message may be sent on ocean policy issues. FON operations are ostensibly “apolitical operations” intended to be nonprovocative and nonconfrontational. However, despite these intentions, FON operations may be 1) perceived as politically motivated, 2) may provoke adversaries, and 3) create confrontation where they sought to avoid it. This therefore has implications for our understanding of naval signaling and crisis stability.²⁴ However, before we can assess why some routine operations escalate, one must consider why the U.S. conducts them in some places and not others. Routine operations are not conducted at random. They are relatively deliberate activities and they occur in regions of the globe where the United States has been present for decades. Finally, this dissertation provides insight into the value of naval presence during peacetime and the non-combat use of the navy as an instrument of foreign policy.

The dissertation proceeds with the following organization. Chapter 2 reviews the Freedom of Navigation program and essential terms and concepts pertaining to the law of the sea. Chapter 3 reviews literature and introduces three theoretical models—a liberalism model, a security model, and an organizational model—and hypotheses to be tested subsequently.

²³ E. H. Carr, *The Twenty Years' Crisis, 1919-1939*, New Edition (New York: Palgrave Macmillan, 2001), 161.

²⁴ See Avery Goldstein, “First Things First: The Pressing Danger of Crisis Instability in U.S.-China Relations,” *International Security* 37, no. 4 (April 1, 2013): 49–89; Jonathan G. Odom, “True Lies of the Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should Be Concerned,” *Michigan State University College of Law Journal of International Law* 18 (2010): 411–52.

Chapter 4 introduces a new dataset of every maritime claim of every coastal state in the world from 1958-2013, whether the United States disputes that claim, what kind of action if any the United States takes each year to demonstrate its refusal to acquiesce to that claim. The chapter describes the sources of the data and offers some descriptive statistics. Chapter 5 describes the nested analysis method used in this dissertation and conducts a large-*n* quantitative analysis using logit regression techniques. The results are discussed and used to select cases for qualitative analysis in the next chapter. Chapter 6 focuses on two coastal states, Iran and Oman, to offer a set of qualitative case studies that illuminate the reasons why the United States conducts operational assertions under the Freedom of Navigation program against some states and not others. The chapter is organized to look at a set of contiguous maritime dyads. By examining the United States behavior with respect to Iran and Oman, the reader observes American behavior in important ocean areas of the world. These two cases exhibit important variation on variables in each of the theoretical models, and the qualitative approach complements the quantitative analysis from Chapter 5. Chapter 7 concludes the dissertation with a focus on the maritime legal disputes in the South China Sea, discussion of the greater strategic implications of freedom of navigation operations there, and policy recommendations.

The Freedom of Navigation program provides a window into the ways in which the United States chooses diplomatic and military tools to achieve national objectives. This is theoretically interesting because three different theoretical approaches suggest different empirical outcomes. By examining the implementation of a particular policy through Freedom of Navigation operations, this study makes a theoretical contribution to the literature on uses of power, coercion and naval signaling, complex interdependence, and bureaucracy. Additionally this study offers guidance to diplomats, policy planners, and operational practitioners whose

challenge to draft and implement policy from the State Department, the Chief of Naval Operations, and Geographic Combatant Commanders.

CHAPTER 2. OVERVIEW OF THE LAW OF THE SEA

2.1 UNCLOS: A Sea Change in Maritime Law

Long before 1982 when the United Nations member states concluded “the largest and most complex international negotiation every held,” it appeared unlikely the international community would ever achieve agreement on comprehensive ocean policy.²⁵ Indeed, decades earlier, the negotiations on the 1958 Geneva Conventions on the Law of the Sea had fallen short of its intended mark: to negotiate a new equilibrium for an acceptable breadth of the territorial sea. Decades earlier, the 1930 Hague Codification Conference also had tried and failed to codify 3nm as the international norm for the breadth of territorial seas. No state disputed that territorial waters may include a coastal belt of 3nm, but several states advocated for a greater breadth of territorial seas such as 4nm, 6nm or 18nm.²⁶ Although the desire for an international standard was widely shared by most major powers, a draft convention eluded the delegates in 1930.²⁷ The 1958 Geneva Convention on the Law of the Sea achieved some important goals, producing four conventions and one optional protocol.²⁸ However, these accomplishments were widely regarded as low-hanging fruit, and consensus on the limits of a territorial sea remained out of reach.

The obstacles to consensus on territorial seas had been erected centuries earlier as states clashed over ownership of the seas. States long have asserted sovereign rights to territorial

²⁵ William Wertenbaker, “The Law of the Sea, Part 1,” *The New Yorker*, August 1, 1983, 39–40.

²⁶ “Territorial Waters,” *The American Journal of International Law* 24, no. 1 (January 1, 1930): 27–28.

²⁷ James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press, 2011), 96.

²⁸ Tullio Treves, “1958 Geneva Conventions on the Law of the Sea: Introductory Note” (United Nations Audiovisual Library of International Law, 2008), http://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf. The four conventions address Territorial Sea and the Contiguous Zone, the High Seas, Fishing and Conservation of the Living Resources of the High Seas, and the Continental Shelf. The optional protocol regards the Compulsory Settlement of Disputes.

waters, a belt of water adjacent to the coastline. The incentives to claim ownership are strong: a wide territorial sea not only increases the resource wealth of the coastal state, but it provides a security buffer.

The customary definition of territorial water hinged on the idea of control, which was perhaps best captured in Cornelius van Bynkershoek's 17th century maxim, "*Imperium terrae finiri ubi finitur armorum potestas*," and has been referred to as the "cannon-shot rule."²⁹

According to this custom, waters within the range of cannon-shot were considered *de facto* territorial waters. Insofar as customary law is the result of actions by strong states, the cannon-shot rule persisted as customary international law, determined by a state's ability to control its adjacent seas with cannons that ranged a short distance offshore.³⁰ When backed explicitly by fire-power from shore batteries, claims to greater distances endured as accepted state practice until the mid-20th century. If coastal states tended to view the oceans as a public good, that idealism militated against an impulse to territorialize the sea.

The extent to which states seek to increase their share of the oceans and restrict activity within their zones of jurisdiction depends to some extent on two contrasting visions of states' relation to the sea—namely whether seas are free or under state dominion. This question can be traced to a centuries-old debate between Dutch jurists, Hugo Grotius and Cornelius van Bynkershoek. Grotius' treatise on the freedom of the seas, *Mare Liberum*, challenged the claims to the high seas by Spain and Portugal, which had divided the waters of the New and Old World along a line of longitude in the mid-Atlantic. The Treaty of Tordesillas (1494) split the world into two maritime spheres of influence. These spheres represented the two halves which Spain

²⁹ Translated from the Latin, this expression says, "The rule of land ends where the power of arms ends."

³⁰ Wyndham L. Walker, "Territorial Waters: The Cannon Shot Rule," *British Year Book of International Law*, Vol. 210, 1945, 211.

and Portugal declared to be their “enclosed waters,” thus excluding all other political and economic claims.³¹ On behalf of his client, the Dutch East India Company, Grotius argued that the oceans are a public good and that all states enjoy the right to use the sea freely. The world’s oceans are a global commons over which no one state or international body has dominion.³² This principle became the basis for the Declaration of Paris (1856) and subsequent doctrine on the freedom the sea. Today, this is represented in the United Nations Convention on the Law of the Sea.

Contemporary maritime jurists like John Norton Moore reflect the Grotian perspective on freedom of navigation in statements such as this offered during a preparatory meeting of the UN Convention on the Law of the Sea:

The costs associated with any failure to recognize freedom of navigation [. . .] will not necessarily be immediately manifest. Initial challenges may be subtle, plausible, and limited. Through time, however, the common interest will be eroded by unwarranted restrictions on transit, discrimination among users, uncertainty of transit rights, inefficient and inconsistent regulations, efforts at political or economic gain in return for passage, increased political tensions, and perhaps even an occasional military confrontation.³³

This statement highlights the shared responsibility of all states to respond to threats to the public good on the high sea. Excessive claims threaten freedom of the seas just as direct threats like piracy do. Article 100 of UNCLOS provides that “all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” Thus, fighting piracy is an international obligation, but by similar

³¹ Ann L. Hollick, *U.S. Foreign Policy and the Law of the Sea* (Princeton University Press, 1981), 5.

³² Magnus Wijkman, “Managing the Global Commons,” *International Organization* 36, no. 3 (July 1, 1982): 511–536.

³³ John Norton Moore, “The Regime of Straits and the Third United Nations Conference on the Law of the Sea,” *The American Journal of International Law* 74, no. 1 (January 1, 1980): 77, 79.

logic, any disputed legal claim that seeks to restrict navigational rights through international waters represents a threat to the international community, too.

Beginning with the first and second UN Conferences on the Law of the Sea in 1958 and 1960, efforts to address contentious issues of territorial seas, baseline claims, limits of continental shelf, and jurisdiction of fisheries proved difficult and ultimately unable to find resolution. The principle cleavage at these first two conventions fell along Cold War lines where issues of military security, commercial navigation, and fishing interests had the greatest salience.³⁴ The particular weakness of these two conferences was their failure to reach agreement on two key issues: the breadth of territorial seas and limitations on the scope of claims of a national continental shelf. In September 1945, President Harry S Truman triggered a “sea change” in maritime claims. Although not pertaining to navigation *per se*, the Truman Proclamation declared the entire continental shelf of the United State under its jurisdiction, thereby upsetting the equilibrium of territorial seas as defined as 3nm. This proclamation prompted negotiation that led to the Geneva Convention on the Law of the Sea in 1958, and eventually catalyzed the creation of the EEZ under UNCLOS in 1982.³⁵ The United States held equities in each of the negotiation areas at the Law of the Sea Convention including the breadth of the territorial sea, but freedom of navigation was its priority issue. Freedom of Navigation was then, and remains today, a cornerstone of American economic and military policy.

In a 1971 Top Secret Memorandum for the President, Henry Kissinger stressed this priority to President Nixon. Following the review of U.S. Oceans Policy and the release of National Security Decision Memorandum 125, Kissinger highlighted the threat to American interests emerging from diplomatic negotiations regarding the extension of territorial seas and

³⁴ Hollick, *U.S. Foreign Policy and the Law of the Sea*, 137.

³⁵ Martin Ira Glassner, *Neptune's Domain: A Political Geography of the Sea* (Boston: Unwin Hyman, 1990), 5.

other issues.³⁶ In a cover memorandum accompanying the National Security Decision Memorandum for the President, Kissinger explicated his concerns to President Nixon: Coastal states were tending toward “extensive unilateral territorial sea claims” stretching as far 200nm, and this territorialization of the seas posed a direct threat to freedom of navigation.³⁷ According to Kissinger, “generat[ing] broad multilateral support for issues most vital to us, namely a 12-mile territorial sea and free transit through straits” should be pursued above all else. The priority for many coastal states had been simply to protect exclusive fishing rights and access to other resources, but a consequence of these policies was the encroachment upon navigational freedom in territorial seas. For the United States, establishing a new norm of 12nm and preserving transit through international straits were of “paramount importance to US security.”³⁸ The root of the coordination problem for United States negotiators was that few coastal states “care much about freedom of navigation, but very many want to maximize their claim to fisheries and seabed resources.”³⁹ For the United States, the major objective to be gained through institutional frameworks was the preservation of “maximum naval and air mobility.”⁴⁰

As the first of eleven rounds of negotiation for the Law of the Sea Conference began in 1973, the priority of the United States negotiating team was clear. In its response to a tasker from Henry Kissinger (then the National Security Assistant to President Nixon), the Interagency

³⁶ Henry A Kissinger, “National Security Decision Memorandum 122” (National Security Council, July 22, 1971), RG 59, S/S-I Files: Lot 83 D 305, National Archives, <https://history.state.gov/historicaldocuments/frus1969-76ve01/d405>.

³⁷ Ibid.

³⁸ Henry A. Kissinger, “Memorandum From the President’s Assistant for National Security Affairs (Kissinger) to President Nixon, Washington, July 22, 1971,” July 22, 1971, NSC Files, NSC Institutional Files (H-Files), National Archives, Nixon Presidential Materials, <https://history.state.gov/historicaldocuments/frus1969-76ve01/d404>.

³⁹ Ibid.

⁴⁰ Ibid.

Task Force on the Law of the Sea sought first to build consensus among a “common front of states with similar interests to demonstrate well in advance the futility of attempting to outvote the U.S. [...] on the straits issue and [maintain] strong opposition to their innocent passage proposal.”⁴¹ In earlier meetings, the Soviet Union—with US support—had proposed codifying freedom of transit through straits used for international navigation and a 12-mile territorial sea.

Negotiation blocs formed between industrialized naval powers and lesser powers that balanced their interests. A special regime for straits used for international navigation was opposed by a coalition of “hard-line strait states” and “archipelago states” whose definition of innocent passage was “more restrictive and subjective” than the customary international law at the time.⁴² Responding to this coalition, the United States (with support from UK, France, Japan, Soviet Union, Kuwait, Madagascar, Tunisia, Norway, and Denmark) argued for its “vital national interests.” The status quo powers position demanded a “12-mile territorial sea coupled with free and unimpeded transit through and over straits used for international navigation, and straits transit considered separately from that of passage generally in the territorial sea.”⁴³ To many members of the delegation, the Third World states fulfilled an expectation of the neorealist theory of international relations; they coordinated around similar interests to balance the “superpowers.”

⁴¹ Charles N. Brower, “Memorandum From the Acting Chairman of the Law of the Sea Task Force (Brower) to the President’s Assistant for National Security Affairs (Kissinger), Washington, June 1, 1973, *Foreign Relations of the United States, 1969-1976*, Vol E-3, Document 2, <https://history.state.gov/historicaldocuments/frus1969-76ve03/d2>.

⁴² Ibid. The Brower memorandum names the following states as participating in this coalition supporting restrictions on Innocent Passage: Egypt, Spain, Morocco, Philippines, Indonesia, Greece, Cyprus, Yemen, Sri Lanka, Peru, and Malaysia. China was increasingly vocal at this conference and endorsed “extreme positions” of the Third World to oppose the “superpowers.” The Chinese accused the Soviets and Americans of pursuing narrow limits “to dominate the oceans militarily and to plunder the resources of the oceans.”

⁴³ Ibid. President Nixon approved this position and disseminated policy guidance one month later via National Security Decision Memorandum 225, Washington, July 16, 1973, *Foreign Relations of the United States, 1969-1976* Volume E-3, Documents on Global Issues, 1973-1976, Document 5.

Delegates to the UNCLOS talks expressed a wide array of security threats to coastal states from pollution and fishing to territorial sea delimitation and scientific exploration. For example, the primary concern for Canadian negotiators at the Law of the Sea Conference was pollution. In particular, Canada singled out oil tankers transiting Canadian territorial sea as posing a threat to their environmental security. On these grounds, Canada sought to restrict innocent passage to this class of ships.⁴⁴ Still other conference delegates expressed unrestricted fishing as a threat to security of the coastal state. Careful management of fish stocks is a central economic concern of many coastal states, but the rapid depletion of fish stocks in the late 20th century had prompted increased vigilance of coastal states to illegal fishing. Increasingly, this sensitivity to maritime resource management in the territorial sea has also led to international disputes—and occasionally violence (e.g. the Cod Wars between Iceland and Britain, Tuna disputes between Ecuador and United States).

The Central Intelligence Agency stated with even greater clarity the divisions among the delegates. In a 1974 analytical study, the CIA drew a distinction between two general camps. First, there were a powerful but relatively small number of industrialized nations with navies, commercial maritime interests, fishing fleets and offshore mining enterprises. This group was balanced by a large majority of states that possessed none (or few) of these maritime interests. The CIA assessed the fundamental aim of this latter group to be profit through exploitation of the ocean's resources. By contrast, the industrial nations sought "unobstructed movement and access" as a primary objective of oceans policy.

⁴⁴ Wertenbaker, "The Law of the Sea," 46.

Experts at the State Department believed that these divisions resulted from three factors: available technologies, increased coastal jurisdiction, and decolonization.⁴⁵ First, technological innovations occurred in the 1940s to facilitate maritime resource exploitation farther offshore. Although submerged oil wells had been drilled in the 1890s, oil companies focused their efforts in shallow waters close to shore. In 1947, the Kerr-McGee Oil Industries (in partnership with Phillips Petroleum) drilled an oil deposit over the horizon out of sight of land. This step was the advent for more sophisticated rotary drilling techniques and barge drilling, and other adaptations of land drilling.⁴⁶ But oil and gas are not the only valuable resources in the sea. Additionally, new fishing techniques emerged for more efficient fishing. As fisheries achieved greater mechanization and scale in the 1950-1960s, trawler-factories, based on the factory whaling ships of the 19th century, hauled in unprecedented amounts of fish. This non-stop, all-weather industrial capability led to fishing rates of 200 tons of fish per hour. In 1968, the cod catch peaked at 800,000 tons. But soon after, annual catch totals began to plummet.⁴⁷ The fish stocks had been depleted. The living resource of the sea was exhausted. To manage the problem, Canada tried to keep foreign fishing trawler-factories farther offshore by extending its fishing limit for foreign vessels from 12 to 200 miles from the coast.⁴⁸

⁴⁵ The Ambassador Jack Stevenson: Minutes of the Acting Secretary of State's Analytical Staff Meeting, Washington, June 17, 1974, 3-4 p.m, *Foreign Relations of the United States, 1969-1976*, Volume E-3, Documents on Global Issues, 1973-1976, Document 13. <https://history.state.gov/historicaldocuments/frus1969-76ve03/d13>

⁴⁶ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, "A Brief History of Offshore Oil Drilling," Draft Staff Working Paper No. 1, 1-2, accessed December 18, 2014, <http://web.cs.ucdavis.edu/~rogaway/classes/188/materials/bp.pdf>.

⁴⁷ "The Collapse of the Canadian Newfoundland Cod Fishery," *Greenpeace International*, accessed December 19, 2014, <http://www.greenpeace.org/international/en/campaigns/oceans/seafood/understanding-the-problem/overfishing-history/cod-fishery-canadian/>.

⁴⁸ "Commercial Fishing," *Encyclopedia Britannica*, accessed December 18, 2014, <http://www.britannica.com/EBchecked/topic/127892/commercial-fishing>.

The second factor that caused division of United Nations member states into two blocs was expansion of sovereignty farther offshore. This application of the principle of sovereignty to the littorals may be better conceived of as the “territorialization of the sea.” The expansion of jurisdiction beyond 12 miles to adjacent waters 200nm offshore concerned many members of the negotiation team from the United States. In most cases, expansive behavior was simply an effort by coastal states to obtain new resources for themselves or protect their existing resources against foreign fishing. Additionally, they sought to control oil and minerals in the seabed, and to protect themselves against pollution. Increases in coastal state claims corresponded to desire for greater jurisdiction of resources offshore.

Third, decolonization caused division at the United Nations as the emergence of many new states in the international system with misgivings about the status quo increased. Bristling against the old order dominated by powerful states, newer less developed states coordinated their objectives in voting coalitions at the UN which would better account for their interests. However, United States policymakers who ascribed decolonization as a cause of division between small states and major powers may have failed to recognize that decolonization was actually the effect of this division which was continuing to manifest itself after independence through voting at the UN.⁴⁹

Regardless of the reasons for the division among the delegations, the primary opportunity (challenge?) presented at UNCLOS negotiations was to reach an agreement that increased the claim to valuable resources of the territorial sea by extended the limit to 12 miles while protecting the freedom of vital activities of the industrial powers’ navies, commercial and fishing fleets, and mining and exploration firms. Given that there were over 150 nations and between 3-

⁴⁹ David Strang, “Global Patterns of Decolonization, 1500-1987,” *International Studies Quarterly* 35, no. 4 (December 1991): 429.

5,000 delegates participating in 11 rounds of negotiations, the negotiation challenge was not insignificant.

For the powerful minority, the anticipated deal would achieve their highest priority—concession of guaranteed movement and access. But this goal came at a price—profit from, and control of, a wider territorial sea. However, policymakers in both camps viewed any compromise on a 12-mile limit to be contingent upon agreement on two other related issues. First, industrialized states demanded unobstructed transit *through straits* for commercial and military vessels, because a 12-mile territorial sea would fully enclose more than a dozen important straits (e.g. Gibraltar, Hormuz, and Malacca). Indeed, according to John Norton Moore, the proposed 12-mile sea overlapped a total of 116 major and minor straits used for international navigation.⁵⁰ Second, most of the less developed countries demanded jurisdiction (not sovereignty) over more resources in a contiguous zone beyond the proposed 12-mile limit as a non-negotiable requirement for the deal.⁵¹

Negotiating these two divergent priorities—the demand for increased jurisdiction over ocean resources while preserving freedoms of navigation—required creative diplomacy. Among the most significant innovations of the third conference on the Law of the Sea was the creation of an exclusive economic zone (EEZ) extending beyond and adjacent to the territorial sea.⁵²

According to UNCLOS, an EEZ may extend no farther than 200nm from the same baseline from

⁵⁰ Minutes of the Acting Secretary of State's Analytical Staff Meeting, Washington, June 17, 1974, 3–4 p.m., *Foreign Relations of the United States, 1969–1976*, Volume E–3, Documents on Global Issues, 1973–1976, Document 13. <https://history.state.gov/historicaldocuments/frus1969-76ve03/d13>

⁵¹ Analytical Study OPR–3 Prepared by the Central Intelligence Agency, Washington, April 1974, *Foreign Relations of the United States, 1969–1976*, Volume E–3, Documents on Global Issues, 1973–1976, Document 11. <https://history.state.gov/historicaldocuments/frus1969-76ve03/d11>

⁵² It should be pointed out that not all coastal states claim EEZs, and the timing of EEZ declaration has varied since UNCLOS provisions for EEZ declaration were agreed upon in 1982. Reasons for not claiming EEZs are outside of the scope of this study.

which a coastal state's determine the territorial sea. This legal innovation recognized potentially vast claims of a coastal state up to 38 million square nautical miles of ocean space and extended the rights of coastal states to exploit, develop, manage and conserve all resources – fish, petroleum and minerals – in the sea or the seabed. Unlike the territorial sea, however, the claims to the EEZ do not convey state sovereignty. A coastal state does not exercise control over all activities in an EEZ. Rather, a state may exercise jurisdiction or “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources [...] and with regard to other activities for the economic exploitation and exploration of the zone.”⁵³ The resources at stake in the EEZ have enormous potential for extraction wealth. According to the UN, extension of the EEZ waterspace now accounts for approximately 87% of known and estimated hydrocarbon reserves under the sea—the presently attainable and readily exploitable wealth.⁵⁴ Under the 200nm-EEZ regime, archipelagic states and nations endowed with long coastlines obtain the greatest areas and thus the larger share of the resources. These states include the United States, France, Indonesia, New Zealand, Australia and the Russian Federation. Although these states are naturally endowed with vast resources, UNCLOS encourages responsible stewardship of these resources by limiting overfishing of fish stocks and responsible extraction of oil and minerals in accordance with the conservation measures established in the laws and regulations of the coastal state.⁵⁵ In South East Asia for instance, both petroleum and fisheries policy may be critical for peaceful resolutions of the many maritime territorial disputes. But, as stated in a 2012 testimony before the United States Senate during a

⁵³ Part V, “Economic Exclusion Zone,” *United Nations Convention on the Law of the Sea*, 1982.

⁵⁴ United Nations, A Historical Perspective. 1998. http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm

⁵⁵ Ibid.

hearing on China's increasing need for resources to sustain economic growth, the appetite for resources may be swallowing up states' respect for rights of navigation, too.⁵⁶

If such expansive reach of the coastal state previously may have appeared to threaten navigation, the UNCLOS negotiations concluded three important assurances in the treaty. First, UNCLOS further codified the customary law on the right of innocent passage in the territorial sea by updating the provisions and definitions of innocent passage that had been agreed to in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Second, the 1982 treaty affirmed the right of transit passage through international straits, including those straits full subsumed in a coastal state's territorial sea. Finally, the treaty ensured the unrestrained activity of warships in the EEZ. The purpose of the Freedom of Navigation program is to preserve these freedoms and to demonstrate American refusal to acquiesce to claims that limit those freedoms.

2.2 The Freedom of Navigation Program

The preservation and enhancement of worldwide navigational freedom is a strategic priority of the United States and is rooted in its core national goals. Freedom of Navigation has been established in customary international law for centuries and reflected in international treaties such as the Geneva Convention on the Law of the Sea in 1958 and the United Nations Convention on the Law of the Sea (UNCLOS) in 1982.⁵⁷ The United States ratified the 1958 Geneva Convention, but has not ratified UNCLOS as of 2016. Ratification of UNCLOS has

⁵⁶ U.S. Senate U.S.-China Economic And Security Review Commission, "Hearing: China's Global Quest for Resources and Implications for the United States" January 26, 2012, Dirksen Senate Office Building, http://www.uscc.gov/hearings/2012hearings/written_testimonies/hr12_01_26.php

⁵⁷ The convention has been referred to by many names, some of which are politically biased. Officially, the convention is called *United Nations Convention on the Law of the Sea of 10 December 1982*. Many of the presidential directives and other policy documents from the US Government refer to the *Law of the Sea (LOS) Convention*. This dissertation may occasionally interchange LOS Convention with UNCLOS. No difference in meaning is implied. Some opponents of the treaty who oppose its ratification refer to the Law of the Sea Convention as "LOST," or the Law of the Sea Treaty. This dissertation does not employ this term, but rather adheres to the terminology used in US or UN documents.

garnered the support of much of the Executive branch of government including the United States Navy and Department of Defense. Clear statements from the Chief of Naval Operations, the Secretary of the Navy, and the President of the United States call attention to the benefits of signing.⁵⁸ The 2015 Department of Defense *Asia-Pacific Maritime Security Strategy* echoes these endorsements and contextualizes the importance of the Convention in terms of institutional measures to address challenges in the South China Sea and East China Sea:

Adherence to a rules-based system has been critical to furthering peace, stability, and prosperity in the Asia-Pacific region. This system provides the basis for shared use of maritime waterways and resources, and ensures safe operations within the maritime domain. This is why the United States operates consistent with – even though the U.S. Senate has yet to provide its advice and consent – the United Nations Convention on the Law of the Sea (Law of the Sea Convention), which reflects customary international law with respect to traditional uses of the ocean.⁵⁹

Yet, despite this commitment to international law and navigational freedom, ratification of the treaty has stalled in the United States Senate for reasons pertaining mostly to rights and responsibilities related to the provisions on deep seabed mining of resources articulated in Part XI of UNCLOS and the anticipated relationship between the United States and the International Seabed Authority created by UNCLOS to regulate resource extraction from the seabed.⁶⁰ Meanwhile, the United States policy on Freedom of Navigation reflects customary international law as reflected in UNCLOS.

⁵⁸ International and Operational Law (Code 10), “The Convention on the Law of the Sea,” *U.S. Navy Judge Advocate General’s Corps*, 2015, http://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm.

⁵⁹ “Asia-Pacific Maritime Security Strategy” (Department of Defense, July 27, 2015), 2, http://www.defense.gov/Portals/1/Documents/pubs/NDAA%20A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF.

⁶⁰ Eugene H. Buck, “U.N. Convention on the Law of the Sea: Living Resources Provisions” (Congressional Research Service, January 18, 2011), 7-5700, www.crs.org.

The United States attempts to preserve and extend these freedoms in at least three ways. First, the United States conducts bilateral consultations stressing the importance of navigational freedoms and adherence to international law.⁶¹ Second, the United States delivers formal diplomatic protests to address claims considered inconsistent with international law. Third, the United States conducts naval and air operations to emphasize and assert international navigational rights. These operational assertions “tangibly exhibit the United States’ determination not to acquiesce in excessive claims to maritime jurisdiction by other states.”⁶² This concern stems from the practice of acquisitive prescription in international law.⁶³ Although the United States has not ratified UNCLOS for domestic political reasons, the United States continues to demonstrate its commitment to the navigation principles the treaty embodies.⁶⁴ According to the Judge Advocate General of the United States Navy, “the Convention is in the national interest of the United States because it establishes stable maritime zones, including a maximum outer limit for territorial seas; codifies innocent passage, transit passage, and archipelagic sea lanes passage rights; works against “jurisdictional creep” by preventing coastal nations from expanding their own maritime zones; and reaffirms sovereign immunity of warships, auxiliaries and government aircraft.”⁶⁵ Of particular concern to the United States are disputed straight baseline claims, claims of territorial seas exceeding 12 nautical miles (nm), and other claims that unlawfully impede freedom of navigation and overflight.

⁶¹ U.S. Department of State, *Limits in the Seas: United States Response to Excessive National Maritime Claims No.112, 1992, 6*

⁶² *Ibid*, 6.

⁶³ D. H. N. Johnson, “Acquisitive Prescription in International Law,” *British Year Book of International Law* 27 (1950): 332–3.

⁶⁴ Statements affirming this position have been issued by the Secretary of the Navy, Chairman of the Joint Chiefs of Staff, Chiefs of Naval Operations, the Commandant of the US Coast Guard, and others.

⁶⁵ U.S. Navy Judge Advocate General Corps, “The Convention on the Law of the Sea,” accessed April 8, 2015, http://www.jag.navy.mil/organization/code_10_law_of_the_sea.htm.

This study does not attempt to analyze the bilateral consultations or formal diplomatic protests of the United States. Rather, this study focuses on the more observable instances when the United States commits its operational resources to challenge claims assert the freedom of navigation. First, under what conditions does the United States devote limited operational resources to conduct assertions of navigational freedom? Indeed, apparently less costly options exist through bilateral consultations and formal diplomatic protests. Second, what accounts for the variation in operational assertions?

Since 2001, the United States has conducted operational assertions of freedom of navigation against 35 countries, with some states receiving more attention than others. The United States has challenged countries like Iran and China at least twice yearly in the last five years, but did not challenge Saudi Arabia, Somalia, or Sudan during the same period. The United States challenged Indonesia more frequently than any other country (18 times since 2001), but has not challenged Denmark, Cuba, or Pakistan in over a decade.

The United States has disputed claims of some 140 states dating back to 1948, long before the Freedom of Navigation Program formally existed. Since the official creation of the Freedom of Navigation program in 1979, the United States has conducted operational assertions via the FON program to protest 110 disputed claims, and the program attributes to these efforts a number of successful outcomes. To wit, many of the states challenged by the United States have rolled back their disputed claims and now conform to the rules of delimitation as stated in the Law of the Sea convention.⁶⁶ Whether the FON program is directly responsible for these rollbacks falls outside the scope of this dissertation.

⁶⁶ J. Ashley Roach, "Excessive Maritime Claims," *Proceedings of the Annual Meeting (American Society of International Law)* 84 (March 28, 1990): 290.

In light of recently declassified presidential directives, slight variations in the FON program have occurred over time. Much of the content in the documents is redacted, obscuring the most politically sensitive aspects of the FON Program. Nevertheless, there are some useful details that emerge from a close reading of the two directives from the Reagan Administration and the directive signed by George H. W. Bush. National Security Decision Directive Number 72 (NSDD-72) written on the occasion of the UN Convention on the Law of the Sea, emphasizes the importance of navigation. This directive underscores the United States commitment to asserting its rights given the “uncertainty in the law of the sea” and the United States decision not to become a party to the Law of the Sea Convention.” According to this directive, United States interests are threatened by six categories of disputed maritime claims. The position of the United States is that these categories of claims lack consistency with either the 1958 Geneva Convention on the Law of the Sea, the 1982 UN Convention on the Law of the Sea, or customary law. These categories of disputed maritime claims include 1) historic waters not recognized by the United States; 2) unlawful baseline claims; 3) territorial sea claims that overlap international straits and do not permit transit passage or contain requirements for advance notification, or apply special requirements such as notification for nuclear-powered vessels; 4) territorial sea claims in excess of 12 miles; 5) claims of jurisdiction over waters outside of 12 miles which affect high-seas related freedom; and 6) archipelagic claims that fail to conform to the LOS Convention or permit sea lanes for transit passage.⁶⁷

The importance of navigation to national security had been a priority long before the Reagan administration. The importance of navigation as an issue of national security policy was apparent to President Nixon also. In 1971, during the so-called Tuna War off the coast of

⁶⁷ National Security Decision Directive Number 72 (NSDD-72), “United States Program for the Exercise of Navigation and Overflight Rights at Sea, 13 December 1982.

Ecuador, tensions that had been rising since 1952 and reached a moment of crisis when Ecuador seized 75 United States-owned tuna fishing boats. These fishing vessels had been operating in waters off the coast of Ecuador.⁶⁸ Since 1966, Ecuador's territorial-sea claim was disputed by its neighbors. However, neighbors Peru and Chile had made similar claims. Until Ecuador rescinded its 200-nm territorial sea claim in September of 2012, it had claimed not only the exclusive economic rights to extraction of resources existing in these waters, but also the sovereignty over navigation activities in these waters.⁶⁹

At the time of the dispute in 1971, the provision for a 200nm EEZ had not been created by UNCLOS (1982). Additionally, the 1958 Geneva Convention on the Law of the Sea was unsuccessful in reaching consensus agreement on 12nm as the limit of territorial seas.⁷⁰ At first glance, it may appear that United States' interest in the case may have been to protect or affirm the rights for 75 Americans to fish in international waters. The priority, however, for the United States was the right of navigation—a globally transferrable principle, and one that had consequences, not just for fishermen, but for international trade and for the mobility of the United States Navy.

These priorities were not only at the service level, but also at the highest levels of government. When Kissinger explained the situation to President Nixon during a taped conversation at the time of the Tuna War, the President responded with the clear priority for the United States government:

⁶⁸ Holless, “‘TUNA WAR’ STAND OF NAVY ASSAILED; Goodwill’ Visit to Ecuador Angers Fishing Officials.”

⁶⁹ Under Secretary of Defense for Policy, *Maritime Claims Reference Manual* (DOD 5200.1M, 2005, 193-195).

⁷⁰ Trullio Treves, “The 1958 Geneva Convention on the Law of the Sea,” United Nations Audiovisual Library of International Law, 2008, 1-2, http://untreaty.un.org/cod/avl/pdf/ha/gclos/gclos_e.pdf.

Kissinger: “We’ve already agreed to negotiate, but we don’t have a formal position yet [...] The State Department wants to negotiate now, but the Defense Department wants to have a showdown. They’re not so concerned about fisheries, but they’re concerned about law of the seas. [...] If we dig in on the fisheries, we’ll lose on navigation—

Nixon: “Navigation we want. Let them fish if they want. That’s my view.”⁷¹

The Reagan Administration later restated this primary national interest in freedom of navigation through NSDD-83, “United States Oceans Policy Law of the Sea and Exclusive Economic Zone,” which reiterates the United States’ commitment to the rights of navigation despite its not becoming party to the UNCLOS convention. President Reagan committed the United States to follow the laws as established, and just as importantly, to ensure that no agency seek to establish new jurisdictions beyond 200 nautical miles.⁷² Later, during the second term of President Reagan, National Security Decision Directive 265 reviewed the United States’ refusal to sign the Law of the Sea Convention because of the provisions for deep seabed mining and the United States support for the provisions regarding “traditional uses of the oceans” consistent with existing maritime law. The deep seabed issue has been the primary point of contention that has prevented United States ratification. The directive repeats its commitment to the same navigational freedoms as stated in NSDD-72, but provides program guidance (most of which is redacted).

Amid the specific guidance for the implementation of the Freedom of Navigation program, four specific orders warrant close attention. First, the guidance calls for frequent challenging of international straits and archipelagic sea lanes. This directive indicates the

⁷¹ “Conversation Between President Nixon and His Assistant for National Security Affairs (Kissinger), Washington, May 29, 1971” (Office of the Historian, Department of State, May 29, 1971), White House Tapes, National Archives, Nixon Presidential Materials, <https://history.state.gov/historicaldocuments/frus1969-76ve01/d395>.

⁷² National Security Decision Directive Number 83 (NSDD-83), “United State Oceans Policy Law of the Sea and Exclusive Economic Zone,” 10 March 1983.

importance of these categories to United States trade routes and military mobility. Second, the guidance discusses the importance of diplomatic protests of disputed claims. This emphasis underscores the importance of interagency coordination between the Departments of State and Defense. Third, the guidance encourages balance. It states that the United States will not pick on rogue states, but instead will contest “excessive claims of friendly states, inimical powers, and neutral states alike.” Finally, the guidance directs “Special emphasis should be given to challenging claims which have no record of prior challenge.” This offers some evidence of the importance of establishing legal precedent of our diplomatic and operational protests to disputed claims. It recognizes the fact that the longer a state practice remains unchallenged, the more likely it is to be viewed as legal acquiescence and accepted as customary law.⁷³

President George H. W. Bush issued National Security Directive 49, which supersedes NSDD-265. NSD-49 reiterates its commitment to upholding the Law of the Sea as contained in NSDD-83 and updates President Reagan’s policy. The current policy document in effect is Presidential Decision Directive 32 (PDD-32) signed by President Clinton in 1995. Nearly the entire current policy document is classified and redacted, but an available portion states, “the purpose of this policy is to preserve the global mobility of U.S. forces by avoiding acquiescence in excessive maritime claims of other nations.”⁷⁴

Although most of the program policy and procedures are redacted, NSD-49 emphasizes more explicitly than preceding documents the importance of interagency coordination. This interagency coordination appears to be most critical to American contestation of claims such as

⁷³ National Security Decision Directive Number 265 (NSDD-265), “Freedom of Navigation Program,” 16 March 1987.

⁷⁴ Presidential Decision Directive 32 (PDD-32) dtd January 23, 1995 in James Kraska and Raul Pedrozo, *International Maritime Security Law* (Netherlands: Martinus Nijhoff Publishers, 2013), 213.

military activities in maritime zone such as contested territorial seas, historic bays, excessive strait baselines, and exclusive economic zones. According to NSD-49, interagency coordination appears to be less critical to operations, which contest claims in international straits and archipelagic sea lanes.

Specifically, the document offers program guidance and it lists procedures for the Department of Defense's planning and administering of operational assertions and it offers criteria for "selection of an excessive maritime claim for the annual list" (redacted). The policy states coordination is required for action against historic claims, excessive straight baseline claims, and territorial sea claims (both territorial and restrictive). However, assertion of navigational rights in international straits appears to be an international legal no-brainer. The policy states, "Military ships and aircraft will use military straits freely and frequently."⁷⁵ Everything else requires interdepartmental coordination and scrutiny.⁷⁶ This exception reemphasizes a green light for operational forces to challenge these claims at will. "Military ships and aircraft will routinely assert U.S. rights against territorial sea claims and other claims to jurisdiction over maritime areas in excess of twelve nautical miles that purport to restrict nonresource related high seas freedoms, and archipelagic claims not in conformance with the LOS convention."

One specific coordination requirement NSD-49 lists is the annual requirement for Department of Defense to "provide to the Department of State and National Security Advisor a semiannual list of operational assertions conducted under the FON program." The statement of this requirement is interesting because it suggest a requirement for coordination *ex post*, not *ex ante*. Unfortunately, the redactions obscure the full extent of requirements for interagency

⁷⁵ National Security Directive 49 (NSD-49), Freedom of Navigation Program, 12 October 1990.

⁷⁶ Ibid.

planning and coordination. But a close reading of the available documents indicates that coordination is required prior to operations as well as afterward.

The redactions observed regarding coordination and other requirements of the Freedom of Navigation program in the declassified documents present a puzzle. Ostensibly, the activities conducted under the Freedom of Navigation program demonstrate the United States' refusal to "acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other traditional uses of the high seas."⁷⁷ These operational activities assert rights, exercise freedoms, and demonstrate a persistent objection to the claims of others. Operational assertions intend to be public acts; they are not covert missions and the results of the operations are published annually for legal precedent. So there is no expectation that there should be a secretive or compartmentalized aspect to the program. In fact, the reason that the operational assertions have any meaning or value with respect to customary international law is because they are public knowledge.

Thus, this dissertation proceeds to explaining why the United States conducts operational assertions in some places and others. In the next chapter, three theoretical models—a liberalism model, a security model, and an organizational model—offer ways of thinking about the variation.

Today, among the 150 coastal states in the world, 80 states make maritime claims to which the US objects. The United States disputes maritime claims that are inconsistent with international law. In most cases, the body of maritime law consists of the soft law of *opinio juris* and custom, or state practice. Together, these comprise customary international law, which is reflected in treaties such as the 1958 Geneva Conventions on the Law of the Sea, which the

⁷⁷ Presidential Decision Directive 32 (PDD-32) dtd January 23, 1995 in Kraska and Pedrozo, *International Maritime Security Law*.

United States has ratified, or the 1982 United Nations Convention on the Law of the Sea, which it has not.⁷⁸ Through the Freedom of Navigation program, the United States issues protests and operational assertions each year at the rate approximately 10-20 per year. The next section describes the different areas of dispute.

2.3 Law of the Sea: Types of Maritime Claims and Passages

This section introduces the various zones of the sea as described in the UN Convention on the Law of the Sea. This section also introduces the category of straight baselines, which leads to contentious maritime claims. Additionally, two regimes of transit, innocent passage and transit passage, are discussed.

FIGURE 2-1

NWP 1-14M

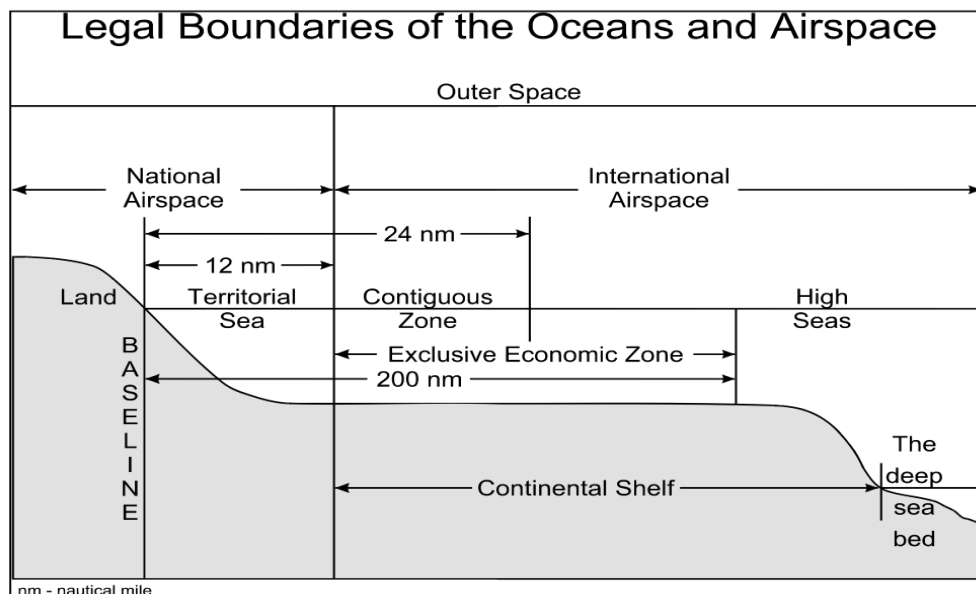


Figure 1-1. Legal Boundaries of the Oceans and Airspace

NWP 1-14M, The Commander's Handbook On The Law Of Naval Operations (JUL 2007), 1-4.

⁷⁸ Representative for Ocean Policy Affairs, *Maritime Claims Reference Manual*, DoD 2005.1-M (Washington, DC: Department of Defense, Under Secretary of Defense for Policy, 2005), 2, <http://www.jag.navy.mil/organization/documents/mcrm/MCRM.pdf>.

2.3.1 Territorial Seas refer to the near waters just offshore a landmass. The territorial sea is an adjacent belt of ocean, measured from coastal baselines (i.e. the “low-water line along the coast as marked on large-scale charts officially recognized by the coastal State”) to a limit not exceeding 12 nautical miles (Article 5). Prior to 1982, the measurement of the territorial sea varied from 2 to 200+ miles from shore. For many years, a rough equilibrium for measuring territorial sea was determined by the distance a cannon could fire. The maximum range of a shore battery approximated the distance over which the state could extend its military power and thus its sovereignty. Today, the sovereignty of a coastal state extends to the breadth of the territorial sea, the airspace above it, and the seabed and subsoil below. But not all land formations are entitled to a territorial sea. According to the United Nations Convention on the Law of the Sea, land formations such as a sovereign continental territory and islands, which are naturally formed area[s] of land, surrounded by water, which is above water at high tide,” are entitled to territorial seas. They also enjoy Exclusive Economic Zones (see below).

FIGURE 2-2

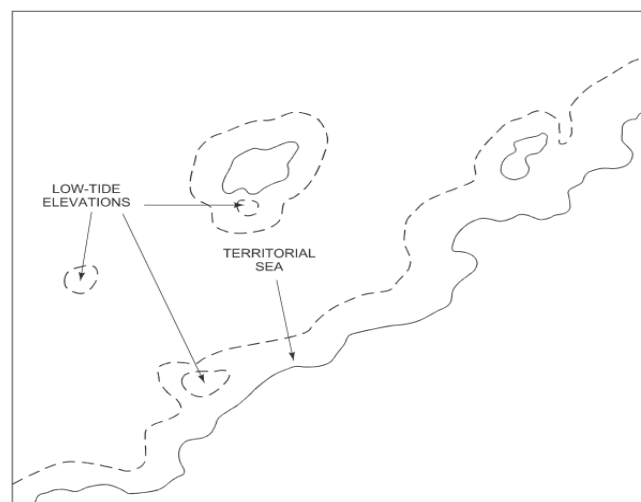


Figure 1-6. Territorial Sea of Islands and Low-Tide Elevations

Additionally, according to the “Regime of Islands in UNCLOS,” rocks, “which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or

continental shelf.” Rocks are entitled to a territorial sea. However, other land formations such as reefs, low-tide elevations, which are “surrounded by and above water at low tide but submerged at high tide,” are *not* entitled to territorial seas (Article 13, 60).⁷⁹ Similarly, artificial islands are not entitled to claim a territorial sea, but they are permitted a 500-meter safety zone by Article 60.

To demarcate the boundaries of the territorial sea, coastal states with adjacent coasts (e.g. Portugal and Spain, or Suriname and French Guyana) and states with opposite coasts (e.g. Iran and Oman, or Djibouti and Yemen) generally draw median lines between each other and divide evenly the water separating them. According to the UN Convention on the Law of the Sea, ships of all states are permitted to enter a state’s territorial seas under the regime of innocent passage (II.1.2-II.2.6, II.2.15). Artificial islands constructed by the state do not possess the legal status of islands and therefore are not entitled to claim a territorial sea or enlarge the coastal state’s claim on its Exclusive Economic Zone (V.60).⁸⁰ A common dispute regarding territorial seas pertains to a claim that exceeds 12 nautical miles. As of 2013, only seven coastal states claim territorial seas in excess of 12 nautical miles.⁸¹ Sometimes referred to as Patrimonial Seas or fishing zones,

⁷⁹ These categorical distinctions are the crux of the dispute between China and its regional neighbors and the United States in the Spratly Islands located in the South China Sea. According to the Island Tracker hosted by CSIS’ Asia Maritime Transparency Initiative as of October 2015, China had artificially constructed seven artificial land formations from reclaimed sand piled atop reefs. *Ceteris paribus*, there are lawful artificial islands, but these formations lie in disputed waters. Moreover, there is confusion as to whether the Chinese are claiming a territorial sea for these newly created land formations because the Chinese have not made clarified their status. Nevertheless, UNCLOS does not entitle these land formations to a territorial sea; in fact, Article 60 *explicitly denies* artificial islands a territorial sea. The Chinese have not clarified their position on these artificial land formations.

⁸⁰ The dispute between China and Japan over the Diayou/Senkaku Islands is an important territorial-claim issue, but disputes over land features are not within the scope of this study. As a matter of policy, the United States does not take a position on competing *land* claims. However, the results of that territorial dispute will have implications of maritime claims. See the UNCLOS “Regime of Islands” (VIII.121)

⁸¹ As of 2013, the coastal states claiming territorial seas in excess of 12nm were Benin (200nm), Greece (airspace), Nicaragua (200), Peru (200nm), Philippines (varies, up to 285nm), Somalia (200nm), and Togo (30nm).

these claims extend in some cases to 285 nautical miles.⁸²

The delegates to the United Convention on the Law of the Sea negotiated the Exclusive Economic Zone as a compromise between parties who wanted to maintain the territorial sea from expanding beyond 12 nautical miles and the parties who sought to maintain rights to the living and non-living resources farther offshore. The EEZ was a provided jurisdiction over management of resources in the ocean and the seabed below out to 200 nautical miles from shore, while limiting a coastal state's sovereignty to the territorial sea out to 12 nautical miles.

2.3.2 Internal Waters are not particularly germane to this study, but bear mentioning because of their distinction from territorial seas. Internal waters are located on the “landward side of the territorial sea” or landward of the mean low waterline. Examples of internal waters include rivers, canals and some bays. Foreign ships require expressed permission to enter internal waters. In internal waters, the right of innocent passage for foreign vessels does not apply. Inland waters are distinct from archipelagic waters. (II.2.8)

2.3.3 Straight Baselines. Typically, the breadth of a territorial sea is measured from a coastal baseline that follows the contours of the coastline. However, when the coastal topography is “deeply indented and cut into” – or contains features such as shifting, silty river deltas -- straight baselines may be drawn to provide a smoother and more stable curve. International law cautions against the tendency to draw these straight baselines too generously, and UNCLOS prohibits drawing straight baselines between most low-tide elevations. When drawn too generously for the coastal state, excessive baselines may have two effects. First, they may redefine portions of the territorial sea as internal water, through which passage may be denied to foreign ships. Second, they extend the coastal state's claim on territorial seas and other zones. For example,

⁸² “Philippines,” in Representative for Ocean Policy Affairs, *Maritime Claims Reference Manual*, Updated May 2014.

Iran's baseline claims 21 straight baseline segments along the North Arabian Sea, Strait of Hormuz, and Persian Gulf. Three of the northernmost baseline claims in the Persian Gulf "would increase Iran's internal waters by nearly 2400 square nautical miles" and "increase its territorial sea by some 1650 nautical miles."⁸³ As of 2016, 41 coastal states make straight baseline claims that the United States disputes. (II.2.7)

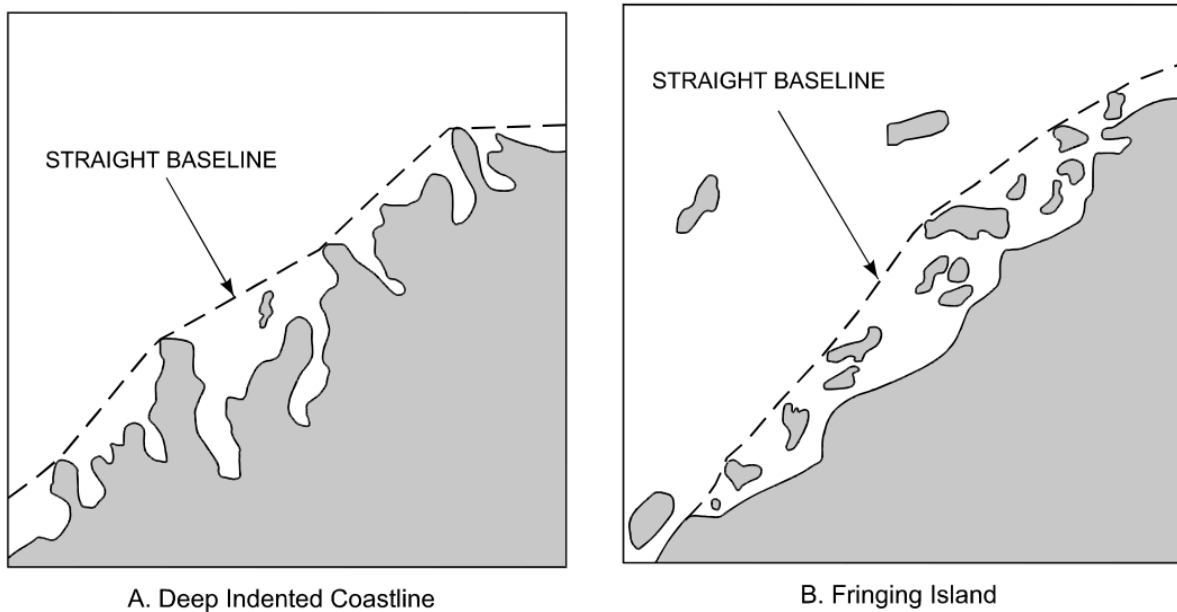
2.3.4 Contiguous Zone. This zone is literally contiguous to the territorial sea and extends beyond the territorial sea to a distance 24 nautical miles from shore (from 12nm to 24nm offshore). The purpose of the Contiguous Zone pertains to a state's control of its territorial sea. The coastal state does not enjoy sovereignty in the Contiguous Zone as it does in the Territorial Sea. Rather, the Contiguous Zone exists for preventing and punishing infringement of customs, laws and regulations in the Territorial Zone. As of 2016, 21 coastal states impose some kind of restriction on activities in their contiguous zones. Most often the coastal state seeks to securitize the contiguous zone, which is similar type of effort to territorialize the sea as mentioned above. (II.4.33)

2.3.5 Archipelagic Waters. Archipelagic states such as Indonesia or Philippines require unique considerations for the delimitation of their territorial seas and the transit of foreign ships through archipelagic sea lanes. Constituted by groups of islands and their interconnected waters, archipelagos form "an intrinsic geographical, economic and political entity." Thus, archipelagic waters may be defined by straight baselines, which connect the outermost points of the outermost prominent land features. However, the UNCLOS treaty prescribes a maximum length for each straight baseline and a maximum ratio of water-to-land (9:1). For archipelagic states, the sovereignty extends over the waters, airspace, and seabed to a limit measured 12 nautical miles

⁸³ Hugh F. Lynch, *Freedom of Navigation in the Persian Gulf and the Strait of Hormuz* (Newport, RI: Naval War College, Center for Naval Warfare Studies, Strategic Research Dept, 1997), 10.

measured from the archipelagic baselines (IV.46-47, 48-50). All ships and aircraft are permitted by customary law and UNCLOS to conduct passage through archipelagic sea lanes (IV.53). The right of innocent passage applies to “all ships and aircraft” through archipelagic sea lanes for the “continuous and expeditious passage of foreign ships and aircraft through or over archipelagic waters and the adjacent territorial sea” (V.53)

FIGURE 2-3



2.3.6 Exclusive Economic Zone. The Exclusive Economic Zone is a recent creation in international law to provide rights to coastal states for managing natural resources. Land formations entitled to claim an EEZ include sovereign continental landmasses and islands. According to the Regime of Islands in the UN Convention on the Law of the Sea, other land formations at sea, such as “low-tide elevations” and rocks “which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf” (VIII, 121).

Defined as the area “beyond and adjacent to the territorial sea,” the EEZ may extend no farther than 200 nautical miles from the baseline (V.56). In the EEZ, the coastal state has three enumerated rights, jurisdictions, and duties. First, the coastal state has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources.” These rights pertain to both living and non-living in the waters and seabed. Second, the coastal state has jurisdiction for the “establishment and use of artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment.” Third, the coastal state “shall have due regard to the rights and duties of other States” (V.56). In the EEZ, UNCLOS states that all states – “whether coastal or land-locked” enjoy “freedom of the high seas.” This expression of freedom reflects a Grotian interpretation of the seas as *open* to all states to navigate. These provisions are enumerated in Article 87 and include, *inter alia*: freedom of navigation and overflight, freedom of fishing and scientific research, etc. As of 2016, 22 coastal states maintain restrictions on permissible activities in their EEZs. This tendency toward restriction and closure reflects the steady erosion of high seas freedoms by some coastal states seeking to close their near seas from international use. These disappearing rights reflect a territorialization of the sea.⁸⁴ (V.55-58) Additionally, not all states benefit equally from an EEZ claim. The total size of a coastal state’s claim depends on physical factors such as total linear distance of coastline and the coastal state’s geographic situation relative to neighboring states. Coastal states sitting on opposite sides of body of water or in close quarters (e.g. Eastern Mediterranean, Persian Gulf, Gulf of Guinea, or South China Sea) may have overlapping EEZ claims that must be mediated.

⁸⁴ Jon M. Van Dyke, “The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone,” *Marine Policy*, Military and Intelligence Gathering Activities in the Exclusive Economic Zone: Consensus and Disagreement II, 29, no. 2 (March 2005): 107–21.

2.3.7 Innocent passage is a regime of transit that entitles “ships of all states” to conduct continuous and expeditious passage in another state’s territorial sea. This regime of passage exists for the purposes of “traversing that sea” or “proceeding to or from internal waters” (Article 17, 18). The restricted regime of innocent passage applies only within the territorial sea, and does not apply to internal waters or other outer zones (e.g. Contiguous Zone and Exclusive Economic Zone).⁸⁵ Innocent passage must not be “prejudicial to the peace, good order or security of the coastal state.” Warships are entitled to innocent passage, but submarines shall pass while surfaced (not submerged) and showing their flag.

Before UNCLOS, the 1958 Geneva Convention on the Territorial Sea articulated the same right of innocent passage.⁸⁶ However, twenty-five years later, the UN Convention on the Law of the Sea had created three provisions that led to a further articulation of innocent passage. First, the UN Convention achieved consensus on the extension of the territorial sea. Second, the regime of Transit Passage for navigating international straits emerged as a necessary creation in light of the newly extended territorial seas.⁸⁷ Third, the meaning of innocent passage was further articulated in Article 19 of UNCLOS by a list twelve activities from which foreign ships must refrain in order to be considered innocent in their passage.⁸⁸

⁸⁵ Freedom of the high-seas for navigation and overflight applies to all states in waters beyond the territorial sea (i.e. the exclusive economic zone) according to rights defined in Article 58 and 87 of UNCLOS.

⁸⁶ The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone entered into force on 10 September 1964 with 41 signatories and 52 parties to the convention. The United States signed the treaty in 1958 and ratified in 1961. More information on the status of the treaty is available at the United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21&lang=en.

⁸⁷ Horace B. Jr Robertson, “Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea,” *Virginia Journal of International Law* 20 (1980 1979): 803–806.

⁸⁸ Article 19 “Meaning of Innocent Passage,” prohibits the following activities: threat or use of force; exercise with weapons; intelligence collection; acts of propaganda; launch or recovery of aircraft or other military devices; loading or unloading of commodities, currency, or persons; willful pollution; fishing; research and survey; interference with communication systems; or other activities not required for passage. See “United Nations Convention on the Law of

Innocent Passage is limited to movement through another coastal state's territorial seas only. As of 2016, approximately 47 coastal states make claims that aim to restrict innocent passage. These restrictions vary by state; they often include requirements for prior notification, impositions of prescribed sea lanes for innocent passage, or limitations on the types of vessels permitted in the territorial sea (e.g. warships, nuclear-powered vessels, etc).

The official policy of the United States is that the list in Article 19 of UNCLOS is an exhaustive elaboration of what constitutes non-innocent passage. According to Schachte (1992), "It is the United States' view that the enumerations in Articles 19 and 21 are all-inclusive, i.e. a ship may engage in any activity while engaged in innocent passage if it is not prejudicial or proscribed in Article 19(2), and a coastal State can only enact those laws and regulations which are contained in Article 21." Schachte continues, "Perhaps the most important factor to be noted in this connection is the unwavering position of the United States and other major maritime powers that Article 21 does not permit a coastal State to require prior permission from, or notification to, a coastal State in order to exercise the right of innocent passage. The *travaux preparatoires* of the Convention unequivocally indicates that such is not the case."⁸⁹

2.3.8 Transit Passage pertains to movement through international straits for the purposes of international navigation. All ships and aircraft are entitled to "continuous and expeditious passage" through international straits, "used for navigation between one part of the high seas or an Exclusive Economic Zone" (III. 2.37-39). In the UN Convention on the Law of the Sea (Article 37), the international strait is "used for international navigation between one part of the

the Sea" (United Nations Office of Legal Affairs (Division for Ocean Affairs and the Law of the Sea), December 10, 1982), http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

⁸⁹ William L. Schachte, "International Straits and Navigational Freedoms" (26th Law of the Sea Institute Annual Conference, Genoa, Italy: U.S. Department of State, 1992), <http://www.state.gov/documents/organization/65946.pdf>.

high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”⁹⁰ The Convention recognizes six categories of international straits and over 100 international straits worldwide.⁹¹ The treaty also articulates exceptions and caveats due to maritime geography (e.g. Strait of Messina) and four long-standing international conventions.⁹² In these international straits, the regime of Transit Passage applies to all ships and aircraft as defined in Articles 38 and 39. Major international straits around the world include: the Panama Canal, Strait of Magellan, Straits of Dover, Danish Straits, Strait of Gibraltar, Turkish Straits (Bosporus and Dardanelles), Suez Canal, Cape of Good Hope, Bab el-Mandeb, Strait of Hormuz, Strait of Malacca.

⁹⁰ “United Nations Convention on the Law of the Sea.”

⁹¹ Schachte, “International Straits and Navigational Freedoms,” 17–33; Lewis M. Alexander, “Chapter IV: International Straits,” in *The Law of Naval Operations*, vol. 64, International Law Studies (Newport, R.I.: Naval War College Press, n.d.), 99–103.

⁹² For a detailed accounting of the four “Article 35(c) exceptions” (i.e. the Danish Straits, the Aaland Strait, Turkish Straits, and Strait of Magellan) for “long-standing international conventions,” see Schachte, “International Straits and Navigational Freedoms,” 30–33.

CHAPTER 3. THEORY

3.1 Customary International Law

International law draws generally from three sources: custom, treaty, and *opinio juris*.⁹³ Custom reflects of state practice (what states do) and subjective beliefs that state behavior is law.⁹⁴ The former mirrors the material interests of a state, while the latter reflects the normative values of a state. *Opinio juris* is the normative belief that a state has a legal obligation to act in a certain way.

Custom alleges credibility through an “aura of legitimacy” because custom, by definition, is not written down or codified. This aura is problematic because of its ethereal nature; an aura of legitimacy is a fleeting phenomenon that may change as state practices change. Moreover, how does one ascribe compliance to an aura? A more concrete definition is preferred for inferring compliance with a particular custom.

Secondly, custom reflects the “authentic expression of the needs and values of the community.” Custom is necessarily a reflection of that community, but the international system is not a homogenous community. The foreign-policy interests of individual members of the anarchic world community are highly varied, and thus their behaviors are varied, too. A *complete* or *comprehensive* “reflection of that community” is going to reflect the heterogeneous needs and values of the many countries of the world. In the case of international maritime law, the current community of 150 coastal states demonstrates variation in interest, and it is highly unlikely that any custom can satisfy the particular needs and values of each and every member

⁹³ Unlike domestic law, there are few settled cases that form legal precedent (nor does there exist a court)

⁹⁴ Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 74, <http://ebooks.cambridge.org/ref/id/CBO9780511841637>.

state.⁹⁵ Although the United Nations Convention on the Law of the Sea earned accolades for achieving one of the greatest compromises in the history of treaty law by creating a so-called “Constitution of the Oceans,” coastal states were (and remained) divided on key issues. As mentioned earlier, the limitation of the territorial sea to 12 nautical miles (a handful of states derogated from the treaty and maintained territorial-sea claims in excess of 12 nautical miles) and limitations on warships from conducting innocent passage in the territorial sea or conducting military operations in the exclusive economic zone posed obstacles to consensus.

As a result of the obstacles to consensus, “the authenticity of the expression” of custom is most likely to reflect the position of the majority of coastal states. If custom reflects an “authentic expression of the needs and values of the community,” then this may reflect the most powerful or most vocal or majority representation of society. Another measure of authenticity may be one of power, thus the prevailing custom is that behavior that is accepted (or promoted) by the most powerful.⁹⁶ If the criterion for custom is acceptance or concurrence by the most powerful states, “a regulation regarding the breadth of the territorial seas is unlikely to be treated as law if the great maritime nations do not agree to or acquiesce in it, no matter how many landlocked states demand it.”⁹⁷

Shaw argues that custom (state practice) can only partially fulfill the necessary requirements for international law. The other necessary condition is the reaction of other states in the international system. How states respond to another state’s actions is a key determinate of international law. Thus, three behaviors deserve attention: explicit acceptance, acquiescence or

⁹⁵ Ibid., 73.

⁹⁶ For an argument why power, not majority opinions, matter more, see Carr, *The Twenty Years’ Crisis*.

⁹⁷ Shaw, *International Law*, 80.

implicit acceptances, and deliberate protest. The normative belief obligating states to act in a certain way, *opinio juris*, may not be sufficient to establish that belief as international law. Rather, one must observe the reactions of other states. For instance, as China claims the entire South China Sea within the Nine-dash Line in the belief that its claim is legal, how can the rule be changed in customary law since that cannot also be in accordance with prevailing law? One has to treat the matter in terms of a *process* whereby states would behave in a certain way in the belief that such behavior is law or becoming law. It would then depend on how other states *react* as to whether this process of legislation is accepted or rejected.⁹⁸ The moral imperative is necessary, but not sufficient, for *opinio juris* to be considered law, according to Shaw's interpretation of *opinio juris*. The reaction of other states—acceptance, acquiescence, or protest—is fundamental to the law.

State participation in international law reflects state preferences, values, and interests. Entry into treaties such as the United Nations Convention on the Law of the Sea (UNCLOS) is optional for states. As Goldsmith and Posner argue, “international law is equilibrium behavior in which self-interested states are constrained only by their expectations about the strategies chosen by other self-interested states.”⁹⁹ Therefore, if a state's action deviates from the norm and that action occurs without protest from other states, acquiescence is considered tantamount to acceptance of that deviation. For example, some coastal states have claimed a 200nm territorial sea (far wider than the 12nm standard according to international law).¹⁰⁰ The United States and other countries have assessed these claims as exceeding the territorial sea provision agreed to in

⁹⁸ Ibid., 87.

⁹⁹ Jack L. Goldsmith and Eric A. Posner, “A Theory of Customary International Law,” *The University of Chicago Law Review* 66, no. 4 (October 1, 1999): 1113–77.

¹⁰⁰ One nautical mile equals 1,852 meters or 1.151 statute miles. All miles in this study refer to nautical miles, unless otherwise noted.

UNCLOS, and have taken diplomatic and operational action to contest these claims. The premise for these actions is that uncontested claims may eventually alter the custom and become the accepted legal practice. Although international law theoretically may foster coordination and cooperation, a less sanguine theory of international law suggests that states comply only when it suits them, and they look for ways to change the law gradually by salami-slicing.

Efforts to assert a particular policy position regarding international law may be analogous to the basic legal concept of *adverse possession*. In domestic property law, adverse possession refers to a “doctrine under which a person in possession of land owned by someone else may acquire valid title to it.”¹⁰¹ For example, the neighbor who visibly mows more and more of his neighbor’s lawn, without any overt disagreement by the owner, may eventually claim ownership without compensation. In this vein, the operational assertions organized, planned, and executed through the United States’ Freedom of Navigation program respond to the encroachment of coastal states upon the publically-held high seas and on the free navigation of all ships within rightfully claimed spaces. Freedom of Navigation operations demonstrate a refusal to acquiesce to the salami-slicing of states that seek to incrementally increase their claim to international waters or limit behaviors in them.

Active protest and demonstrated refusal to acquiesce are the essence of the Freedom of Navigation program. But do inconsistencies in protest imply that there may be pockets of compliance or that there may be regionally determined rules? Evidence indicates that custom is law in some places and not others because of the selective pushback and that there exceptions to the rule that some enjoy and not others. This also implies a wherewithal to push back—that a state has the capacity or powers to protest.

¹⁰¹ Cornell University Law School Legal Information Institute, “Adverse Possession,” accessed September 14, 2014, http://www.law.cornell.edu/wex/adverse_possession.

For example, in 2001 China asserted its sovereignty over (and efforts to control activities in) a maritime zone far beyond its territorial sea during two aggressive intercepts in the EEZ. Within one week in 2001, on 23 March and 1 April, a Chinese frigate intercepted *USNS Bowditch*, which was conducting lawful hydrographic research in the Chinese EEZ approximately 70 nautical miles south of Hainan Island.¹⁰² *USNS Bowditch* was not conducting innocent passage, because it was outside of the 12-nm territorial sea. Rather she was conducting hydrographic research, which is necessary for drawing accurate maritime charts used in navigation, construction, and exploration and is consistent with the provision of the Exclusive Economic Zone in the United Nations Convention on the Law of the Sea. International legal expert, Raul Pedrozo summarizes the essence of the legal disagreement in the *Bowditch* case:

The EEZ is a creature of UNCLOS, which created it for the purpose of giving coastal states greater control over the resources adjacent to their coasts out to two hundred nautical miles (articles 56 and 57). Coastal states were also granted jurisdiction in the EEZ over artificial islands and structures, MSR, and protection and preservation of the environment (article 56). Unfortunately, over the years some coastal states like China have sought to expand their jurisdiction in the EEZ by attempting to exercise control over non-resource-related activities, including many military activities. These illegal coastal-state restrictions in the EEZ take many forms, including prohibitions on military marine data collection (military surveys and hydrographic surveys), requirements of prior notice or consent to conduct military activities, environmental constraints on sovereign immune vessels and aircraft, and national-security restrictions. These excessive claims have no basis in customary international law or in UNCLOS, and they have been diplomatically protested by the U.S. government and operationally challenged by the U.S. Navy.¹⁰³

Then, a Chinese F-8 jet intercepted and collided with American EP-3 aircraft killing the Chinese air force pilot and leading to the destruction of the EP-3 and the detention of the crew

¹⁰² Erik Eckholm, "China Complains About U.S. Surveillance Ship," *The New York Times*, September 27, 2002, sec. World, <http://www.nytimes.com/2002/09/27/world/china-complains-about-us-surveillance-ship.html>.

¹⁰³ Raul Pedrozo, "Close Encounters at Sea: The USNS Impeccable Incident," *Naval War College Review* 62, No. 3 (Summer 2009): 111–112.

for 11 days.¹⁰⁴ Many more events have occurred since 2001, such as the *USNS Impeccable* incident in 2009, which transpired similarly to the *USS Bowditch* incident in 2001. In each of these incidents, China has sought to restrict military activities in its EEZ based on its interpretation of international law. Yet, the UN Convention on the Law of the Sea had created the Exclusive Economic Zone for the purpose of resource management, not for securitization. In each case, the United States has asserted its right to conduct such activities based on its interpretation of international law.

This case highlights the dynamic nature of international law, which is reinforced “through the process of disputing.” “Actors collectively discover the meaning and scope of application of social rules, and disputes between states are to be *expected* regardless of the specificity or vagueness of the law.”¹⁰⁵ The empirical data on maritime disputes confirms this notion. According to Sandholtz, “rules cannot cover every contingency, and because conflicts among rules are commonplace, actions regularly trigger disputes.”¹⁰⁶

3.2 Understanding State Motivation in Shaping International Law

At first glance, this struggle over activities in the South China Sea appears to be merely a local contest for control of rocks, reefs, resources, and rights of sovereignty. For the United States and many regional neighbors, the fundamental legal concern regarding China’s disputed resource claim relates to its creeping jurisdiction in maritime zones. Such efforts to expand jurisdiction are not unique to China, but China’s behavior exemplifies this trend among coastal states, which is also known as “territorialization.” Creeping jurisdiction, or territorialization of

¹⁰⁴ “U.S. PLANE IN CHINA AFTER IT COLLIDES WITH CHINESE JET - New York Times,” *New York Times*, accessed May 7, 2013, <http://www.nytimes.com/2001/04/02/world/us-plane-in-china-after-it-collides-with-chinese-jet.html?pagewanted=all&src=pm>.

¹⁰⁵ Wayne Sandholtz, “Dynamics of International Norm Change: Rules against Wartime Plunder,” *European Journal of International Relations* 14, no. 1 (March 1, 2008): 101–31.

¹⁰⁶ *Ibid.*, 103.

the sea, is the behavior whereby a coastal state progressively extends its sovereignty offshore, and asserting claim to—and restricting behaviors in—maritime spaces otherwise governed by international law.¹⁰⁷

Seen in a wider context, the controversy over Chinese claims offers evidence of a contest for regional hegemony – or worse, a showdown between a revisionist, rising power and a status-quo power. In its full expanse, this dispute suggests the limits of international law and fragility of international institutions that undergird the Western liberal order. Samuel Huntington presaged the gravity of the situation in civilizational terms:

What is most plausible and hence most disturbing about this [global civilizational war], however, is the cause of war: intervention by the core state of one civilization (the United States) in a dispute between the core state of another civilization (China) and a member state of that civilization (Vietnam). To the United States, such intervention was necessary to uphold international law, repel aggression, protect freedom of the seas, maintain its access to South China Sea oil, and prevent the domination of East Asia by a single power. To China, that intervention was a totally intolerable but typically arrogant attempt by the leading Western state to humiliate and browbeat China, provoke opposition to China within its legitimate sphere of influence, and deny China its appropriate role in world affairs¹⁰⁸

Depending on the distribution of power in the international system, balancing against a status-quo power may manifest itself in the strategic manipulation of international law.¹⁰⁹ The preparatory conferences for the United Nations Convention on the Law of the Sea witnessed a coalition of smaller states forming a negotiation bloc to demand not only a territorial sea, but also a restriction on warships within coastal waters.

¹⁰⁷ Ken Booth, “Naval Strategy and the Spread of Psycho-Legal Boundaries at Sea,” *International Journal* 38, no. 3 (July 1, 1983): 374.

¹⁰⁸ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, 2011), 316.

¹⁰⁹ Stephen M. Walt, “Alliance Formation and the Balance of World Power,” *International Security* 9, no. 4 (April 1, 1985): 3–43.

The condition of the international system is such that no power is appointed above all others to enforce the law—unlike the domestic-law context within a sovereign state, where the state maintains “the monopoly of the legitimate use of physical force.”¹¹⁰ In addition to matters of enforcement, international law differs from domestic law insofar as it is largely comprised of either treaty law or customary law, and it lacks much positive case law as precedent. In a world where international law reflects custom, what states do is the law. In an international system conditioned by anarchy, or the absence of a supreme government, a demonstrable refusal to acquiesce to another state’s practice is vital to the maintenance of customary law.

As international law lacks stringent mechanisms for enforcement, questions about state compliance deserve attention. States may comply with international law because the law reflects their preferences and is thus “an epiphenomenon of interests” reflecting the balance of power. Thus, when there is an asymmetry of power between states, weaker states will more likely to comply with customs established by stronger states.¹¹¹ Another approach to compliance suggests that states comply with the law occurs when it aligns with the state’s incentives. The perceived benefits of adhering to the rules of the system guide state behavior. Thus, states will more likely deviate when noncompliance exceeds the costs of participating in the system designed for collective good.¹¹² Alternatively, a theory of regime type may explain state compliance—especially among democracies. Democracies have a greater affinity for international legal processes for the resolution of disputes because democracies rely on legal processes for domestic

¹¹⁰ Max Weber, *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills (Princeton, N.J.: Oxford University Press, 1958), 78.

¹¹¹ Beth A. Simmons, “Compliance With International Agreements,” *Annual Review of Political Science* 1, no. 1 (1998): 79.

¹¹² *Ibid.*, 80.

governance.¹¹³ Finally, democratic norms may influence states to comply with international law in the presence of an interdependent social system. The law can influence behavior, but it requires the influence of international, transnational, and nongovernmental organizations to narrow the range of equilibrium outcomes available to states. Institutions can create instrumental incentives and increase a state's sense of obligation to act in a prescribed manner.

The premise of non-acquiescence forms the *raison d'être* of the Freedom of Navigation program. Given the variation in compliance with international law generally, and the challenge in maintaining the equilibrium of the maritime legal norms, the United States has focused on the importance of customary international law. When the United States interprets a coastal state's maritime claim as a challenge to the status quo, it must act diplomatically or operationally to demonstrate its refusal to acquiesce to that claim. Thus, the *persistent objection* aims to counter the claims of that state seeking to alter the status quo. The United States' actions under the Freedom of Navigation program are its demonstrable refusal to acquiesce to other states' deviation from customary international law.

3.3 Theoretical Paradigms of Action

Of the 150 coastal states in the world, 80 states currently make maritime claims that the United States disputes. When the United States actively contests a disputed claim, it has at least two mechanisms for protesting these disputed claims.¹¹⁴ First, the United States may issue a diplomatic protest, usually in the form of some diplomatic communication such as a *note verbale*, *aide de memoir*, or demarche. Second, the United States may dispatch warships or

¹¹³ Ibid., 81.

¹¹⁴ According to the Department of State's Bureau of Oceans and International Environmental and Scientific Affairs, the Freedom of Navigation Program employs three mechanism: diplomatic representations, operational assertions by U.S. military units, and bilateral/multilateral consultations with other governments to promote maritime stability and consistency with international law. The latter, consultations, fall outside the scope of this study. <http://www.state.gov/e/oes/ocns/opa/maritimeseurity/>

military aircraft to drive through contested areas in order to demonstrate both the freedom to navigate freely and its refusal to acquiesce to a coastal state's claim. However, diplomatic protests and operational assertions occur infrequently in disputes over freedom of the seas. In the period 1958-2013, the United State used diplomatic channels to communicate protests 197 times or in 7.1% of disputes (where the unit of analysis is the country-year-dispute). During the same period, the United States conducted operational assertions 535 times 19.3% of dispute (average of 15 countries each year).

This empirical variation is puzzling and prompts theoretical questions. First, the observed variation belies power-based explanations that the United States simply picks on weak states not strong states. Second, it suggests that the United States' commitment to liberal institutions is not so universal that it protests all disputed claims, everywhere, all the time. Third, it suggests that despite geographical proximity or contiguity of some coastal states, some specific policy may dictate when the United States asserts against some claims and not others. For example, the United States has asserted its freedom of navigation against Peru and Columbia, but not Chile or Costa Rica; against Finland and Sweden, but not Estonia or Lithuania; against the Soviet Union, but not the Russian Federation; against Liberia repeatedly but not against Nigeria during a twenty-year period, and against India but not Pakistan since 2001. Meanwhile, the United States has consistently conducted an operational assertion against the Philippines every year since 1979, against Oman every year since 1983, against Iran every year since 1989, and against Bangladesh's every year since 2001.

Thus, despite the American commitment in principle to freedom of the sea and the United States' implied commitment to a universal defense of freedom of navigation, the United States appears to be inconsistent in its diplomatic and operational behavior. Empirical evidence shows

that the United States does not issue diplomatic protests or conduct operational assertions each year against every state with which it has a maritime claims dispute. Neither universal nor ubiquitous in its protests and demonstrations, the United States has neglected some countries and concentrated on others during different periods of time.

The observed behavior of the United States since the 1958 Geneva Convention on the Law of the Sea, the 1979 establishment of the Freedom of Navigation Program, and the 1983 UN Convention on the Law of the Sea demonstrate that the United States' policy approach to Freedom of Navigation does not comport fully with any dominant explanation in international relations. Protests and assertions vary over time and space. Available evidence indicates the United States does not consistently contest the claims of any one state or group of states, but rather varies when and where it chooses to protest and assert. This dissertation seeks to understand this variation and explain why the United States acts against some maritime claims and not others. Specifically, this chapter considers three theoretical approaches for explaining the variation of American operational assertions against the maritime claims of some coastal states but not others.

This chapter considers three theoretical approaches for identifying the conditions under which the United States implemented a particular policy to pursue its national interests. Specifically, this chapter draws on liberalism, neorealism, and organizational theory to explain whether and how the United States actively protested the maritime claims of other states during a 55-year period from 1958 to 2013. These theoretical approaches are called the Liberal Model, the Security Model, and the Organizational Model.¹¹⁵ The time period permits analysis of behavior by a great power across multiple levels of analysis. Specifically, this permits variation

¹¹⁵ This approach is similar to three models used in Scott D. Sagan, "Why Do States Build Nuclear Weapons?: Three Models in Search of a Bomb," *International Security* 21, no. 3 (December 1, 1996): 55.

in the distribution of power in the international system, foreign domestic political regime types, and variation in United States military bureaucratic organization.¹¹⁶ These three models may be considered ideal types as no one of these models explains perfectly the variation in state behavior. Rather, they provide explanations that may provide great, but incomplete explanatory power, and which seek complement from additional models to complete the explanation of behavior. Although parsimony is a preferred virtue of theory, this dissertation follows the counsel of King, Keohane, and Verba who note that “theory should be just as complicated as all our evidence suggests.”¹¹⁷

3.3.1 Liberal Model.

American commitment to the institutionalization of liberal ideals is a natural starting point for explaining the United States’ activity in the Freedom of Navigation program. A leading explanation for the United States’ conduct of naval operational assertions is its commitment to international institutionalism. This commitment is rooted in the earliest days of the Republic and later articulated in the second of President Woodrow Wilson’s *Fourteen Points*, “Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.”¹¹⁸

The Freedom of Navigation program offers the United States mechanisms for legal dispute and demonstration to pursue this absolute freedom. The very fact that the United States disputes anywhere is a reflection of its commitment to international law and the institutions that

¹¹⁶ For discussions of levels of analysis or images, see Robert Jervis, *Perception and Misperception in International Politics* (Princeton, N.J.: Princeton University Press, 1976), 13–31; Waltz, *Man, the State, and War*.

¹¹⁷ Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press, 1994), 20.

¹¹⁸ Woodrow Wilson, *Woodrow Wilson: Essential Writings and Speeches of the Scholar-President* (New York: New York University Press, 2006), Ch. 8.

uphold it. The Freedom of Navigation program is motivated by a liberal notion of liberty and commitment to the institutions, laws and norms that preserve this liberty.

According to the paradigm of Liberalism, any variation in the Freedom of Navigation program results from a recognition that the states' interests are inextricably tied to a free sea. Its essential logic lies in wealth, growth, and ideas, not only in security. To a trading state, the sea is its source of wealth or commercial power—not just for one state to exploit, but for all to enjoy. This idea of liberty has deep roots in Western thought, particularly in positive theories of individual and collective liberty, commercial trade, and social interdependence (Grotius, Mill, Smith, et al). Defense of the global commons reveals a fundamentally commercial approach to the seas, which values the ocean as the primary conduit for liberalized trade.

Consistent with this view of international politics is the theory of a commercial peace, which is manifest in Great Britain's adaptation of its role from protector to provider. In the spirit of Adam Smith and Jeremy Bentham, the idea that free commerce, not force, would enrich England led to a shift away from a protectionist, mercantile approach to state security.¹¹⁹ According to this view of international politics, capital, not conquest, is the route to state power.¹²⁰ The pursuit of the benefits of free commerce fostered a security strategy that conceived of security as a public good. Great Britain pursued a naval strategy dedicated to protecting sea lanes of communication for and ensuring freedom of navigation. In doing so, Great Britain adapted its role from protector of national commerce to provider of maritime security as a global public good for all states to enjoy. Whereas the mercantilist strategy aims to

¹¹⁹ Jeremy Bentham, "Principles of International Law," in *The Works of Jeremy Bentham Published under the Superintendence of His Executor*, ed. John Bowring, vol. 2 (Edinburgh: William Tait, 1838), 535ff, <http://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-2>.

¹²⁰ Semmel, *Liberalism and Naval Strategy*, 51–53.

deny access and halt trade of the enemy or a competitor, a capitalist strategy built on the foundation of free-trade offers a different concept of maritime security. Open access to the ocean ensures all can navigate the global commons as a global public good. Some states may (and do) free-ride on this provision of security, but the underlying liberal assumption is that an objective harmony of interests may be achieved in society and international relations, because “a purely capitalist world can offer no fertile soil to imperialist impulses.”¹²¹ Like a rising tide that floats all boats, an open maritime commons is a public good that benefits all states. According to Schumpeter, capitalism is by nature anti-imperialist, and war in capitalist countries always leads to a domestic political struggle because of the domestic opposition to war. No people can afford to regard war as normal state of affairs. Moreover, conquering is costly; trade benefits all (Kant, Marx, Wilson). According to Schumpeter, “When free trade prevails no class has an interest in forcible expansion” because free trade creates a situation where goods and people flow freely. In this situation, “dominion of the seas [...] means little more than a maritime traffic police.”¹²²

If freedom of the sea is an unalloyed good that benefits all states, it is a relatively fragile one. Participation in an open system of free, liberal trade holds the promise of economic growth through commerce, while failure to abide by the system or to actively threaten it risks sanction from the international community. The foundation of today’s open maritime system resulted from a mixture of hard power and soft power.¹²³ In the case of maritime law, the country with the most powerful Navy, the United States, has been the self-appointed manager of the system, as was the Royal Navy one century before it. This system, the post-World War II liberal order

¹²¹ Joseph A Schumpeter, *Imperialism & Social Classes: Two Essays* (Ludwig von Mises Institute, 1955), 69.

¹²² *Ibid.*, 75–76.

¹²³ Joseph S. Nye, *The Future of Power* (New York: PublicAffairs, 2011), 90–109.

has been maintained through international institutions and underwritten by the power of the United States and its allies. This mixture of coercion and consent has fostered a harmonious and prosperous international order.

A broader look at the international institutions created in the post-World War II decades offers a better understanding of why maritime security may be considered a public good. The reconstruction of post-war Europe demanded massive development efforts to alleviate poverty in war-torn countries and to construct a new international economic order that would provide for economic stability, promote economic growth, and facilitate development. But just as this challenge required unprecedented international collective action through institutions like GATT and Bretton Woods for trade and finance, this challenge also required substantive efforts for providing security.¹²⁴ In order for new regimes of international free trade and finance to operate, a secure environment is necessary. International trade depends on freedom of navigation and security at sea.

As manifest in the maritime laws and norms of freedom of navigation, the Western-led order has been unusually accessible, legitimate, and durable. An open sea where ships of all states, regardless of their influence and power, may navigate freely is the ideal result of the Liberal Model. The Liberal Model explains why the United States uses the Freedom of Navigation program to maintain the maritime legal aspect of the international system. As a foundational principle of American foreign policy, it suggests that the United States will contest any and all efforts to enclose the open seas or restrict activities at sea.

With some minor exceptions, this ideal has been reality for the greater part of the twentieth and early twenty-first centuries. But the ideal of complete and open access to the

¹²⁴ Joseph E. Stiglitz, "International Financial Institutions and the Provision of International Public Goods," *EIB Papers* 3, no. 2 (1998): 117–118.

ocean has not always been realized. Freedom of the seas historically has been undermined by threats to neutral shipping, such as privateers and commerce raiders, enemy navies, and other efforts to deny the full use of the seas to other states. Efforts to constrain navigation freedoms or to reduce the free and open high seas are antithetical to the American interpretation of liberty.¹²⁵ For the United States, freedom of commerce and navigation has been articulated not only as a national birthright of independence, but as a global public good which American efforts extend to all states in the international system. The Liberal Model reflects a state's pursuit of absolute gains through the establishment and preservation of ordering principles such as the rule of law and international institutions, not the pursuit of relative gains through accumulation of material power.

Such a system is “difficult to overturn and easy to join,” but it is not self-sustaining.¹²⁶ Indeed, the efforts and investments necessary for maintaining the institutions that undergird the contemporary international system are substantial and cannot be ignored. Today, the United State Navy works with partner navies and coast guards around the world to maintain security. The U.S. Navy maintains approximately 100 ships underway around the world each day and maintains maritime headquarters in four geographically deployed locations around the world to ensure the command and control of forces and the coordination and cooperation with regional partners for theater security. This global presence is at the heart of the maritime strategy titled, *A Cooperative Strategy for 21st Century Seapower*. The Liberal model suggests that states should – and actually do – contribute to the provision of public goods. In this example, the costs of

¹²⁵ Bemis, *John Quincy Adams and the Foundations of American Foreign Policy*, 448ff.

¹²⁶ G. John Ikenberry, “The Rise of China and the Future of the West: Can the Liberal System Survive?,” *Foreign Affairs* 87, no. 1 (January 1, 2008): 26–28.

maintaining a navy represent a type of enforcement cost required by a hegemon for maintaining the stability of an international system.¹²⁷

Of course, willingness to pay these costs is not entirely altruistic. The concept of maritime security as a global public good overlooks the disproportionate benefits derived by the UNCLOS provisions for freedom of the seas. Moreover, the United States has such interest in maintaining maritime freedom and security on behalf of the international system because it benefits disproportionately from the freedom of navigation it supports. By definition a public good is both non-excludable and non-rivalrous (non-exhaustible), then security cannot be considered a public good.¹²⁸

Adam Smith recognized the challenges in promoting free trade, “Commerce, which ought naturally to be, among nations, as among individuals, a bond of union and friendship, has become the most fertile source of discord and animosity.”¹²⁹ Two centuries later, Waltz echoed the uncomfortable truth about interdependence that states experience in international trade: “Interdependence means that the parties are mutually dependent upon,” not merely sensitive to, economic conditions. The interdependence of nations varies depending on their capabilities. Politics is comprised greatly of these inequalities in capabilities between states, which are

¹²⁷ Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981), 85–96.

¹²⁸ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1971); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990). In resource terms, some states can be excluded from the consumption of a good like security. Strong states that provide maritime security to allies may be able to exclude non-allies or non-members of the club. To do so, however, tends to be costly. Embargo, blockade, or denial through attacking ships or mining waters would be an act of war. Similarly, strong states may raise the cost of doing business by creating some kind of exclusion zone or denying an area of the sea through the threat of force. In these terms, security is an excludable good—something that may be denied to some states and not others. Thus, security is not a public good; it is a private good. Even if security were non-rivalrous, it would be, at best, a club good. A state’s commitment to provide open-access to the maritime commons for all is not a credible commitment to provide security to all states. The same seapower that benefits all on one day may be used to deny access to the maritime commons on another. Second, an open concept of maritime security may have other negative externalities.

¹²⁹ Adam Smith, *Wealth of Nations*, ed. Kathryn Sutherland (New York: Oxford University Press, 1998), 306.

potential causes of conflict.¹³⁰ Interdependence means greater contact between people, which according to Waltz, actually increases the likelihood of conflict.

Thus a rationalist explanation for American policy seems to be most convincing. Insofar as the United States has led the provision or defense of this public good of maritime freedom, its efforts may not have been motivated out of altruism but self-interest. The United States bears the cost of securing the global commons, but it derives a significant benefit from this good as well. Democracy and capitalism have reinforced the very rules and institutions they are rooted in and benefiting from. By widening the array of participants and stakeholders in the system, the United States has fostered economic growth for all while also restraining the use of its power and ensuring sustained benefit at reduced costs.

Without vigilance and institutional maintenance that threatens sanction, the tide can shift. Contemporary maritime jurists like John Norton Moore warn of the dangers of taking for granted the open seas. The threats to the maritime commons may not be obvious and the immediate costs of a closing sea may not be immediately discernable. Initial challenges may be subtle, plausible, and limited. But Moore warns, “Through time, however, the common interest will be eroded by unwarranted restrictions on transit, discrimination among users, uncertainty of transit rights, inefficient and inconsistent regulations, efforts at political or economic gain in return for passage, increased political tensions, and perhaps even an occasional military confrontation.”¹³¹

Threats to freedom of the seas are often less obvious than pirates or enemy navies; freedoms at sea may be threatened in seemingly ordinary or inconspicuous ways. For centuries, states have asserted claim to so-called territorial waters. The accepted definition of territorial

¹³⁰ Waltz, *Theory of International Politics*, 142–143.

¹³¹ John Norton Moore, “The Regime of Straits and the Third United Nations Conference on the Law of the Sea,” *The American Journal of International Law* 74, no. 1 (January 1, 1980): 77, 79.

water had been those adjacent seas that states could control from the shore. This sentiment was perhaps best captured in Cornelius van Bynkershoek's 17th century maxim, "*Imperium terrae finiri ubi finitur armorum potestas*,"¹³² which later became interpreted as the "cannon-shot rule." Waters within the range of cannon-shot were considered de facto territorial waters. The custom of cannon-shot rule became the international norm, determined by a state's ability to control its adjacent seas with cannons that ranged a short distance offshore. This became accepted state practice until the mid-20th century.¹³³ As late as 1958, a majority of states adhered to this norm as 45 coastal states claimed a territorial sea of three nautical miles, and the four Nordic states claimed four nautical miles.¹³⁴ However, a movement to claim more ocean and further territorialize the seas gained traction, resulting in the establishment of a 12-nautical-mile territorial sea which states agreed to in the UN Convention on the Law of the Sea, but which more states violate than ever before. Today, nine states claim territorial seas exceeding 12 nautical miles, and 47 coastal states have set some type of restriction regarding the conditions under which foreign vessels may enter these territorial seas.

Centuries earlier, Grotius' argued that the oceans are a public good and all states enjoy the right to use the sea freely. His challenge to the Treaty of Tordesillas in the 15th century fought against the notion of enclosed waters. Grotius opposed political and economic claims that intended to exclude some states from full access to the seas. At the time, Grotius argued on behalf of his client, the Dutch East India Company, whose business interests suffered from the

¹³² Translated from the Latin, this expression is "The rule of land ends where the power of arms ends."

¹³³ Wyndham L. Walker, "Territorial Waters: The Cannon Shot Rule," *British Year Book of International Law*, Vol. 210, 1945, 211.

¹³⁴ Robert W. Smith and J. Ashley Roach, "Limits in the Seas: United States Responses to Excessive National Maritime Claims, No. 112" (Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, March 9, 1992), 33–34, <http://www.state.gov/documents/organization/58381.pdf>.

Portuguese efforts to close the sea and monopolize trade to the East Indies. Grotius gave voice to the idea that the world's oceans are a global commons over which no one state or international body has dominion, which became the basis for the Declaration of Paris (1856) and subsequent doctrine on the freedom of the sea.¹³⁵ For Grotius this doctrine is based in the “most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it.”¹³⁶

Today, the Grotian perspective on freedom of navigation is represented in the United Nations Convention on the Law of the Sea, which codifies the shared responsibility of all states to respond to threats to the public good on the high sea. Despite Grotius' prominent concept of the “freedom of the seas,” the behavior of states with respect to the oceans has tended towards enclosure. Today, the open commons are challenged by the desire of coastal states to control more offshore space despite international coordination under what is arguably the most successful international treaty, the UN Convention on the Law of the Sea. Whether for security purposes or for gain of economic resources, the extension of state control over the seas has created an increasingly territorialized sea that threatens open access.

Testable hypotheses derived from the Liberal Model include:

H1a. Because maximum participation in and adherence to customary international law and the UNCLOS treaty is the desired outcome, the United States will conduct operational assertions against as many states as possible regardless of geographic situation.

¹³⁵ Magnus Wijkman, “Managing the Global Commons,” *International Organization* 36, no. 3 (July 1, 1982): 511–536.

¹³⁶ Hugo Grotius, *The Freedom of the Seas, or the Right Which Belongs to the Dutch to take part in the East Indian Trade*, Translated by Ralph Van Deman Magoffin, Introduction by James Brown Scott, Director of the Carnegie Endowment for International Peace (New York: Oxford University Press, 1916). 6/20/2015. http://oll.libertyfund.org/titles/552#Grotius_0049_202

H1b. The United States will use operational assertions as outward expressions promoting its domestic political order and will be more likely to conduct operational assertions to contest the claims of autocratic states than institutionalized democracies.

3.3.2 Security Model.

According to the Security Model, one expects the United States to deploy its naval vessels to conduct operational assertions when there is a likely security payoff. The primary concerns here are those of relative security gains and the likelihood of conflict. But how does the simple act of an operational assertion achieve a state's security goals? As a peacetime use of the Navy for political purposes, Freedom of Navigation operations resemble "gunboat diplomacy."¹³⁷ To some observes the use of a naval vessel to assert navigational freedoms resembles a threatened use of force reassure allies or send a coercive message to foreign states within their waters.¹³⁸ As such, this definition implies the existence of a dispute, which conforms to Cable's expansive definition that includes any threat committed in furtherance of an international dispute.¹³⁹

There exists a tension between the Realist view of the seas and a Liberal view of the seas that has persisted for over four centuries. In many ways these two theoretical approaches offer conflicting imperatives for the United States in the modern international system. However, this conflict is nothing new, as Grotius observed in the early 17th century, "There are times when maritime powers want freedom of navigation, and there are times when coastal states wish to claim exclusive ownership over parts or the whole of the oceans. The legal outcome depends

¹³⁷ Cable, *Gunboat Diplomacy 1919-1991*, 7.

¹³⁸ Thomas C. Schelling, *Arms and Influence* (New Haven: Yale University Press, 2008); Luttwak, *The Political Uses of Sea Power*.

¹³⁹ Cable, *Gunboat Diplomacy 1919-1991*, 9–10.

upon who dominates whom.”¹⁴⁰ On one hand, Security Model expects the use or threat of force to ensure security and achieve national goals. On the other hand, promotion of an international regime of rules and institutions that provides stability and greater opportunities for cooperation seems most likely according to the Liberal Model.

A foundational tenet of Realism maintains that a state will pursue its interests, and the state’s interest is defined in terms of power and security. To this end, this dissertation assumes a state’s national objectives in the following prioritized way.¹⁴¹ First, as a matter of primary importance, states seek core national objectives (sometimes referred to as “vital interests”), which relate to the security of the state. These objectives include the maintenance of national sovereignty; protection of the homeland, territories, and resources; and the defense of treaty allies. Some states, particularly authoritarian regimes, may also include the preservation of the regime as a core national objective. Second, states pursue middle-range goals such as welfare objectives to increase their wealth and standard of living, whether through international trade, institutions, regimes, and other international organizations, etc. Third, states pursue long-range objectives such as broader milieu goals which seek to establish long-term, ideational objectives like as the pursuit of broader human rights, rule-based exchanges, democratization, and the like.¹⁴²

Whether explicit or implicit in the pursuit of these objectives, the pursuit of power governs the sphere of action of states and “infuses a rational order into the subject matter of

¹⁴⁰ Grotius, *Mare Liberum* quoted in William Joseph Aceves, *The Freedom of Navigation Program: A Study on the Relationship Between Law and Strategy* (University of Southern California, 1990), 262.

¹⁴¹ K. J. Holsti, *International Politics: A Framework for Analysis*, 5th ed. (Englewood Cliffs, NJ: Prentice Hall, 1988), 139.

¹⁴² *Ibid.*, 141–162.

politics.”¹⁴³ This reflects the underlying condition of the international system, anarchy. States exist in a so-called state of nature, where states are like-units, uniform in function, and differentiated in capability, struggling to survive. In this ungoverned, anarchic world, no supranational entity or international organization provides order or security. States must provide for their own security; states can count only on themselves for survival. Those states that fail to provide for their own security discover the Hobbesian truth that life is “nasty, brutish, and short.”¹⁴⁴

These hypotheses contribute to theories of international relations and foreign policy. First, in terms of the Security Model, the dataset covers a long period during which the distribution of power in the international system varied. From 1958 to 2013, the distribution of power arguably transitioned from a bipolar to a unipolar to a multipolar world.¹⁴⁵ Second, the Freedom of Navigation program offers a gauge to measure whether the foreign policy of the United States has become more militarized over time. One expectation of balance of power theory is that an unchecked, unipolar state is more likely to use or threaten force than a state that is balanced in a bipolar or multipolar distribution of power.¹⁴⁶ In a period when the United States enjoyed naval mastery, one would expect the United States to exercise its advantage in military power. With an ability to exert itself far beyond its home waters, the United States

¹⁴³ Hans Morgenthau, *Politics Among Nations*, ed. Kenneth Thompson and David Clinton, 7th edition (Boston: McGraw-Hill, 2005).

¹⁴⁴ Thomas Hobbes, *Leviathan* (New York: W. W. Norton, 1997), 70.

¹⁴⁵ William C. Wohlforth, “The Stability of a Unipolar World,” *International Security* 24, no. 1 (July 1, 1999): 5.

¹⁴⁶ Waltz, *Theory of International Politics*; Stephen M. Walt, “Alliance Formation and the Balance of World Power,” *International Security* 9, no. 4 (April 1, 1985): 3–43; Christopher Layne, “The Unipolar Illusion: Why New Great Powers Will Rise,” *International Security* 17, no. 4 (April 1, 1993): 5–51; Wohlforth, “The Stability of a Unipolar World.”

Navy has possessed a command of the commons since the fall of the Soviet Union, and arguably for most of the second half of the twentieth century. Paul Kennedy describes naval mastery as:

A situation in which a country has so developed its maritime strength that it is superior to any rival power, and that its predominance is or could be exerted far outside its home waters, with the result that it is extremely difficult for other, lesser states to undertake maritime operations or trade without at least its tacit consent. It does not necessarily imply a superiority over all other navies combined, nor does it mean that this country could not temporarily lose local command of the sea; but it does assume the possession of an overall maritime power such that small-scale defeats overseas would soon be reversed by the dispatch of naval forces sufficient to eradicate the enemy's challenge.¹⁴⁷

During the 1970s and 1980s, the Soviet Navy emerged as the sole challenger to American Naval mastery as submarine technology and, later, aircraft carriers contested the U.S. naval dominance. Similarly, in the early 2000s, the People's Liberation Army Navy (PLAN) has rapidly modernized its fleet and enabled China to challenge American dominance in East Asia.

The Security Model leads us to expect that the United States will use the Freedom of Navigation program first to increase national security close to home, to preserve or increase its sovereignty and claim over resources, and to increase its security abroad among treaty allies. Whatever the absolute advantages to be gained from international trade, the Security Model is sensitive to the fungibility of power. As Adam Smith observed, "The wealth of a neighboring nation, however, though dangerous in war and politicks, is certainly advantageous in trade. In a state of hostility it may enable our enemies to maintain fleets and armies superior to our own; but in a state of peace and commerce it must likewise enable them to exchange with us to a greater value and to afford a better market[...]"¹⁴⁸ Wealth, and the commercial system that begets it, is thus a double-edged sword. Recognizing that relative power, not absolute power, is the measure

¹⁴⁷ Kennedy, *The Rise and Fall of British Naval Mastery*, 9.

¹⁴⁸ Smith, *Wealth of Nations*, 307–8.

of security and that increasing power increases likelihood of state survival, the Security Model predicts the following behavior:¹⁴⁹

Testable hypotheses derived from the Security Model include:

H2a. The United States will conduct operational assertions to challenge claims, which restrict freedom of movement in areas most vital to American military security or commercial security. The strategic chokepoints are the highest priority transit zones.

H2b. The United States will conduct operational assertions to challenge the emergence of a regional hegemon.

3.3.3 Organization Model

Although the Security Model and Liberal Model provide much explanatory power for the conditions under which the United States conducts operational assertions, many cases elude these explanations. Jervis argues if state behavior cannot be explained by either internal policies or the external environment, then the bureaucracy may determine policy. Accordingly, positions in government determine policy positions, such that “where you sit is where you stand.”¹⁵⁰ To gain a finer understanding of the variation, some consideration must be given to the organizations that are responsible at for implementing policy. A bureaucratic level of analysis offers an explanation of the variation of this program’s implementation that may account for the relatively low severity or acute nature of ocean policy issues.

The security challenges and opportunities for gain that the state faces vary over time and by issue area. However, ocean policy is simply not at the top of the list of priorities for most states. Thus, the behaviors of a state on issues of maritime claims are not likely to be largely determined by heads of state or decisionmakers at the highest echelons of government. Moreover, matters of ocean policy because of their relatively lower importance vis-à-vis other

¹⁴⁹ John J. Mearsheimer, *The Tragedy of Great Power Politics*, 1st ed (New York: Norton, 2001), 36.

¹⁵⁰ Jervis, *Perception and Misperception in International Politics*, 24-25.

policies of national importance may be used as focal points for cooperation on other high political issues or as they may be used as linkages or levers on more contentious issues. Thus, it is unlikely that the theories of either the Liberal Model or the Security Model will have complete explanatory power. These models may be useful in understanding many cases, but there are likely to be special cases that fail to conform to the theory. The exceptional cases may be explained at the margins by bureaucratic and organizational factors. Within the bureaucracy, career-professionals, not politicians, actuate the levers of power. Within the bureaucracy, the government's expertise resides; political leaders often delegate authorities for decisionmaking on discrete issues down to these organizations. The organization of these bureaucracies, their prioritized objectives, and the limited availability of resources affect their decisions just as much as the larger theoretical concerns or dominant political climate of the day.

The bureaucratic level of analysis is particularly useful in situations when national survival is *not* at stake, and thus is helpful for thinking about Freedom of Navigation. The burning-house metaphor helps to illuminate this fact. When a house is on fire, Wolfers tells us that one expects to observe a uniform response—occupants will race for the exits. Through this metaphor, one thus expects to observe states acting uniformly to dire security threats. Under more ordinary conditions, however, we expect more variation in state behaviors. Wolfers acknowledges that in international politics “the house is not always, nor everywhere on fire.”¹⁵¹ Oceans policy and disputed maritime claims rarely rise to levels of “dire and unmistakable threat to national survival.”¹⁵² Thus, by examining variation at the bureaucratic level, we can move

¹⁵¹ Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore: Johns Hopkins Press, 1962), 15.

¹⁵² *Ibid.*, 14.

from a state-as-actor theory and delve inside the black-box of the state to examine sources of state conduct closer to the individual decisionmakers.

This theory assumes two basic principles. First, it assumes that the policy preferences of bureaucrats are determined largely by their position in government, and their interests are affected by structural incentives operating on them, workload and resource constraints, expectations of peers and seniors, and the clients of the organization.¹⁵³ Second, this theory assumes that states' policies are determined by bureaucratic bargains and routines, which affect the statesman's decision or policy implementation in such a way as to render the decision itself irrelevant.¹⁵⁴ Jervis argues that we have no way to explore the extent to which bureaucratic factors affect the outcome of behavior, because we have no grounds to claim that a different bureaucratic constellation would have produced a different result.¹⁵⁵ However, by varying the bureaucratic structure while maintaining a constant policy, this study should illustrate how a bureaucracy matters to outcomes. Additionally, the bureaucratic model must consider the resources available to it for implementation of prioritized policy objectives.

Thus, the Organization Model proceeds in two stages by explaining why an organization is selected and then by explaining how that chosen organization's attributes affect its execution. First, the Organization Model considers what organization the government charges with the mission of executing an operational assertion to protest a disputed maritime claim. The Organization Model helps to explain the reason that the U.S. Navy is the organization selected to implement the policy in the first place. That is, why does the United States government dispatch

¹⁵³ Jervis, *Perception and Misperception in International Politics*, 1976, 24; James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), 88.

¹⁵⁴ Jervis, *Perception and Misperception in International Politics*, 1976, 25.

¹⁵⁵ *Ibid.*, 25–28.

warships to conduct Freedom of Navigation assertions and not some other type of vessel? It is worth noting that the United States Navy is most regularly chosen to demonstrate the United States' refusal to acquiesce to maritime claims. On one hand, this choice may be explained by a theory of signaling which argues that messaging within the same domain leads to most effective communication.¹⁵⁶ So, an objection over a maritime dispute would be best communicated in the same mode or medium by sending a maritime message with ships. But cannot a commercial tanker ship fulfill the role? Would a rowboat be as effective in demonstrating the United States' refusal to acquiesce to a disputed maritime claim?

Whether a warship is an appropriate communication instrument depends in part on one's beliefs about the type of organization being tasked to execute the mission. In the typology of James Q. Wilson, the armed forces during peacetime exemplify *procedural organizations*, whose "managers can observe what their subordinates are doing but not the outcome if any that results from those efforts." (Wilson 163). Without war to test its mettle, a military in peacetime can only estimate, but not gauge with certainty, its readiness for combat. According to Wilson, a procedural organization differs from a *craft organization* whose output and effectiveness are readily apparent. A craft organization consists of operators whose activities are hard to observe (e.g. ships dispersed across the Pacific Ocean¹⁵⁷) but whose outcomes are relatively easy to evaluate (e.g. destruction of enemy ships in battle)." If the navy were a procedural organization, then policymakers would likely select it because of its ability to be observed procedurally – in addition to its relative ease of movement or operational agility. However, if the navy were a craft organization then it would be likely be selected because of its ability to defeat other naval vessels

¹⁵⁶ Robert Jervis, *The Logic of Images in International Relations* (Princeton University Press, 1970).

¹⁵⁷ The ability to observe dispersed forces in near-real-time has improved in the networked, information age through satellite communications and systems like Blue Force Tracker.

in combat.

For the purposes of the Freedom of Navigation program, the warfighting capabilities and attributes of a craft organization may not seem necessary. After all, a ship that is innocently conducting a legal demonstration of its freedom and which intends no disruption that is prejudicial to the peace of the coastal state should not need to be combat-ready. Thus, any ship (even a rowboat) should be sufficient for conducting a simple innocent transit from point A to point B. Indeed, an operational assertion would seem to be the stuff of procedural organizations.

However, any vessel conducting an assertion under the Freedom of Navigation program may be denied by force the right to navigate by the coastal state. Anticipating a worst-case response from a state that seeks to deny navigational freedom, a ship must be prepared to fight if engaged by hostile forces, even though the intended character of an operational assertion may have been procedural, innocent, legal, and non-combative. As a procedural organization, the United States Navy offers a level of assurance and reliability to policymakers that it will function as desired not as a combat platform for warfare but as a communication tool for “lawfare.” However, only those warships that are deemed operationally combat-ready will be employed to conduct FONOPS lest operation require the capability to fight.

This typology, with its clear distinction between procedural and craft organizations, poses a challenge for classifying the U.S. Navy for the purposes of this study. Although Wilson argues, “The largest procedural organization in the government is the United States Armed Forces during peacetime,” the U.S. Navy is not a garrisoned force.¹⁵⁸ The navy is an expeditionary service—constantly deployed and ever-ready.¹⁵⁹ This attribute of sustained

¹⁵⁸ Wilson, *Bureaucracy*, 163.

¹⁵⁹ Richard K Betts, *Military Readiness: Concepts, Choices, Consequences* (Washington, D.C.: Brookings Institution, 1995), 19–34, 40.

readiness and constant operational deployment is relatively unique among the services during peacetime. The peacetime Navy remains operationally active and deployed worldwide during periods of peace and crisis. Moreover, the materiel readiness of the navy during the post-WW2 era, in terms of warships and auxiliary ships, has remained roughly the same in times of peace and war due to the very large capital investments and long lead-times for ship construction. This behavior is inherently different to that of the army which tends to remain garrisoned during peacetime and which may expand and contract with greater agility in preparation for war.¹⁶⁰

Nevertheless, Wilson's general distinction is well taken. A navy cannot receive a complete test of its fighting ability except against a live, interactive enemy. The minutia of training and deployment may be observed carefully by ship captains and fleet admirals—with great attention placed on the observable readiness of weapons systems, the personnel operating them, and their equipment. But, the U.S. Navy has not experienced conventional, fleet-on-fleet engagements since World War II. The Navy has engaged in limited naval skirmishes and uses of warships for projection of power ashore from uncontested waters suggest, but these operations pale in comparison to Leyte Gulf in 1944 when the ships and aircraft of the U.S. Navy's 3rd and 7th Fleets destroyed what remained of the Imperial Japanese Navy.

And yet throughout the period of this study, the U.S. Navy has remained deployed worldwide and ready for combat – even if on a lower scale, as the total number of available warships in current American inventory is less than the number of American ships that fought in the four days at Leyte Gulf.¹⁶¹ But ready for what? For when? With What?¹⁶² These questions formed

¹⁶⁰ The point here is that whereas armies may expand rapidly through conscription in anticipation of war, navies cannot rapidly expand. The massive shipbuilding effort made possible through legislation of the Vinson-Walsh Act, or Two-Ocean Navy Act, of 19 July 1940 is a rare example of massive fleet expansion. Yet, this act anticipated the likelihood of war and enabled the production of warships years before they were eventually christened.

¹⁶¹ Morison, *History of United States Naval Operations in World War II*, 415–432.

the crux of an existential crisis experienced by the Navy in the decade after its victory of WW2, and they provide a guide for considering exactly what type of organization is the U.S. Navy during the period 1958-2013

Possessing the largest fleet in its history, the U.S. Navy appeared to have little reason to maintain such a fleet. As Samuel Huntington observed in 1954, “It appeared impossible, if not ridiculous, for the Navy still to claim the title of the Nation’s ‘first line of defense’ when there was nothing for the Navy to defend the nation against.”¹⁶³ During the Cold War and post-Cold War era then, the distinction between craft and procedural organization may be less salient in understanding the role of an organization like the U.S. Navy.

The Navy seems to function as an index of American power for communication purposes. Its carefully calibrated weapon systems communicate a technical ability to inflict damage from specific distances and with measured likelihoods.¹⁶⁴ Second, the organization model explains how the tasked organization’s capabilities, interests, and perspectives affect how it carries it out the mission. At the risk of absurdity, this question draws attention to two concerns: quality and reliability of the policy instrument selected and ability to command and control that instrument. Both of these concerns are active for the diplomatic-defense bureaucracy.

The United States Navy is the organization selected to implement policy because it is perceived by decisionmakers to be operationally ready and reliable.¹⁶⁵ To assess readiness, In order to implement a delicate policy that may potentially be misperceived and escalate into a

¹⁶² Betts, *Military Readiness*, 33.

¹⁶³ Huntington Samuel P, “National Policy and the Transoceanic Navy,” *U.S. Naval Institute Proceedings* 80, no. 5 (May 1954).

¹⁶⁴ Jervis, *The Logic of Images in International Relations*.

¹⁶⁵ Robert Mandel, “The Effectiveness of Gunboat Diplomacy,” *International Studies Quarterly* 30, no. 1 (March 1, 1986): 63.

more severe crisis situation, political leaders delegate mission to a specific organizations for implementation. These missions require a level of assurance that the operations will be accomplished professionally and without likelihood of operational mishap or political escalation. By their nature, routine procedures are practiced more frequently. This seemingly banal observation leads us to a testable hypothesis for empirical research.¹⁶⁶ The frequent practice of routine operations leads to organizational learning and the development of the standard procedures and repertoires leaders may rely on in sensitive situations, in cases when escalation is possible or likely, and in periods of crisis. Provided there is adequate feedback, routinized decisionmaking lends itself to organizational learning in most environments.

In addition to the explanation of quality, the Organization Model helps us understand the importance of a tool the government can control. Finely calibrated legal operations that are not intended to provoke hostile responses require a trusted agent over whom the government has complete command-and-control. Defense contractors or private entities cannot fulfill this requirement without requisite legal protocols. The tool selected must be one that has observable readiness and proficiency; it must be an organization that spends time training and operating. But to communicate a very finely calibrated message with confidence that it will be conveyed as intended, the United States needs a robust, calibrated, trustworthy tool to conduct operations. Occasionally even well routinized processes lead to unexpected outcomes. Highly complex organizations often perform in accordance with expectation, but occasionally fail spectacularly due to “practical drift”¹⁶⁷ and decoupling of tactical actions from strategic objectives.¹⁶⁸

¹⁶⁶ I thank Dr. Jonathan Bendor for this point.

¹⁶⁷ Scott A Snook, *Friendly Fire: The Accidental Shootdown of U.S. Black Hawks over Northern Iraq* (Princeton: Princeton University Press, 2002).

¹⁶⁸ Bouchard, *Command in Crisis*, 191. For a discussion of similar problems in the most recent Taiwan Strait Crisis, see Andrew Scobell, “Show of Force: Chinese Soldiers, Statesmen, and the 1995–1996 Taiwan Strait Crisis,”

According to the Organization Model, we expect the United States to deploy its naval assets to conduct operations when it has the organizational capacity and interest in doing so. The Freedom of Navigation program requires an integration of agents within the bureaucracies of State and Defense who have their individual and organizational interests and priorities that do not always align.¹⁶⁹ This problem may stem from a virtue of bureaucracies. The common, internal imperatives of bureaucracies are to ensure abundant options for their principals; bureaucracies rarely seek to burn bridges.¹⁷⁰ However, the current organizational structures of the Departments of State and Defense differ, and delegation to the military bureaucracy may actually cause or exacerbate the very political problems it was supposed to forestall unless there is sufficient coordination.

In complex organizations, principals delegate the planning and execution of routine tasks and operations where little confrontation is expected. Freedom of Navigation operations are relatively mundane—a class of operations that are explicitly designed to avoid confrontation. These operations are delegated to relatively low levels of the Departments of Defense and State where career professionals with high levels of regional and functional expertise plan and execute routine operations. Such decentralization in an organization is common and creates organizational efficiencies in terms of expertise, opportunity cost (time and money), and

Political Science Quarterly 115, no. 2 (2000): 227–46. For a theoretical discussion of this phenomenon, see John D. Huber and Charles R. Shipan, *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy* (Cambridge University Press, 2002), 17–43.

¹⁶⁹ This tendency toward uncoupling results from limitations of communication, conflicting incentives, information availability, and perception-reaction relationships. Four outstanding examples are offered by Bouchard, *Command in Crisis*.

¹⁷⁰ Terry M. Moe, “Political Institutions: The Neglected Side of the Story,” *Journal of Law, Economics, & Organization* 6 (January 1, 1990): 213–53.

information.¹⁷¹ However, decentralization can result in decisions being made by many agents throughout the hierarchy with different beliefs, varying perspectives on the problem at hand, and occasionally overlapping goals.¹⁷² Within the bureaucracy of the Department of Defense, tactical units, regional fleet headquarters, and theater commanders must coordinate to implement policy. Combatant Commands within the Department of Defense have statutory responsibility to maintain ready operational options for the President to execute.¹⁷³ At these levels, defense strategy is crafted and implemented. Serving as a bridge between national policy and operational action, strategy is a plan that balances political ends and military means.¹⁷⁴ Within the bureaucracy, a wide spectrum of policy aims must be prioritized for action, and the limited means available must be applied to the most important objectives.

H3a. The United States will conduct Freedom of Navigation operations when an operational headquarters exists to plan and execute them.

H3b. The United States will not conduct Freedom of Navigation assertions when political sensitivities dictate—as expressed by Department of State or National Security Council.

H3c. The United States will conduct Freedom of Navigation operations when diplomatic relations are in tact.

¹⁷¹ Herbert A. Simon, *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations*, 4th ed. (New York: Free Press, 1997), 317.

¹⁷² Philip Zelikow and Graham Allison, *Essence of Decision: Explaining the Cuban Missile Crisis*, 2nd ed. (New York: Pearson, 2009).

¹⁷³ There are 6 geographic Combatant Commands: U.S. Africa Command, U.S. Central Command, U.S. European Command, U.S. Northern Command, U.S. Pacific Command, and U.S. Southern Command. Additionally, there are 3 functional Combatant Commands: U.S. Special Operations Command, U.S. Strategic Command, and U.S. Transportation Command. The 1986 Goldwater-Nichols Act updated the roles and responsibilities of Combatant Commanders. Combatant Commands derive their operational authority from Title 10 of U.S. Code. See Title 10, Section 163, “Commanders of Combatant Commands: Assignment; Powers and Duties.” <http://uscode.house.gov/browse/prelim@title10/subtitleA/part1&edition=prelim>

¹⁷⁴ Richard K. Betts, *American Force: Dangers, Delusions, and Dilemmas in National Security* (New York: Columbia University Press, 2012), 233.

In Chapter 4, I present a dataset designed to help test these hypotheses. Spanning 55 years from 1958 to 2013, the Freedom of Navigation (FON) dataset contains information on the maritime claims of coastal states, disputes over various states' compliance with international law, and the actions taken by United States to demonstrate its refusal to acquiesce to claims it interprets as unlawful. The data include both diplomatic protests and physical assertions, which are backed by the threat of military force. The variation observed will not likely conform perfectly to any one of the models introduced above. There is not likely to be any clear, perfect explanation. However, I anticipate that the Liberal Model and Security Model will explain a large portion of the observed variation, but the Organization Model accounts explains important contingent events.

CHAPTER 4. DATASET INTRO AND DESCRIPTIVE STATISTICS

4.1 Introduction

This Freedom of Navigation (FON) dataset, which spans the years 1958–2013, contains three important categories of information. First, the dataset records information on each type of maritime claims of every coastal state in the world (e.g. specific claims to Territorial Seas, Exclusive Economic Zones, etc.). Second, the dataset records whether the United States disputes one or many of a coastal state’s maritime claims. Third, the dataset records whether the United States took action—either a diplomatic protest, or an operational assertion, or both—to demonstrate its refusal to acquiesce to claims it interprets as unlawful. The unit of analysis is the coastal state-year. The dependent variable is whether the United States issues a diplomatic protest (0/1) or conducts an operational assertion (0/1) to contest a disputed maritime claim of a coastal state. This dataset is a pooled dataset, meaning the data have the attributes of both time-series data and cross-section data.¹⁷⁵ The dataset contains a cross-section of every coastal state in a given year, and the number of coastal states varies over time. It contains approximately 7,412 observations and the data comprise over 30 variables for every coastal state in the world during a 55-year period.

The FON dataset records each of the various maritime claims of every coastal state in the world and what action, if any, the United States takes when it disputes those claims.. When a coastal state makes a maritime claim that conflicts with the United States’ interpretation of international law, there are two primary tools available to challenge those claims. The coastal state’s claim is a necessary precursor for American action and for entry into the dataset as a dispute. These claims are elements of each state’s domestic law and they are recorded in two

¹⁷⁵ Damodar N. Gujarati, *Basic Econometrics*, 4th Edition (New York: McGraw-Hill, 2003), 27.

important source: the United Nations Division for Ocean Affairs and the Law of the Sea and the United States Navy's Judge Advocate General Maritime Claims Reference Manual. When a disputed claim exists, the United States may respond by issuing a diplomatic protest with a demarche, or by conducting an operational assertion with a warship of the United States Navy.¹⁷⁶ The former may be accomplished with a formal note, *aide memoir*, or other communiqué delivered through diplomatic channels. To conduct the latter, a warship sails through a contested area to its assert freedom of navigation. Both measures are intended to contest claims assessed by the United States to be unlawfully "territorial" or "restrictive of usage." Each measure constitutes an American refusal to acquiesce to the claims of the particular coastal state. This chapter introduces a dataset designed to help test hypotheses related to one application of military force to achieve political outcomes in peacetime. This dataset will contribute to hypothesis testing and theory building on the utility of force and international law in international politics.

A demonstrable refusal to acquiesce to another state's practice is vital to the maintenance of customary law. International law is largely comprised of either treaty law or customary law, and it lacks much positive case law as precedent. Rather, the law relies heavily on custom and normative sense of obligation to act, *opinio juris*. Thus, "what states do" comprises much of international law. As Goldsmith and Posner argue, "international law is equilibrium behavior in which self-interested states are constrained only by their expectations about the strategies chosen by other self-interested states."¹⁷⁷ Positive law, such as treaty law is also fundamental, but entry

¹⁷⁶ In some cases, the US Air Force will conduct flights to assert freedom of navigation in international airspace. The focus of this study is on the use of naval forces in the Freedom of Navigation program.

¹⁷⁷ Jack L. Goldsmith and Eric A. Posner, "A Theory of Customary International Law," *The University of Chicago Law Review* 66, no. 4 (October 1, 1999): 1113–77.

into treaties such as the United Nations Convention on the Law of the Sea (UNCLOS) is optional for states. Therefore, if a state's action deviates from the norm and that action occurs without protest, acquiescence is considered tantamount to acceptance if that behavior is visible to other states, is purposeful in its deviation from the norm, and is part of a pattern of similarly intentioned action. For example, some coastal states have claimed a 200nm territorial sea (far wider than the 12nm standard according to international law). The United States and other countries have assessed these claims as exceeding the territorial sea provision agreed to in UNCLOS, and have taken diplomatic and operational action to contest these claims. The premise for these actions is that uncontested claims may eventually alter the custom and become the accepted legal practice. Although international law can theoretically foster coordination and cooperation, a less sanguine theory of international law suggests that the law states comply only when it suits them and look for ways to gradually change the law by salami-slicing.

Efforts to assert a particular policy position regarding international law may be analogous to the basic legal concept of *adverse possession*.¹⁷⁸ In property law, adverse possession refers to a “doctrine under which a person in possession of land owned by someone else may acquire valid title to it.”¹⁷⁹ The demonstrations conducted by the United States reveal a particular legal stance on the maritime claims. They respond to the salami slicing of states who seek to incrementally increase their claim to international waters. These activities are organized, planned, and executed through the United States Freedom of Navigation program, a bifurcated program administered by the Departments of State and Defense.

The following pages discuss the rationale for constructing this dataset and describe the characteristics of the dataset itself. First, I describe coding rules and procedures for the FON

¹⁷⁸ Lieutenant Commander Ian Wolf, US Navy (JAGC), interview by author, Newport, RI, 9 September 2014.

¹⁷⁹ Legal Information Institute, “Adverse Possession.”

dataset, including coding choices made during its assembly. Second, I present basic descriptive statistics about key items of interest in the data and evaluate several bivariate relationships. Third, I compare the FON dataset with several other relevant datasets. The chapter concludes with a discussion of possible applications and extensions of the FON dataset for academic research and policy execution.

4.2 Data Coding Procedures

4.2.1 Time Series

There are two primary reasons to begin data collection in 1958—one legal and one operational. The first reason is that 1958 represents a milestone in the history of international maritime law. From 24 February to 27 April of that year, the first United Nations Conference on the Law of the Sea convened in Geneva under Resolution 1105 (XI) of 21 February 1957. This conference was the culmination of seven years of work by the International Law Commission, which sought to codify the regime of the high seas and the territorial sea. Previously, maritime demarcation adhered to the legal principle of state practice, but variation in coastal state practice occasionally led to dispute. The 1958 conference produced the Conventions and Protocol which follow earlier efforts of international jurists at of the Hague Conference for the Codification of International Law in 1930, but the 1958 conference was unable to produce consensus on the breadth of territorial seas.

By beginning the data collection in 1958, three important phases in international maritime history are captured. First, the period begins at the conclusion of the landmark 1958 Conference on the Law of the Sea and the implementation of those conventions. Second, the period continues through the diplomatic efforts of the subsequent convention, which met from 1973-1982 and produced the current treaty, UNCLOS. Third, the period continues through the

years of ratification and implementation of UNCLOS from 1983 onward during which arguably the most ambitious multilateral treaty of its time was implemented.

The second reason the dataset begins in 1958 is that the year marks a major reform of the Department of Defense. In 1958, the United States Congress enacted the Department of Defense Reorganization Act. This legislation amended the National Security Act of 1947 and responded to President Eisenhower's desire for a more unified and streamlined chain-of-command.¹⁸⁰ At least three factors contributed to the call for reform. First, Eisenhower experienced during World War II the efficiency and effectiveness of unified command. Second, increased rivalry between the services following the DOD reforms of 1947 required organizational adjustment.¹⁸¹ Finally, rapid technological modernization of United States weapons systems and Soviet systems prompted a call for new organizations to command and control a modern force. The legislation provided to military commanders the legal codification of Operational Command (OPCON).¹⁸² The reform also streamlined command structure by eliminating service chiefs as executive agents.¹⁸³ The time series also captures the Goldwater-Nichols Department of Defense Reorganization Act of 1986, which is widely considered the most significant restructuring of the Department of Defense since 1947.

The effect of Goldwater-Nichols on naval operations, among other activities, was significant. Until 1986, the Chief of Naval Operations performed duties as his title implied: this four-star admiral literally commanded operations of the navy around the globe. After the 1986 legislation,

¹⁸⁰ Edward J. Drea et al., *The History of the Unified Command Plan, 1946-2012* (Washington, DC: Joint History Office, Office of the Chairman of the Joint Chiefs of Staff, 2013), 20, http://www.dtic.mil/doctrine/doctrine/history/ucp_2013.pdf.

¹⁸¹ Walter J. Boyne, *Beyond the Wild Blue: A History of the U.S. Air Force, 1947-1997* (Macmillan, 1998), 124.

¹⁸² "Joint Publication 1-02: Department of Defense Dictionary of Military and Associated Terms" (Joint Chiefs of Staff, August 15, 2014), http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

¹⁸³ Drea et al., *The History of the Unified Command Plan, 1946-2012*, Joint History Office (2013), 20–21.

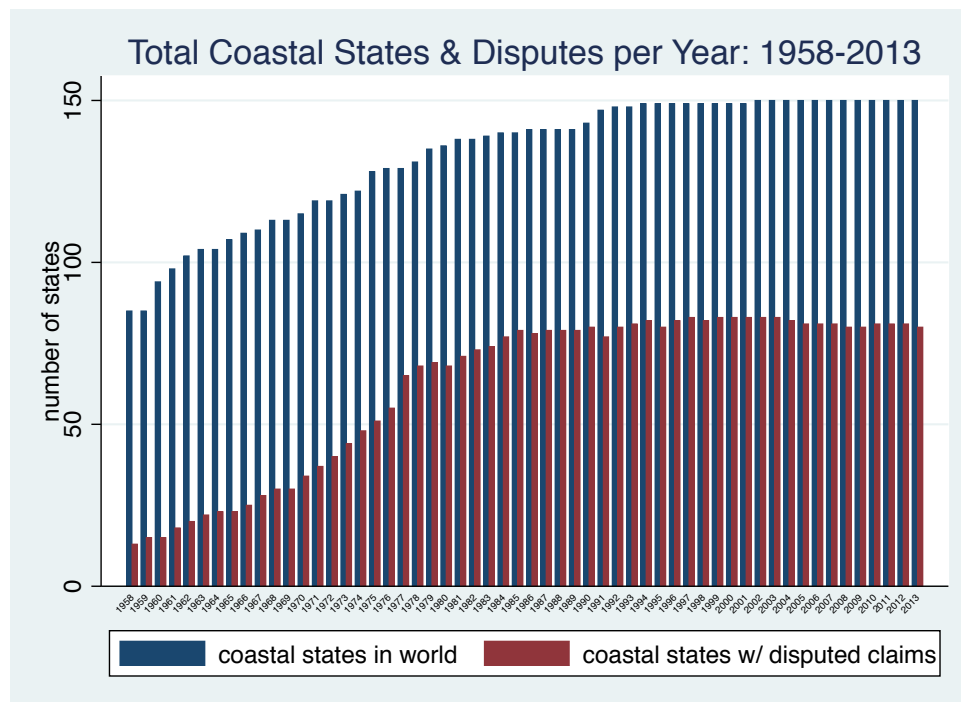
the Chief of Naval Operations and the other service chiefs became so-called service providers. Their responsibilities were curtailed to the programming and management of forces. The post-Goldwater-Nichols Chiefs of Naval Operations focuses on “manning, training, and equipping” the navy which they subsequently provide to the geographic combatant commanders around the world who maintain operational control of the forces.

4.2.2 State Entry to Dataset.

In 1958, the number of coastal states in the international system was 85. That number nearly doubles from 1958 to 2013 when the total number of coastal states in the international system is 150. No observation is recorded for a state until it formally declares independence. For instance, Cameroon enters the dataset in 1960 when it gained independence from France, and Latvia enters the dataset in 1991 following its declaration of independence after the dissolution of the Soviet Union. Similarly, states that dissolve are terminated from the dataset in the year of their disestablishment, and no observation is recorded for a dead or fragmented state. For instance, neither the Soviet Union nor Yugoslavia appears in the dataset after 1991. In the case that two states unify, they are recorded separately through the year of their unification, then they are recorded as a new state with a new Correlates of War country code for the remaining years. For example, the Yemen Arab Republic (Sanaa) and the People’s Democratic Republic of Yemen (Aden) appear in the data as separate states with distinct COW country codes from the dates of their inception (1961 and 1967 respectively) until the year of their unification, 1990. In 1990, the dataset records a new state, Yemen, with a unique COW country code. States that change names are also recorded. For instance, Cape Verde becomes Cabo Verde after its domestic legislation in 2013 to change its name. Similarly, after the fall of the Soviet Union, the

Russian Federation replaces USSR for COW Country code 365. These minor details have no statistical significance, and the COW country codes do not change.

FIGURE 4-1



4.2.3 Exclusion of Landlocked States

Landlocked states, defined as those states without a coastal access to the sea, fall outside the scope of this study, both theoretically and operationally. The data do not include landlocked states for three reasons. First, only a coastal state possesses a territorial sea and can make claims to other maritime zones. UNCLOS does make important provisions in Part X for landlocked states, such as “right of access” to the sea via “transit states.” However, landlocked states may not make physical claim of sovereignty to the coastal seas.¹⁸⁴ Second, this study examines

¹⁸⁴ “Right of Access of Land-locked States To and From the Sea and Freedom of Transit,” UN Convention on the Law of the Sea, Part X, 1982.

United States responses to disputed claims and the United States does not conduct operational assertions under the Freedom of Navigation program against landlocked states. Finally, to include landlocked states would risk skewing statistical results.

4.3 Data-reliability and Concerns about Missing Data

The dataset created for this study, which is detailed in the following chapter, records the reports published by the United States government of operational assertions and diplomatic protests from 1958-2013. However, one concern remains about completeness of data reporting that necessitate scope conditions for this study. The secretive nature of diplomatic communications undermines confidence that this dataset contains *every* diplomatic protest issued by the United States over maritime disputes in 55 years. Diplomats value discretion or secrecy in communications with representatives of other states, and even the most fastidious efforts to collect openly available, unclassified data from multiple sources may not be able to assemble a complete body of reporting on diplomatic communications. There are likely to be some secretive aspects to diplomatic protests because sometimes, in the communication between states, diplomats will refrain from public remarks that might be politically constraining or diplomatically embarrassing. Thus, due to the problem of secretive diplomacy, this study can only claim to draw conclusions about public acts of diplomacy.

In contrast to diplomatic communications, which may occasionally privilege secrecy, operational assertions conducted under the Freedom of Navigation program are public in nature. All Freedom of Navigation assertions are intended to be observable operations (not covert or clandestine), and the United States government publishes the results each year as a matter of annual legal record. Moreover, these operations are intended to be not only non-confrontational, but also public demonstrations and overt communications of the United States' legal positions on

a particular maritime claim of a coastal state. There is no expectation that the conduct of these operations belongs to any secret or compartmentalized program.

Due to the concern about completeness of data resulting from the difficulty in observing all diplomatic communications, this study focuses on the latter category of activities, operational assertions. However, the data on diplomatic protests may provide some contextual evidence for understanding the United States' policy position on disputes regarding particular claims by certain coastal states, and these data may suggest some cases that require greater scrutiny. For instance, closer analytical attention may be appropriate in cases when *both* diplomatic and operational efforts coincide in a given year. Also of interest are those cases when diplomatic communication efforts have *not* been observed but operational assertions have been reported.

These two instances, the following concerns about introducing error shall be considered. First, in the former case when *both* diplomatic and operational efforts coincide, Type 1 errors (false positives) present a relatively low risk, because the concern over diplomatic protests is their (occasionally) secretive nature. Reports that are publically available do not risk this type of error. Second, the contrasting cases in which no diplomatic protests have been observed but operational assertions have been attempted deserve somewhat greater caution. To neglect these cases would be to risk Type 2 errors (false negatives) and to underweight the possibility that diplomatic communications did actually occur in secret. In these cases, because secret diplomatic communications may have occurred (but not observed), the observation of an operational assertion alone should not disqualify such cases from closer qualitative scrutiny.

Any academic study of the implementation of policies pertaining to statecraft and military operations is likely to encounter obstacles of classification. However, most information

about the Freedom of Navigation program is unclassified. Reports about the occurrence of operational assertions by naval vessels are made public and intended to be openly communicated. This policy was promulgated in NSDD-72 and it fulfills an important legal purpose of announcing to the other states the completion of a freedom of navigation transit, which achieves the desired intent under customary international law.

One concern to this dataset is the availability of information regarding diplomatic communications. The exchange of diplomatic communications is generally considered a sensitive activity, and classification protocols exist to protect their classified contents. Thankfully, the annual *Digest of the United States Practice in International Law* provides annual listings of exchanged notes and other diplomatic protests over maritime claims. Unfortunately there is no way to confirm whether this information is complete. Most likely, the digest omits sensitive and classified communications for two reasons. First, the State Department's classified repository containing all diplomatic cables sent is not accessible. As with intelligence message traffic, diplomatic cables are classified according to tiers of sensitivity.¹⁸⁵ Cables that are unclassified are most likely to be transmitted in the State Department's communication system to "All Diplomatic and Consular" officers, or ALDACs. When messages are too sensitive to be sent in common distribution channels, they may be sent discretely to only a named embassy and, still more discretely, to named individuals. Therefore, the data regarding diplomatic protests may be incomplete. Second, underreporting of diplomatic protests is possible because of the considerations diplomats make before issuing sensitive communiqués. This selection effect occurs because diplomats are most likely to make demarches in cases when a greater return on

¹⁸⁵ The Controlled Access Program Coordination Office (CAPCO) establishes tiers of categories of classified government information according to Executive Order 13526 and Title 32 of the Code of Federal Regulations.

investment is anticipated and diplomatic outreach is most likely to be received favorably.¹⁸⁶

Diplomats assess carefully the likelihood of “getting to yes” and will be more formal and public in those cases. When resistance is anticipated, communications may be indirect or delayed.¹⁸⁷

Diplomats understand that when efforts are too forward or too aggressive, foreign counterparts are likely to demur. So communications are made in private, and diplomatic records are classified at higher levels to protect the sensitivity of the relationship. The data of unclassified communiqués is likely complete. These demarches are available in the public record because they were either unclassified or because they have recently been declassified due having reached their declassification date.

4.4 Sources

4.4.1 Coding the Dependent Variable: Diplomatic Protests and Operational Assertions

This dataset contains information from a variety of sources, but there are six primary sources of information for this data set that deserve special attention. First, I draw from a collection of diplomatic records published by the United States Department of State to code diplomatic protests. Each year since 1973, the State Department’s Office of the Legal Adviser has published the annual *Digest of United States Practice in International Law*. This compendium document provides “a historical record of the views and practice of the Government of the United States in public and private international law.”¹⁸⁸ Of interest to this research is the regularly recurring chapter titled, “Territorial Regimes and Related Issues” in

¹⁸⁶ Virginia Ramadan FSO, US Department of State, interview by author, Newport, RI, 8 October 2014.

¹⁸⁷ This point is not unlike the argument made by Page Fortna in her book, *Does Peacekeeping Work?* She argues that in order to understand whether and peacekeeping operations work, a two-step approach is necessary. First, one must account for the variation in the crises to which peacekeeping forces are assigned. Why do we send PKO to some places and not others? Then, one can address why some are successful and others are not.

¹⁸⁸ Bureau of Public Affairs Department Of State. The Office of Website Management, “Digest of United States Practice in International Law,” July 12, 2012, <http://www.state.gov/s/l/c8183.htm>.

which records and commentary related to the Law of the Sea and Freedom of Navigation are published. This resource provides an authoritative compilation of diplomatic activities and correspondence related to the Freedom of Navigation program. However, the publication of this document is inconsistent. The State Department did not produce the *Digest* from prior to 1963 or during the years 1981 to 1988. Also, for the period from 1963 through 1973, the State Department published a similar digest under a slightly different title, *Digest of International Law*, which includes similar content as the later digest.

Second, to code operational assertions since 1991, I reference annual reports by the Department of the Navy regarding operational assertions conducted under the Freedom of Navigation program. Published annually, these reports on Freedom of Navigation operations have appeared in two formats since 1991. From 1991-2001, information about Freedom of Navigation activities appeared in the Department of Defense *Annual Report to the President and Congress*.¹⁸⁹ (Incidentally, the title of this annual report changed in 1991 to include the President. Prior to Secretary of Defense Richard Cheney, the title of this document was the *Annual Report to Congress*). Since 2001, annual reports on the Freedom of Navigation program have been published directly on a Department of Defense website.¹⁹⁰ These documents list the countries against which the United States conduct operational assertion and the specific maritime claims disputed.

In the years prior to 1991, *the Annual Report to the Congress* did not include any information regarding activities conducted under the Freedom of Navigation program because

¹⁸⁹ Office of the Secretary of Defense Historical Office, “Annual Reports,” accessed July 31, 2014, http://history.defense.gov/docs_ar.shtml.

¹⁹⁰ Under Secretary for Policy Department of Defense, “DoD Annual Freedom of Navigation (FON) Reports,” accessed July 31, 2014, <http://policy.defense.gov/OUUSDPOffices/FON.aspx>.

there was no requirement to do so. In Oct 1990, President George H. W. Bush signed National Security Directive 49 (NSD-49) requiring an annual report on Freedom of Navigation activities:

On an annual basis, the department of defense will incorporate into an already existing report an unclassified listing of fun operational assertions conducted during the previous year. The listing will specify the country and excessive claim, but not the date or frequency of the assertion. Assertions specified in the annual list will become unclassified upon incorporation into the report.

Prior to 1991, no reporting requirement existed and *Annual Report to Congress* contains no mention of “freedom of navigation” except for the 1988 report from Secretary of Defense Caspar Weinberger¹⁹¹ and in 1989 by Secretary Frank Carlucci.¹⁹² These two reports reference the highly publicized operations in the Libya’s Gulf of Sidra and reflagging of Kuwaiti oil tankers in the Persian Gulf, but they do not list other operational assertions that occurred in those years. This silence is particularly surprising for at least three reasons. First, there is evidence of consistent high-level attention to United States ocean policy throughout the 1960s, 1970s, and 1980s, which implies that organizational reporting and feedback on activities pertaining to ocean policy would have been required or desired. Somewhere in the Defense bureaucracy there was likely an appetite for information reported on these topics. Additionally, in 1979 the Carter administration formalized the Freedom of Navigation program as a two-pronged effort between the Departments of Defense and State, yet appears to have received no public reporting on it. Finally, the Reagan administration expressed its renewed commitment to these earlier policy positions through executive memoranda on United States ocean policy and the Freedom of Navigation programs, yet received so public information either.

¹⁹¹ Caspar W. Weinberger Secretary of Defense, *Annual Report to the Congress, Fiscal Year 1988* (Washington, DC: Government Printing Office, 1987), 169, 262, http://history.defense.gov/resources/1988_DoD_AR.pdf.

¹⁹² *Annual Report to Congress and the President, Fiscal Year 1989* (Washington, DC: US Government Printing Office, 1989), 66, 82, http://history.defense.gov/resources/1989_DoD_AR.pdf.

Third, I rely on the excellent *Maritime Claims Reference Manual* produced by the United States Navy Judge Advocate General (JAG) Corps. This source helps to corroborate annual reports to Congress, but it also provides crucial information for activity prior to 1991 and it offers a greater fidelity of information about precisely which disputed claims were protested or asserted against. This document lists each coastal state in the world from A to Z and compiles information about the various maritime claims of each coastal state by category. Where applicable, the *Maritime Claims Reference Manual* lists each state's claims and related territorial seas, straight baselines, historic bays, contiguous zone, environmental and fishing restrictions, and exclusive economic zones. The manual also includes references to the pertinent domestic laws and legal decrees that establish each state's claim. The manual further specifies whether the a) United States contests a specific claim, and b) it itemizes any diplomatic protests or operational assertions the United States has conducted against specific claims of each coastal state. Within the Navy JAG Corps, the International and Operational Law Department (Code 10) bears responsibility for International Agreements, Operational Law, and the Law of the Sea. As the Department of Defense's Representative for Oceans Policy Affairs, the Navy JAG Corps' Law of the Sea division maintains the *Maritime Claims Reference Manual*. The Operational Law Department's "provide[s] advice across the spectrum of law of the sea issues to assist policy makers throughout the Department of the Navy, JCS and DoD; interact with other agencies including State, Commerce, Justice and Interior; advise on international environmental matters; represents DoD at the International Maritime Organization; and support the DoD Representative for Ocean Policy Affairs."¹⁹³ This organization describes the *Maritime Claims Reference Manual* as a "general reference concerning the maritime claims of all coastal nations [...] to

¹⁹³ "International & Operational Law (Code 10) | U.S. Navy JAG Corps," accessed July 31, 2014, http://www.jag.navy.mil/organization/code_10.htm.

facilitate the DoD Freedom of Navigation Program.”¹⁹⁴ It is published in accordance with the Department of Defense (DoD) Instruction C-2005.1, titled “U.S. Program for the Exercise of Navigation and Overflight Rights at Sea” June 21, 1983. The most recent complete publication of the *Maritime Claims Reference Manual* was 2005, however, updates for each coastal country have been completed and made available in 2013-2014.¹⁹⁵

Fourth, I draw upon *Limits in the Sea*, a series published by the United States Department of State. This series of publications dedicates individual volumes to the detailed explication of maritime claims by individual states, and it offers historical details about American activity vis-à-vis foreign maritime legal claims. Among these, I extensively consulted Volume 112, which discusses U.S. activity in response to maritime claims around the world.¹⁹⁶ Written in 1992, this specific volume documents American diplomatic protests by category of claim, highlights rollbacks or those maritime claims that drew disputes but were later changed to conform with international law, and it provides some tabular data and descriptive statistics regarding various types of claims. The volume includes useful citations to diplomatic documents and serves as a helpful cross-reference to fill gaps in the *Maritime Claims Reference Manual* and *Annual Report to Congress*. Additional volumes in the *Limits in the Sea* series address the maritime claims of individual coastal states specifically and are useful for cross-referencing data found elsewhere.

Fifth, I referred to the *Law of the Sea Bulletin* to ensure completeness of collection of data on diplomatic protests. Published three times annually by the United Nations Division for

¹⁹⁴ “Maritime Claims Reference Manual,” *U. S. Navy Judge Advocate General’s Corps*, accessed July 31, 2014, http://www.jag.navy.mil/organization/code_10_mcrm.htm.

¹⁹⁵ I am grateful for the assistance of Commander Joe Carilli US Navy JAGC who provided advanced copies of the 2013-14 update prior to their publication online.

¹⁹⁶ Bureau of Oceans and International Environmental and Scientific Affairs Department of State, J. Ashley Roach, and Robert W. Smith, *United States Responses to Excessive National Maritime Claims 1992*, Limit in the Seas 112 (Washington, DC: US Government Printing Office), accessed August 1, 2014, <http://www.state.gov/documents/organization/58381.pdf>.

Ocean Affairs and the Law of the Sea, the *Bulletin* chronicles a wide range of topics including the status of, and legal developments related to, the UN Convention on the Law of the Sea. These topics include ratifications and declarations; treaties and national legislations; new claims, protests and responses; and rulings from the International Court of Justice.¹⁹⁷ The Bulletin is most useful as a cross-reference to the *Digest of United States Practice in International Law* and *Limits in the Sea* to ensure the accurate and complete recording of unclassified protest data throughout the entire time series.

4.4.2 Coding the Independent Variables

4.4.2.1 Liberalism Model

First, I use the POLITY2 variable from the Polity IV dataset created by the Center for Systemic Peace measure levels of democracy or autocracy. This information is coded in two ways. First, this variable is appears as an interval measurement on a scale from -10 (full autocracy) to +10 (full democracy). This value is derived by subtracting the AUTOC value from the DEMOC value, which are each based on an eleven-point scale constructed from the competitiveness of political participation (variable 2.6), the openness and competitiveness of executive recruitment, and constraints on the chief executive.¹⁹⁸ Second, I collapsed the data into categories Autocracy (-10 to -7) Anocracy (-6 to +6) and Democracy (+7 to +10) to reflect the terminology used in the democratic peace literature (Doyle, Snyder and Mansfield).

Second, I code whether each state signed and/or ratified UNCLOS and whether the state made a declaration at the time of signing. These declarations and statements are catalogued by

¹⁹⁷ For a listing of state activities by category (e.g. Declarations; Objections to Declarations; Notes, Statements and Communications; General Assembly Resolutions) http://www.un.org/depts/los/doalos_publications/LOSBulletins/Bulletin_repertory.pdf

¹⁹⁸ Monty G. Marshall and Ted Robert Gurr, "Polity IV Individual Country Regime Trends, 1946-2013" (Center for Systemic Peace, 2014), <http://www.systemicpeace.org/polity/polity4.htm>.

the Treaty Section of the Office of Legal Affairs of the United Nations and published on line by the Division for Ocean Affairs and the Law of the Sea. These are important because, in many cases, the declarations articulate the ways in which the ratifying state refuses to participate fully in the treaty. These derogations sometimes initiate a dispute when the state declares a maritime claim at odds with the treaty it is signing. The declarations and statements appear in chronological order of signature and ratification with hyperlinks to text from each declaration or statement by the state from 10 December 1982 to 27 December 2013.¹⁹⁹

Third, in the cases when the United States disputes a particular maritime claim of a coastal state, I code two categorical variables, each dichotomous (0/1), indicating the whether the claim is expansive or restrictive claims. Discussion of these claims appears below.

Fourth, I measure economic interdependence to consider the pacifying effect of trade.²⁰⁰ Data come from the World Bank's World Development Indicators dataset, which compiles time-series data from international sources from 1960-2013. I select one factor to operationalize economic interdependence: trade as measured by import and export. Different factors could be capital or trade. Goods (and services) are ultimately the product of capital and labor (either as a net measure of trade balances that subtract import from export) where negative trade balances suggest a weaker position, or as a sum measure reflecting the absolute value of the relationship between the two trade partners. For this study I omit services.²⁰¹

¹⁹⁹ "Declarations and Statements," *United Nations Division for Ocean Affairs and the Law of the Sea*, October 29, 2013, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

²⁰⁰ Norman Angell, *The Great Illusion: A Study of the Relation of Military Power to National Advantage*, 4th ed. (New York: G. P. Putnam's Sons, 1910); Dale C. Copeland, "Economic Interdependence and War: A Theory of Trade Expectations," *International Security* 20, no. 4 (April 1, 1996): 5-41.

²⁰¹ "World Development Indicators | Data," October 16, 2013, <http://data.worldbank.org/data-catalog/world-development-indicators>.

4.4.2.2 Security Model

First, I reference military expenditure data published by the Stockholm (SIPRI) in three formats: total military expenditure in constant 2011 U.S. dollars, military expenditure as a percentage of GDP, and military expenditure per capita according to the calendar year. The period of the data includes 1988-2013.²⁰² This is intended as a rough proxy of military capability. In a later study, a measure of naval capacity may be appropriate, whether in terms of number of warships or tonnage.

Second, I reference economic wealth data published in the databank of World Development Indicators at the World Bank.²⁰³ Recognizing the fungibility of economic and financial power into military power and the vast influence that an economic giant may have regardless of its military readiness, I include this variable to as an attribute of state power.

Third, I code whether the coastal states possesses a nuclear weapons program. This is a dichotomous variable, and the source of this information is the World Nuclear Forces at the Stockholm International Peace and Research Institute.²⁰⁴ As the period of the entire study ranges from 1958 to 2013, there is variation on this measure and it offers a glimpse at perhaps the *sine qua non* of power in the international system for the majority of the Cold War.

4.4.2.3 Organization Model

First, I code the total number of operational warships ships in the United States Navy. This number includes the following ship classes: battleship, carrier, cruiser, destroyer, frigate,

²⁰² Aude-Emmanuelle Fleurant and Samuel Perlo-Freeman, “Military Expenditure Database” (Stockholm International Peace Research Institute (SIPRI), 2014), http://www.sipri.org/research/armaments/milex/milex_database.

²⁰³ “World Development Indicators | Data.”

²⁰⁴ Shannon Kile and Phillip Schell, “Stockholm International Peace Research Institute (SIPRI): World Nuclear Forces,” Page, *Military Spending and Armaments*, (January 2015), <http://www.sipri.org/research/armaments/nuclear-forces>.

submarines (SS, SSN), SSG/SSBNs, command ship, mine warfare, patrol, amphibious, auxiliary, and other surface warships. The source of the data is the Naval History Heritage and Heritage Command. They compiled the data from various sources Comptroller of the Navy (NAVCOMPT) compilations; Department of the Navy (DON) 5-Year Program, Ships & Aircraft Supplemental Data Tables (SASDT); and records and compilations of the Office of the Chief of Naval Operations (OP-802K, now N804J1D) Ship Management Information System (now Ship Management System), refined and edited with the assistance of the annual Naval Vessel Register. The notes in the source observe, “the dramatic fall in ship numbers after 1968-1969 is due to the decision to limit the use of American military force in Vietnam and the decommissioning of many WWII-era ships. Rapid decline in force level is evident after the anticommunist revolutions in Eastern Europe and the collapse of the Soviet Union, 1989-1991. End of the Cold War 'peace dividend' leads to decommissioning of many older ships, especially cruisers and auxiliaries, in a manner similar to downsizing at the end of the Vietnam war. Post-1999 data provided by OPNAV N8F.”²⁰⁵

Second, I merge the Diplomatic Exchange data set from the Correlates of War project. This variable measures diplomatic representation at the level of increasing levels of seniority and significance from chargé d'affaires to minister and ambassador. Information is available for states in the Correlates of War interstate system on five-year periodicity from 1950 to 2005, and it is based on the *Europa World Year Book* series. For the missing years, I impute missing data by a process of interpolation and cross-reference with listings of diplomatic postings by embassy. The assumption for missing data imputation is that if there is no change in the status of diplomatic exchange between five-year entries, then the interim years are unchanged as well.

²⁰⁵ “US Ship Force Levels: 1886-Present,” *Naval History and Heritage Command: Ship Histories*, July 31, 2014, <http://www.history.navy.mil/research/histories/ship-histories/us-ship-force-levels.html>.

However, I cross-reference listings of U.S. diplomats to foreign postings to confirm. I include only three variables from this dataset. First, the dataset includes an ordinal variable (0-3) for United States diplomatic representation in another country (DR_at_2). Second, the dataset includes an ordinal variable (0-3) for other state representation in the United States (DR_at_US). Finally, the dataset includes a dichotomous variable for existence of any diplomatic exchange between the United States and the other side (DE). These variables are necessary for considering whether the existence or absence of a diplomatic relationship affects the likelihood of either issuing a diplomatic protest or conducting an operational assertion.²⁰⁶

Third, I code the geographic defense organization, or Geographic Combatant Command, into which the coastal state falls according to the Unified Command Plan. I reference a history of the Department of Defense's Joint Chiefs of Staff written by the Chairman's Historian in the Joint History Office.²⁰⁷ This document was fundamental to coding the often-shifting geographical assignments of United States military commanders. I cross-referenced this with individual histories of each of the geographic combatant commands. Each of the Unified Commanders bears responsibility for an assigned geographic area of operations in which United States forces operate. However, the geographic and operational responsibilities of the Unified Commanders have changed frequently as the Department of Defense reorganized the Joint Chiefs of Staff 13 times and updated its Unified Command Plan 22 times from 1958 to 2012.²⁰⁸ For example, Commander, United States Central Command (CENTCOM) currently bears responsibility for an area of operations comprising 20 countries in the Middle East and Central

²⁰⁶ Resat Bayer, "Diplomatic Exchange Data Set, 1817-2005 (v2006.1)," Folder, *The Correlates of War Project*, accessed November 8, 2015, <http://correlatesofwar.org/data-sets/diplomatic-exchange>.

²⁰⁷ Drea et al., *The History of the Unified Command Plan, 1946-2012*.

²⁰⁸ See Organizational Development of the Joint Chiefs of Staff 1942-2013 (Joint History Office) 2013, and Ibid.

and South Asia. The area of responsibilities stretches from Egypt in the west to Pakistan in the east. This geographic theater also includes the waters of the Red Sea, Persian Gulf, and a portion of the Indian Ocean. Prior to 2006, CENTCOM encompassed a larger area including the Horn of Africa (Somalia, Kenya, Ethiopia and Eritrea were reassigned from CENTCOM to the newly established United States Africa Command). Prior to CENTCOM's creation as a unified command in 1983, many of the countries in the Middle East had been assigned to other Unified Commanders, such as U.S. European Command. Some were assigned to a portfolio maintained by the Joint Chiefs of Staff, and still others were not assigned at all.

Fourth and fifth, I created two simple categorical variables to sort coastal states by continent and coastal state-years by presidential administration. The purpose of this coding is to allow sorting by geographic location and presidential administration.

Sixth, I categorize coastal state-years by National Security Advisor to the President. The reason for this coding is due to the policy guidance offered in NSDD-265 and later documents which describe the interagency coordination process for conducting freedom of navigation operations in sensitive areas. This variable offers the possibility to determine whether a difference in policy implementation exists between the President's National Security Advisor who may be executing the policy and the President who signed a specific policy.²⁰⁹

4.4.3 Law of the Sea Variables and Coding Rules

This dataset records nine possible types of claims by coastal states over which the United States may have a difference of legal interpretation and active dispute. The basis of these disputes is the categorizations of coastal claims observed in customary international law,

²⁰⁹ Alan G. Whittaker et al., *The National Security Policy Process: The National Security Council and Interagency System* (Washington, D.C.: Industrial College of the Armed Forces, National Defense University, U.S. Department of Defense., 2011), 67, <http://www.virginia.edu/cnsl/pdf/national-security-policy-process-2011.pdf>.

codified in UNCLOS, recorded in the *Maritime Claims Reference Manual*, and mentioned briefly in Chapter 1.

Disputes reflect a difference in legal interpretation of two general types. First, a dispute may be recorded over a difference of legal interpretation of treaty law. Since 1982, UNCLOS has been the primary point of legal reference, with the 1958 Convention on the Law of the Sea prior to it. However, international law also relies upon customary rules, which include both practice and *opinio juris*, and these international norms may change over time. The coding rules for dispute focus on the former. Thus, I code a dichotomous variable (0/1) when the coastal state issues a domestic law, decree, or other legal declaration that asserts a new maritime claim. I draw on the United States Navy's Maritime Claims Reference Manual which lists each of these by coastal state. The text of many of these domestic legal decrees is available at the United Nations Division for Ocean Affairs and the Law of the Sea.

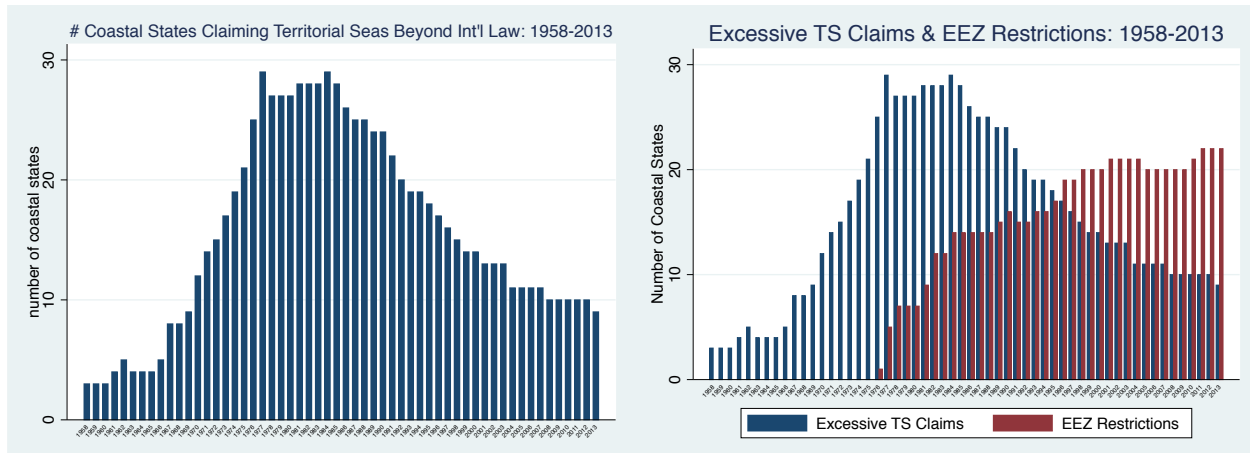
For each country year, I code whether the United States disputes another coastal state's claims such as 1) territorial sea, 2) straight baselines, 3) historic bay, 4) prior permission requirements, 5) contiguous zone restrictions, 6) exclusive economic zone restrictions, 7) nuclear vessel restrictions, and 8) environmental restrictions. This dataset records whether the United States has an active dispute with another coastal state's claim in a given year; the coding does not reflect this author's independent legal judgment about the nature or validity of that dispute.

4.4.3.1 Territorial Sea

The territorial sea has experienced a significant shift in both treaty law and state practice over recent decades. For centuries, a state determined its territorial sea by the distance from shore that it could claim to defend. The custom of claiming a three-mile belt of water adjacent to

the shoreline became known as the “cannon-shot rule.”²¹⁰ During much of the 20th century, the majority of coastal states claimed 3nm (or so) based not only on custom, but the technological ability to effective control their adjacent seas through force.²¹¹ There was some variation in state practice, the magnitude of variation was minor. Some states claimed 4nm, 6nm or 12nm, but only two states’ territorial sea claims exceeded 12nm. That distribution changed significantly by the end of the 20th century. After the conclusion of UNCLOS and its arguably clearer legal codification of what states can claim as a territorial sea, a much higher percentage of states coordinated around the new legal norm of 12nm. Yet, the number of states whose claims exceed 12nm increased nearly tenfold.²¹² The United States has acted against all claims exceeding 12 nm by communicating a diplomatic protest or conducting an operational assertion.²¹³

FIGURE 4-2



²¹⁰ Some legal discussion during the diplomatic deliberations on the Law of the Sea refers to the “One-League Rule” during discussions of territorial seas. While many jurists refer to the Cannon-Shot Rule,” the customary claim of 3 miles offshore measured one league. As a unit of measurement, the league finds its origin in the estimate distance an adult could walk in one hour, or approximately 3 English miles. At sea, a league measured 3 nautical miles. See "league, n.1". OED Online. September 2014. Oxford University Press. <http://www.oed.com/view/Entry/106642?result=1&rskey=NzdpYe&> (accessed September 26, 2014).

²¹¹ I do not attempt to resolve whether the dominant military technology or custom was the primary cause of this equilibrium.

²¹² Department of State, Roach, and Smith, *United States Responses to Excessive National Maritime Claims 1992*, 33–36.

²¹³ J. Ashley Roach and Robert W. Smith, “Identification of Excessive Maritime Claims,” in *Excessive Maritime Claims*, *International Law Studies*, Vol 66, 13.

The peak was in 1976, when the United States disputed the territorial sea claims of 29 states. Today, the United States disputes only 7 states' territorial sea claims (Benin, Greece, India, Nicaragua, Philippines, Somalia and Togo). Most states adjusted their claims to comply with the territorial sea provisions in the UNCLOS treaty. The 1982 agreement extended the territorial sea to 12nm, but it also created a new provision, the Exclusive Economic Zone, which permitted coastal states to extend their management of resources out to 200nm offshore.

4.4.3.2 Straight Baseline Claims.

Coastal states may claim straight baselines for at least two legitimate reasons. First, coastal states may claim straight baselines to enclose those waters, which have the character of internal waters due to their close interrelationship with the land. Second, straight baselines may reduce eliminate complex patterns in its territorial sea that would otherwise result from the use of normal baselines. If drawn in accordance with international law, properly drawn straight baselines do not extend the limits of the territorial sea.²¹⁴ However, the United States argues that the straight baselines drawn by many states seek to unlawfully extend the coastal states share of the sea.

By drawing straight lines between prominent points along the contours of a coast rather than tracing a 12 nm belt more closely along the contours, a coastal state may claim a baseline farther offshore or claim "enclosed seas" and thus increase the total area of its territorial sea claim with excessive baselines. Occasionally, straight baseline claims have led to cases at the International Court of Justice such as in the cases of the delimitation of territorial seas between

²¹⁴ J. Ashley Roach, "China's Straight Baseline Claim: Senkaku (Diaoyu) Islands," *American Journal of International Law*, February 13, 2013, <http://www.asil.org/insights/volume/17/issue/7/china%E2%80%99s-straight-baseline-claim-senkaku-diaoyu-islands>.

Qatar and Bahrain or Honduras and Nicaragua.²¹⁵ These assessments are made on geometric standards of cartography. According to UNCLOS, the normal baseline for measuring the breadth of a territorial sea is the “low-water line along the coast as marked on large-scale charts official recognized by the coastal state.”²¹⁶ However, straight baselines are permitted “in localities where the coastline is deeply indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity.”²¹⁷ These exceptional circumstances are detailed two sources: first, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, which the United States has signed and ratified; and second, the UN Convention on the Law of the Sea which the United States has not. The International Court of Justice states, however, that the straight baselines are an exception to the normal rules for the determination of baselines.²¹⁸ Yet, coastal states occasionally claim straight baseline claims as a legal tactic to expand territorial sea claims.

²¹⁵ For a complete listing of cases before the International Court of Justice, see <http://www.icj-cij.org/docket/index.php?p1=3&p2=2>

²¹⁶ “Normal Baseline,” Part II, Section 2, Article 5, UNCLOS.

²¹⁷ “Straight Baselines,” Part II, Section 2, Article 7, UNCLOS.

²¹⁸ Maritime Delimitation and Territorial Question between Qatar and Bahrain, Merits, 2001 I.C.J. 40, at 67, ¶ 212, available at <http://www.icj-cij.org/docket/files/87/7027.pdf>.

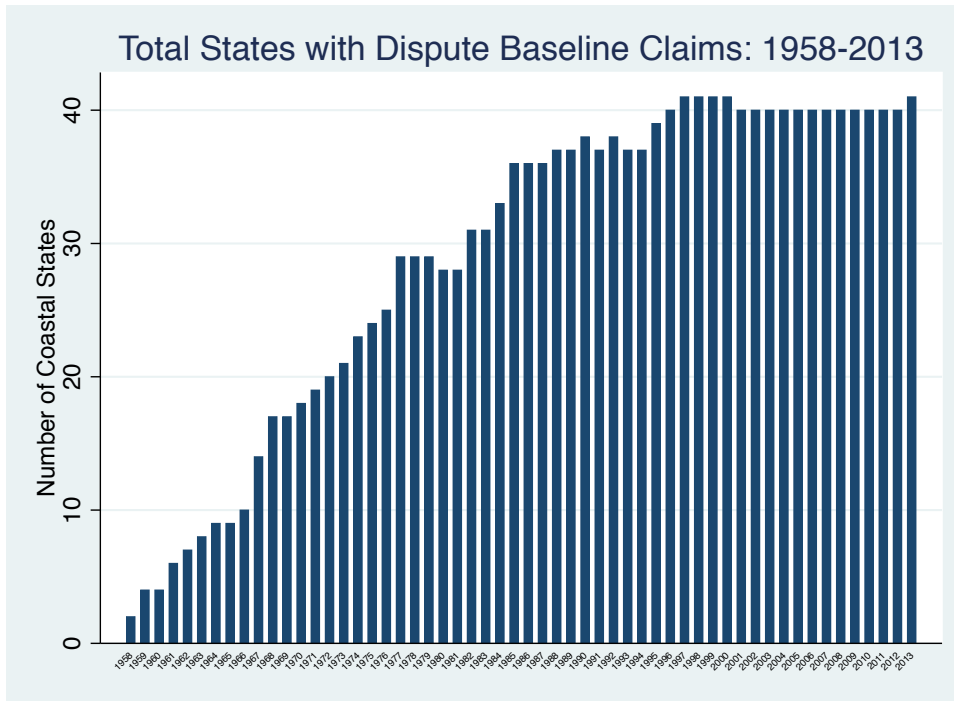


FIGURE 4-3

In 1958, two coastal states made excessive straight baseline claims. In 2013, 41 states make straight baseline claims disputed by the United States.

4.4.3.3 Historic Bay

In 1958, the historic bay claims of 6 states were disputed by the United States. In 2013, the United States disputed 20 such claims. For example, Libya claims the Gulf of Sidra as Libyan internal waters. The claimed closure line drawn horizontally across the opening of the Gulf measures approx. 300nm along 32° 30' N lat.²¹⁹ Other historic bay claims the United States has protested or disputed include the Russian Federation's claim to Peter the Great Bay, Cambodia's claim to part of the Gulf of Thailand, Vietnam's claim to part of the Gulf of Tonkin, and Panama's claim to the Gulf of Panama.

²¹⁹ Representative for Ocean Policy Affairs, *Maritime Claims Reference Manual*.

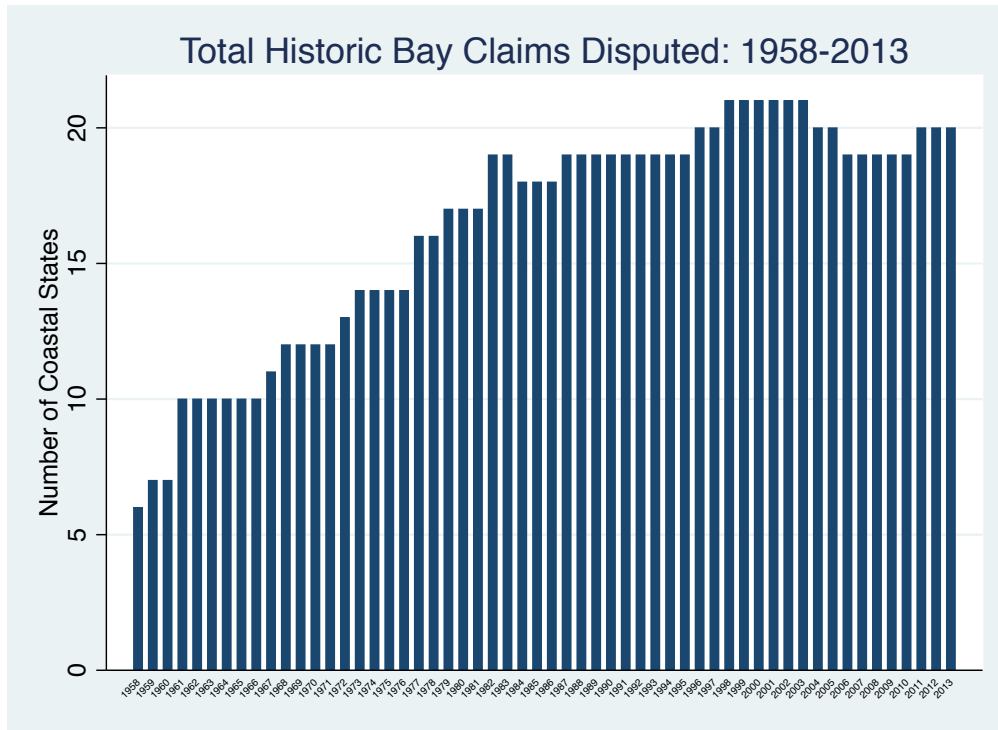


FIGURE 4-4

4.4.3.4 Prior Notification

Many states require prior notification (48 hours to 30 days) from foreign warships before transiting its territorial seas. Some states also claim the right to restrict various types of activity such as military surveillance or oceanographic surveys within Contiguous Zones (the area 12-24nm offshore) and Exclusive Economic Zones (the area 24-200nm offshore). The United States and other states interpret such claims to be not only inconsistent with UNCLOS, but also inconsistent with customary law and thus impermissible, because they aim to limit freedom of access to a coastal state’s coastal waters (territorial sea, contiguous zone, or exclusive economic zone) by requiring prior notification before entering territorial seas.

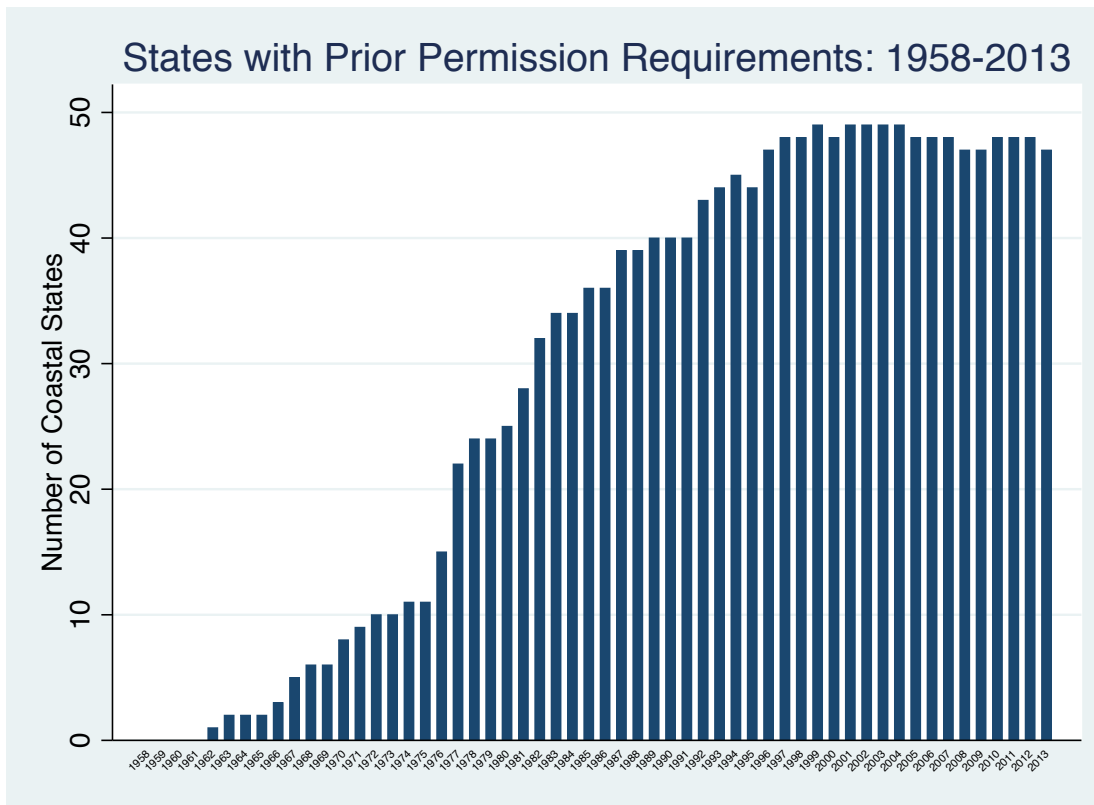


FIGURE 4-5

4.5 Descriptive Statistics

The FON dataset contains 7,412 observations representing between 85 and 150 coastal states in a given year from 1958 to 2013. As this time series progresses from 1958 to 2013, new states enter the dataset in the year of their establishment, such as in cases of post-colonial states declaring independence. Over the 55-year period of this study, the number of coastal state in the world nearly doubled. In 1958, there were 85 states bordering the ocean. The number of coastal states peaked in 2002 at 150 where it has remained ever since. As the total number of states has increased, the number of states whose claims the United States disputed has also increased at nearly the same rate. The percentage of states whose claims the United States disputed in 1958 was 15.3%. This percentage peaked in 1990 when the United States disputed the maritime

claims of 55.9% of coastal states (80 of 143). By 2013, the total number of disputes remained at 80 while the total number of coastal states had increased to 150 (53.3%).

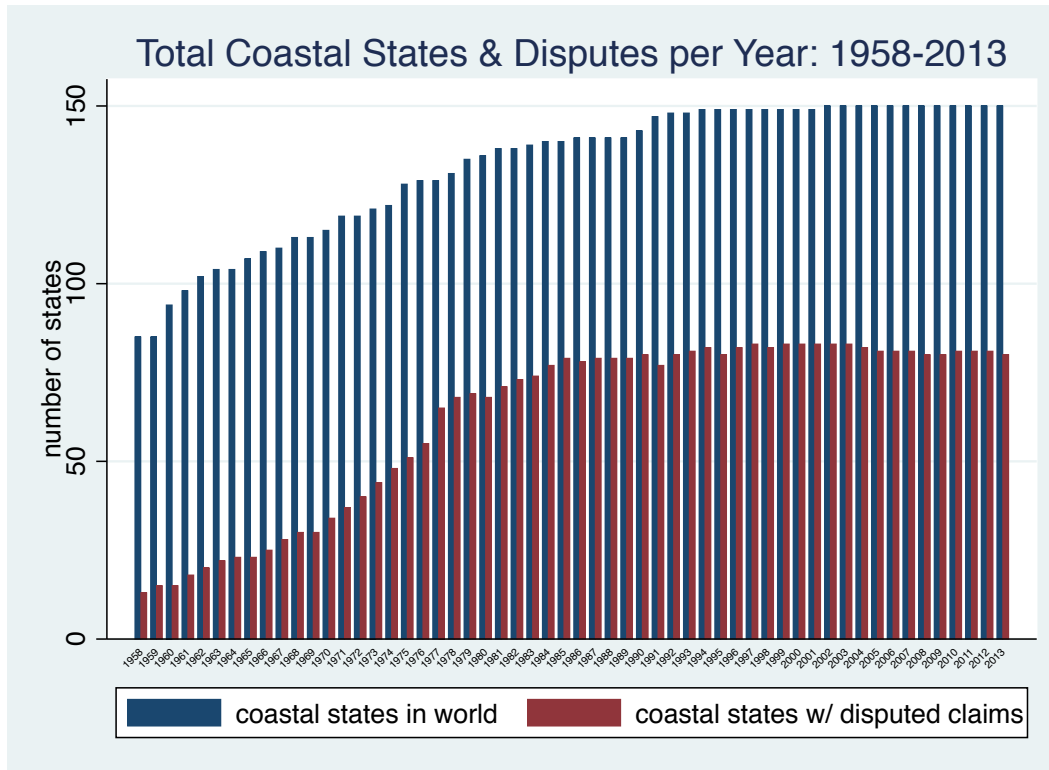


FIGURE 4-6

A casual glance at Figure 2 suggests that new coastal states (states declaring independence after 1958) may be responsible for the increase in disputes each year. However, a closer look reveals that this is not the case. Only 26 of 71 new disputes involved new coastal states whose maritime claims drew dispute from the United States. The remaining 45 disputes after 1958 were regarding maritime claims by “old states” that existed pre-1958. However, the large increase in coastal state disputes was not the result of new states or whether existing states changed claims (see Table 1).

Table 4-1. States whose maritime claims the United States disputed in 1958 and 2013

Albania	<u>Canada</u>	Ecuador	India	<i>Mauritania</i>	<i>Samoa</i>	Taiwan
Algeria	<i>Cabo Verde</i>	<u>Egypt</u>	Indonesia	Mexico	<u>Saudi Arabia</u>	Thailand
Antigua & Barbuda	Chile	<u>El Salvador*</u>	Iran	<i>Montenegro</i>	<i>Seychelles</i>	<i>Togo</i>
Argentina	China	<u>Ethiopia/Eritrea</u>	Italy	Nicaragua	<i>Sierra Leone</i>	Tunisia
Australia	Columbia	<u>Estonia</u>	Japan	Oman	<i>Slovenia</i>	<i>UAE</i>
Bangladesh	Costa Rica	Finland	<i>Kenya</i>	Pakistan	Somalia	Uruguay
Barbados	<i>Croatia</i>	<i>Gabon</i>	<i>Latvia</i>	<u>Panama</u>	South Korea	<i>Vanuatu</i>
Benin	Cuba	<u>Greece</u>	Libya	<u>Peru</u>	<u>Russian Fed.</u>	<u>Venezuela</u>
Brazil	<u>DPRK</u>	<i>Guinea-Bissau</i>	<i>Lithuania</i>	Philippines	Spain	Vietnam
<u>Bulgaria*</u>	Denmark	<i>Guyana</i>	Malaysia	Portugal	Sri Lanka	<i>Yemen</i>
Burma	Djibouti	Haiti	<i>Maldives</i>	Romania	Sudan	
Cambodia	<u>Dominican Rep</u>	Honduras	Malta	<i>St. Vincent & Gren.</i>	Syria	

1. The 13 underlined states are the only states with maritime claims disputed by the US in 1958.
2. 80 claims are disputed in 2013.
3. Among the disputes from 1958, only Bulgaria's and El Salvador's disputes have been resolved. These are denoted with an asterisk (*) above. The rest remain active.
4. New states (declaring independence after 1958) are differentiated in *red*.

The total number of diplomatic protests and operational assertions conducted each year by the United States from 1958-2013 are depicted in Figure 2 (totals by decade are represented in Figure 3). Diplomatic protests begin in 1958 and reach their peak in 1982 during the year of the final meeting for the UN Convention on the Law of the Sea, which produced the treaty in December of that year. Operational assertions begin 1979 and reach their peak in 1998. After operational assertions begin in 1979, the year with the fewest number of assertions conducted is 2006.

FIGURE 4-7

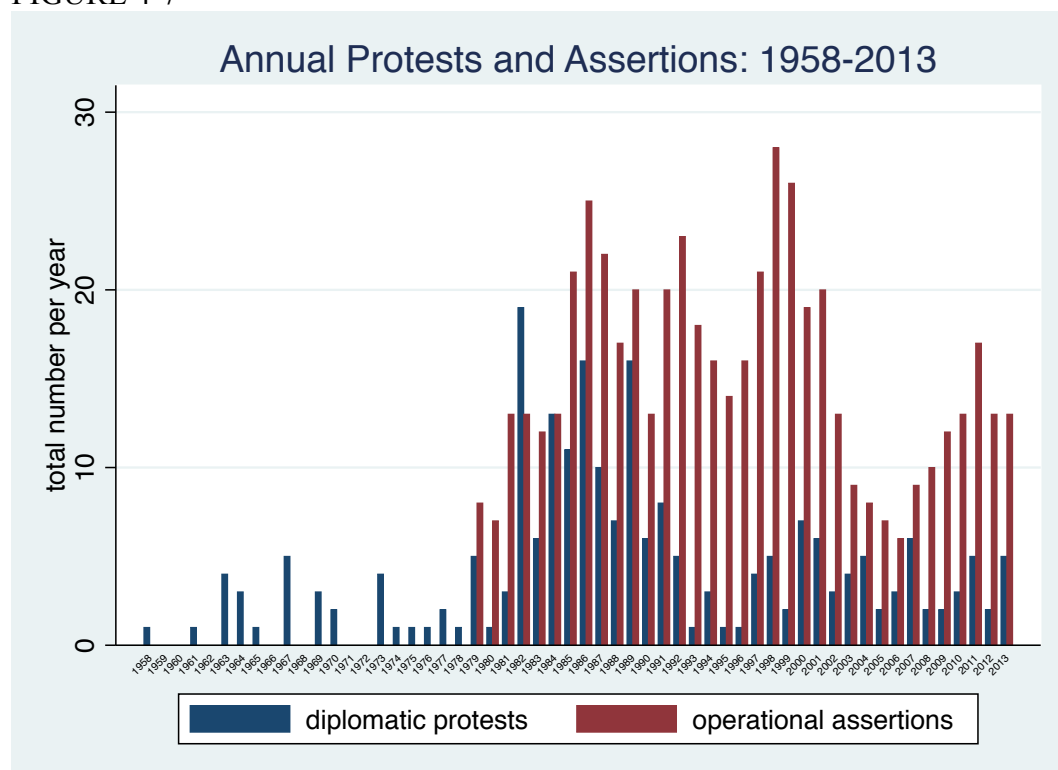


TABLE 4-2 DEPENDENT VARIABLES - TOTALS

	total coastal-state-claims	disputed coastal state claims	some action taken	protests	assertions	both
1958-2013	7,412	3,473 (46.9%)	693 (9.4%)	228 (3.1%)	535 (7.2%)	70 (0.9%)
1958-1978	2,316	704 (30.4%)	31 (1.3%)	31 (1.3%)	0	0
1979-2013	5,096	2,769 (54.3%)	662 (13.0%)	197 (3.9%)	535(10.5%)	70 (1.4%)

In a frequency distribution for protests and assertions for the time period 1958 to 2013, there are a total of 7,412 coastal-state-claims from 1958-2013 (where the unit of analysis is country-year). This number represents the total number of maritime claims by existing coastal states in a given year over 55 years. During this 55-year span, the United States disputed claims 3,473 times (46.9%). To have disputed a claim does not necessarily imply that the United States took action. Rather, the United States simply had legal disagreements with 46.9% of maritime claims; the American interpretation of maritime law conflicted with the interpretation of the other state.

In response to these 3,473 disputes (unit of analysis is country-year), the United States acted 693 times (9.4%). For the purposes of this study, there are effectively two types of action possible under the freedom of navigation program: diplomatic protest and operational assertion.²²⁰ The United States issued a diplomatic protest 228 times (3.1%) and conducted an operational assertion 535 times (7.2%). In 70 cases (0.9%), the United States exercised both measures – issuing a diplomatic protest and conducting an operational assertion *in the same year* against the coastal state with which it had a dispute.

These rates of response may appear to be low for such a powerful state with considerable means available and a strongly stated commitment to freedom of navigation, but rates of response depend on the types or levels of discrepancy and the prior protests, too. So, I consider how rates increase after the government created an institutional mechanism for action in 1979. This question is vital to the explanation of the Organizational Model, which argues that the

²²⁰ A third option, diplomatic consultation, does exist, but it is extremely difficult to observe empirically. No records of consultations were discovered in the extensive research for this dissertation. It is possible, of course, that diplomatic consultations enable disputes to be handled at the lowest level, and these consultations may preclude the need for stronger diplomatic or operational measures. Further research is necessary to understand the frequency and importance of consultations.

balance of bureaucratic means and their prioritized aims of the organizations that are tasked to implement policy significantly influence the behavior.

Over the three decades after the formal establishment of the Freedom of Navigation program (1979-2013), there were 2,768 disputes. That is, the United States disputed 54.3% of coastal states' claims. In response to these maritime legal disputes, the United States acted 662 (13.0%) times. The United States issued a diplomatic protest 197 times (3.9%) and conducted an operational assertion 535 times (10.5%). In 70 cases (1.4%), the United States took both diplomatic and legal action. These results prompt the following three notable observations:

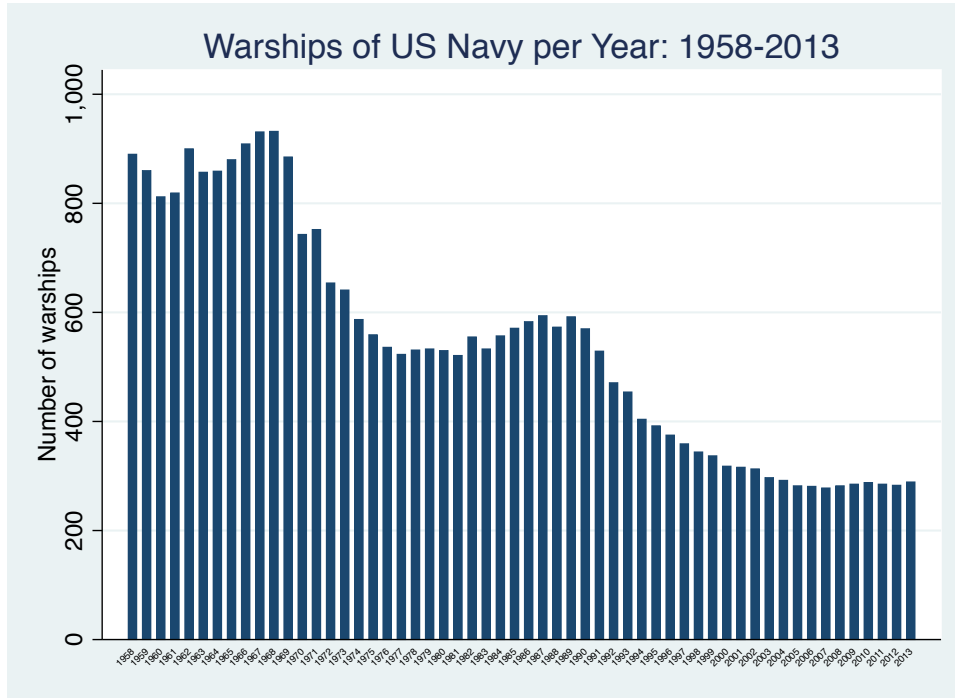
- First, the dataset contains no observations of operational assertions conducted prior to 1979. It is possible that operational assertions were conducted in the earlier period (1958-1978), but they are not reflected in any of the data sources listed in Chapter Three. However during the early period, the United States issued 31 diplomatic protests (1.3%).
- Second, during the period 1979 to 2013, the United States was nearly three times as likely to conduct an operational assertion than to issue an open diplomatic protest. This finding is interesting because diplomatic action seems to be less costly and less likely to lead accidentally to destabilizing miscalculation or escalation of violence, yet diplomatic protests are more rare. It may be the case that diplomatic protests are occurring more frequently, but are not observed because they are sensitive communications not announced publically.
- Third, these results demonstrate how rare American action on active legal maritime disputes is. Prior to 1979, the United States acted in only 1.3% of cases (all of these actions were diplomatic protests). Although the FON program invigorated American

response in the period after 1979, the United States acted in a mere 13% of cases where it disputed a coastal state's maritime claim.

Given these results, we reject the hypothesis United States maintains a universal commitment to actively pushing back against disputed maritime claims everywhere, all the time. Indeed these data show that only in rare cases does the United States demonstrate its failure to acquiesce to such claims by protesting or asserting. This dissertation will explain why the United States acts in some cases and not others.

Is the level of operational activity a function of available warships in the United States Navy? No, it does not appear as if the total number of ships affects the annual number of operational assertions in this time-series. As the number of warships has dropped from a Vietnam War era high of 932 ships, to a Reagan era peak (during SECNAV John Lehman's tenure) of 594 ships, and then dropped again to the to the 2013 level of 289 ships, the number of operational assertions remained relatively flat.

FIGURE 4-8

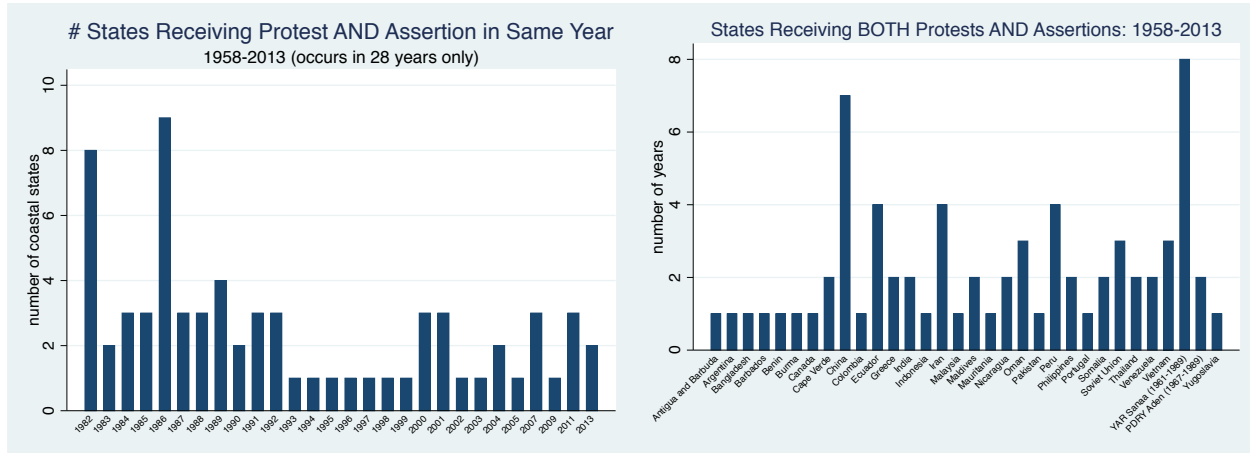


4.6 Frequency of combined protests and assertions

Theoretically, one of the strongest possible signals to send via the FON program is to make both a diplomatic demarche and operational assertion against a coastal state in a near simultaneous coordination of foreign policy. However, this coordination is rare due to organizational limitations and divergent priorities, thus it occurs relatively rarely. Another way to underscore refusal to accept a specific claim is to conduct multiple assertions in a given year, however, the data available do not list the number of assertions conducted per country-year.

Regarding the former, from 1958 to 2013, the coordination of both protest and assertion has only occurred 28 of 55 years (51%), and never before 1982. Since 1982, the United States has coordinated both measures of the FON program to varying levels. The maximum coordination of protests and assertions against a coastal state occurred in 1986 (9 times) and in 1982 (8 times), however most years feature a coordination of diplomatic protests and operational

assertions of 1-3 states. The most coastal state which most frequently received both demarche and assertion is Yemen (8 times) followed by China (7 times). Other frequent recipients of coordinated action are Peru, Ecuador, and Iran (4 times each). See figures below.



4.7 Organizational Explanation: Regional Fleet / Theater Combatant Commands

The operational Navy is apportioned into numbered fleets and navy component commands by geographic area. The numbered fleets and navy component commands are typically combined into one staff, physically situated in the same headquarters, and responsible for the same geographic area. For example, the United States Navy's 4th Fleet is responsible for the Pacific, Atlantic, and Caribbean maritime regions around Latin America; the 5th Fleet is responsible for the Red Sea, Persian Gulf, and Indian Ocean; the 6th Fleet is responsible for the oceans and seas around Europe and most of Africa²²¹; the 7th Fleet maintains responsibility for the Western Pacific and South/Southeast Asian waters.

²²¹ U.S. Naval Forces Europe-Commander, U.S. Naval Forces Africa (NAVEUR-NAVAF) area of responsibility (AOR) covers approximately half of the Atlantic Ocean, from the North Pole to Antarctica; as well as the Adriatic, Baltic, Barents, Black, Caspian, Mediterranean and North Seas. The AOR covers more than 20 million square nautical miles of ocean, touches three continents and encompasses more than 67 percent of the Earth's coastline, 30 percent of its landmass, and nearly 40 percent of the world's population. <http://www.c6f.navy.mil/AORPAGE.html>

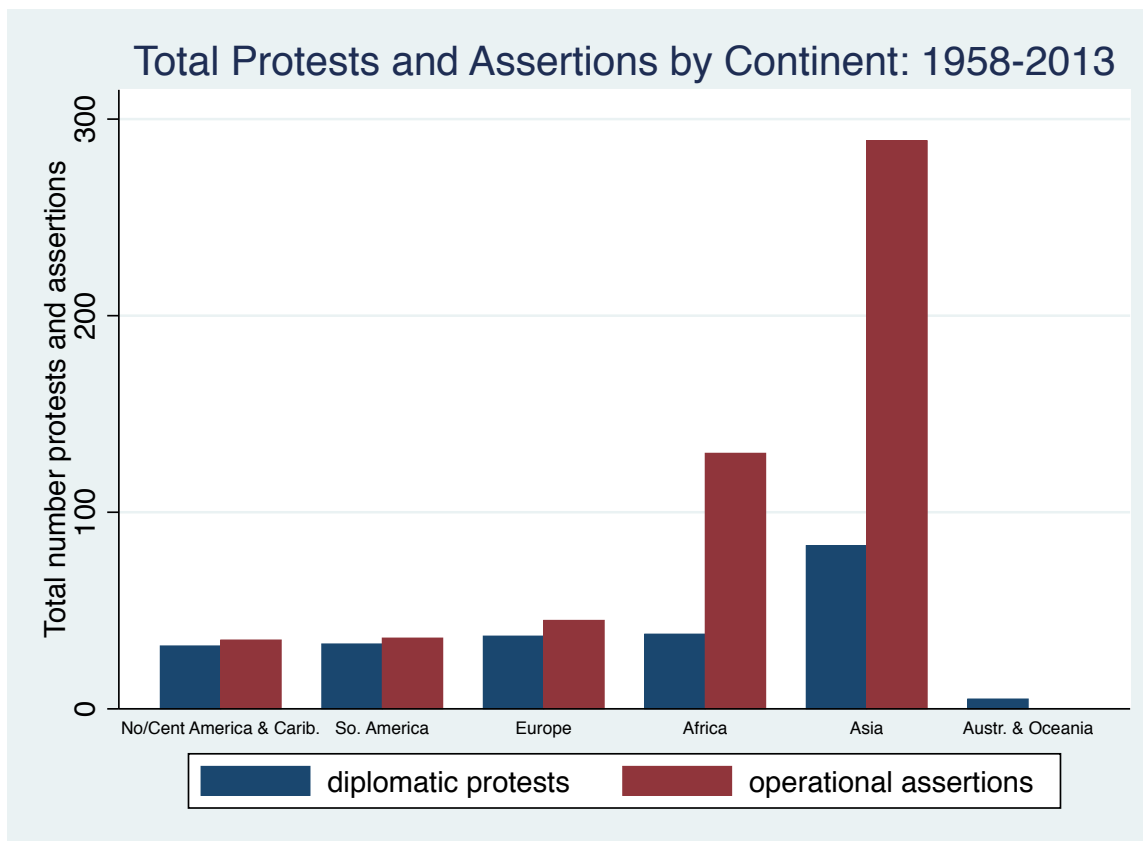


FIGURE 4-3

In each of these geographic areas, the numbered fleet commander maintains operational responsibilities by the geographic combatant commanders. Formerly known as theater commanders (or CINCs), the geographic combatant commanders are organized according to the Unified Command Plan.²²² These geographic combatant commanders report to the Secretary of Defense via the Joint Staff. Operational priorities and executed missions within each geographic combatant command reflect—to some extent—the product of three bureaucratic processes. First, the operations are planned by the commander’s staff and reflect the standing missions and priorities of that geographic combatant command. Second, tasking is received from the Joint

²²² The Unified Command Plan is a key strategic document that establishes the missions, responsibilities, and geographic areas of responsibility for commanders of combatant commands. UCP 2011, signed by President Obama on April 6, 2011, assigns several new missions to the combatant commanders. Every two years, the Chairman of the Joint Chiefs of Staff is required to review the missions, responsibilities, and geographical boundaries of each combatant command and recommend changes to the President. http://www.defense.gov/home/features/2009/0109_unifiedcommand/.

Staff, which reflects guidance and directives from the President of the United States and coordination with other departments and agencies. For example, FON operations in politically sensitive areas require prior coordination with the Department of State via the Joint Staff. Finally, operations conducted within the geographic combatant command reflect the priorities of subordinate service component commanders. In this case, a navy component commander such as 6th Fleet/ NAVEUR may have service-specific priorities for his available assets which reflect his security goals, relationships with partner nations, available forces, and specific threats.

When the data were sorted by numbered fleet and by decade, the following results were obtained. In each decade, approximately twice as many assertions occur in the 7th Fleet (WestPac and Indian Ocean) as in 4th Fleet (Americas). From decade to decade, FON operations appear to have maintained operational consistency by volume in 4th Fleet (Latin America) and 7th Fleet (Western Pacific and South/Southeast Asia), however the number of operational challenges have decreased by 55% in 5th Fleet (Mideast) and by 44% in 6th Fleet (Europe and Africa).

Numbered Fleet	4 th Fleet	5 th Fleet	6 th Fleet	7 th Fleet
1991-2000	8	11	16	14
2001-2011	7	5	9	14

During the latter decade, the United States fought two wars in the CENTCOM theater. As a result commanders prioritized naval platforms for maritime security operations and close air support for those combat missions. Simultaneously, the rise of Somali piracy and other missions required ships. Finally, missions in the Horn of Africa and Yemen pursuit of Al Qaeda and other associated threats have demanded resources. However, in addition to ship availability, these operational missions demanded partnerships. None of these missions was conducted without vital support in terms of basis rights, law enforcement and military partnership, and other material support. Thus, in 5th Fleet FON challenges of Djibouti, Pakistan, Saudi Arabia,

Seychelles, and Somalia were not conducted during the GWOT decade. However, the number of operational challenges of excessive claims by Egypt, Iran, Oman, and Sudan, and Yemen stayed level or increased.

This continuity may be best explained by the guidance expressed in NSDD-265 which directs frequent challenging of international straits and archipelagic sea lanes. If this directive reflects the highest priority FON missions due to the importance of geographic chokepoints and other straits to United States trade and military mobility, then these nations are priority candidates. Egypt (Suez Canal), Sudan (Red Sea), Yemen (Bab el Mandeb), Oman and Iran (Strait of Hormuz) represent the gateways to the Middle East (its resources and battlefields) for the western world. Even under the limiting conditions of war and low ship availability, these challenges represent non-negotiable cases.

5 th Fleet/NAVCENT 1991-2000		5 th Fleet/NAVCENT 2000-2011
Djibouti	Saudi Arabia	Egypt
Egypt	Seychelles	Iran
Iran	Somalia	Oman
Oman	Sudan	Sudan
Pakistan	UAE	Yemen
Yemen		

While wars raged in the CENTCOM theater, the EUCOM and AFRICOM theaters experienced a decade of partnership-building from 2001-2011. The Freedom of Navigation program received little attention as the successive commanders placed a higher emphasis on theater cooperation. Additionally, the planning and establishment of a new geographic combatant command for Africa led to operational restraints.

During this decade, almost all of the West African nations in the vicinity of the Gulf of Guinea area that had been challenged between 1991-2000 were not challenged. The Navy was also spread thin and ship availability was diminished for two reasons. First, most ships were prioritized for CENTCOM or PACOM. Second, Navy's 6th Fleet held dual responsibilities as the navy component commander for both EUCOM and AFRICOM. As such, the 6th fleet did not receive any additional ships, but was challenged to accomplish more with fixed or diminishing resource. This force efficiency led to a change in operational behavior and fewer FON challenges. Whereas, 5th Fleet conducted challenges during 2001-2011 against the excessive claims of the countries who infringed upon chokepoints and straits vital to international trade and security mobility, 6th Fleet had no such concerns in this decade.

6 th Fleet NAVEUR-NAVAF 1991-2000		6 th Fleet NAVEUR-NAVAF 2001-2011	
Albania	Libya	Albania	Libya
Algeria	Malta	Algeria	Malta
Angola	Mauritania	Croatia	Sweden
Benin	Nigeria	Liberia	Syria
Cameroon	Sierra Leone	Togo	
Cape Verde	Sweden		
Congo	Syria		
Croatia	Togo		
Liberia			

4.8 Comparison to Existing Datasets: ICOW Maritime Claims (v1.1).

One other dataset related to maritime claims exists, but it has limitations inherent to its different purpose, which led to the creation of this new dataset. Anyone researching maritime claims more generally will want to review Sara McLaughlin Mitchell's ICOW Maritime Claims (v1.1) dataset, which extends the research begun by Paul R. Hensel on Territorial Claims and is part of the Issue Correlates of War project. Mitchell examines "explicit contention between two or more states over the access to or usage of a maritime area including riverine and offshore areas."²²³ The unit of analysis in the ICOW Maritime Claim study is the dyadic claim. The current version of the dataset (v1.1, dtd 2007) is limited to dyadic maritime claims in the Western Hemisphere and Europe only from 1900-2001. To enter Mitchell's dataset, two or more states must actively contest a space for access or usage. Mitchell records 86 total maritime claims disputes between two or more states in the Western Hemisphere and Europe, of which 15 involve the United States with 13 other states.²²⁴ According to these definitions and coding rules, many

²²³ Paul R. Hensel; Sara M. Mitchell, 2007, "The Issue Correlates of War (ICOW) Project Issue Data Sets: Maritime Claims Data", http://hdl.handle.net/1902.1/OFMUUPZGAT_UNF:3:AT9Kx7uv+vzYYTZA9Fo35Q== IQSS Dataverse Network [Distributor] V2 [Version].

²²⁴ Mitchell records the following disputants in the Western Hemisphere: Argentina, Bahamas, Brazil, Canada, Chile, Ecuador, El Salvador, Mexico, Nicaragua, Panama, Peru, St. Vincent and Grenada and Uruguay. The only maritime dispute recorded between the US and a European country is with Russia.

disputed maritime claims of interest in my study do not appear in Mitchell's data. In fact, disputes with 10 states in the Western Hemisphere are omitted.²²⁵ Fifteen disputes with European states do not appear in the dataset.²²⁶ Furthermore, disputes related to riverine claims and other claims related to internal waters are not germane to my research.²²⁷

²²⁵ Omitted disputants in the Western Hemisphere include: Antigua and Barbuda, Colombia, Costa Rica, Guyana, Cuba, Dominican Republic, Haiti, and Venezuela.

²²⁶ Omitted disputants in Europe include: Albania, Bulgaria, Croatia, Denmark, Estonia, Finland, Greece, Italy, Latvia, Lithuania, Malta, Portugal, Serbia and Montenegro, Slovenia, and Spain.

²²⁷ Of the 10,041 recorded claims in Mitchell's dataset, 3,226 or 32.1% are maritime claims. Terrestrial and riverine claims comprise 60.3% and 7.6% respectively.

CHAPTER 5. QUANTITATIVE DATA ANALYSIS: LARGE-N REGRESSION

5.1 Introduction.

The purpose of this chapter is to introduce and initiate a mixed-methods strategy for analysis through logit regression. This chapter follows a nested analysis proceeds in two parts.²²⁸ First, it consists of a quantitative large-*n* analysis. Then, the next chapter proceeds with a qualitative, case-study analysis depending on the quantitative findings. Study of the Freedom of Navigation program and the variation of operations conducted under it require this analytical approach because of the difficulty in operationalizing key variables, questions about quantitative variable reliability, and because of the historical contingencies that affect outcomes. This integration of methodological approaches responds to the calls of many scholars lamenting the shortcomings of either type of analysis.²²⁹ It also responds to the need to combine both types of analysis and find the synergies between them.²³⁰

The intent of this approach is to maximize analytical leverage by combining qualitative and quantitative analysis. The combination of methods in this analysis does more than simply offer breadth and depth. First, nested analysis increases both internal and external validity. Second, the quantitative analysis yields causal inferences that result from quantitative estimates of a multivariate model. The qualitative analysis yields causal inferences from case comparison and process tracing using historical resources interviews and the like. This approach offers

²²⁸ Evan S. Lieberman, "Nested Analysis as a Mixed-Method Strategy for Comparative Research," *American Political Science Review* 99, no. 03 (August 2005): 435–52.

²²⁹ For examples, see Barbara Geddes, "How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics," *Political Analysis* 2 (1990): 131–50; King, Keohane, and Verba, *Designing Social Inquiry*.

²³⁰ Christopher H. Achen and Duncan Snidal, "Rational Deterrence Theory and Comparative Case Studies," *World Politics* 41, no. 2 (1989): 143–69; Sidney Tarrow, "Making Social Science Work Across Space and Time: A Critical Reflection on Robert Putnam's Making Democracy Work," *The American Political Science Review* 90, no. 2 (1996): 389–97; Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2005); David Collier, Henry E. Brady, and Jason Seawright, "Outdated Views of Qualitative Methods: Time to Move On," *Political Analysis* 18, no. 4 (2010): 506–13.

answers to both broad and specific questions. Specifically, a nested analysis offers insights into not only the explanations for variation of protests and assertions within a program like the Freedom of Navigation program. But also a nested analysis permits one to consider the likely outcomes under specific conditions. By isolating variables and controlling for different factors (e.g. Measures of military power, GDP, polity, organizational attributes), one can see how specific factors make outcomes more or less likely. Rather than choosing between two perfect analytical approaches, the nested analysis approach seeks to leverage the strengths of each.

The two types of analysis work in tandem complementing each other's strengths. When a statistical analysis raises questions about the relationship *between* variables or a causal process, the qualitative analysis can address those questions. Through a within-case study, qualitative analysis can provide the necessary information to understand exactly how a causal process worked in a particular case. A general strength of large-*n* quantitative analysis is its ability to estimate simultaneously the effects of competing explanations and to control for the effect of particular variables on the outcome of interest. However there are weaknesses to such observational studies, and often, has one delve into the particulars of an individual case to clarify important differences among statistically similar cases. A general strength of qualitative analysis is its ability to explore and discuss the differences among "similar" cases.²³¹ Large-*n* quantitative analysis offers the ability to rule out a hypothesis where no statistically significant relationship exists. Likewise, quantitative analysis provides justification for isolating particular explanatory variables and focusing analytical attention on them, or for eliminating noisy variables.

²³¹ Evan S. Lieberman, "Nested Analysis as a Mixed-Method Strategy for Comparative Research," *American Political Science Review* 99, no. 03 (August 2005): 438–439.

Additionally, I intend to share these findings with a diverse audience of scholars and practitioners, therefore a diversity of methods should enable communication to a diverse audience. I see this effort as part of a broader effort to bridge the gap between technical scholarly work and the work of practitioners and policymakers.

5.2 Method.

According to Lieberman 2005, there are a number of prerequisites for carrying out a nested analysis. First, one must have a quantitative data set with a sufficient number of observations to yield statistically and substantively significant results. For the purpose of this dissertation, I gathered data and assembled over 7,400 observations. This far exceeds the number of cases required to produce statistically powerful analysis. Even when the number of variables increases the number of degrees of freedom there is sufficient statistical power to produce meaningful results. This assembly of data permits the complete and thorough evaluation of the universe of cases pertaining to the study of freedom of navigation. It also allows one to evaluate whether and to what extent there exist correlations between the variables. A second requirement is that one must approach these data with testable hypotheses.²³² The theory presented in Chapter 3 offered testable hypotheses derived from a carefully considered theoretical framework. Each variable included in the data set attempts to capture, or operationalize, a theoretically relevant measure. At first, the regression analysis groups the variables according to each of three discrete theories: a theory of Liberalism, a Realism-based theory of security, and an organizational theory. Then the analysis proceeds to combine all three theories into one model to observe their combined power. Finally interactive terms are introduced into the regression analysis.

²³² Evan S. Lieberman, "Nested Analysis as a Mixed-Method Strategy for Comparative Research," *American Political Science Review* 99, no. 03 (August 2005): 438.

Ultimately, the goal of a nested analysis is “to make inferences about the unit of analysis that is shared between two types of analysis”—especially when the unit of analysis is a country-year as in this study.²³³ By operationalizing the factors that are believed to matter in the conduct of diplomatic protest and operational assertions under the freedom of navigation program, we can assess our prior assumptions and determine whether assumed variables have any statistical significance. On these grounds, we can select cases for closer inspection with confidence that the selection of qualitative case studies for comparative analysis is justified and not just a result of prior assumptions and biases.

As described in the earlier chapter, the large- n analysis examines pooled data or panel data consisting of n sets of observations on individual coastal states to be denoted $i = 1, \dots, n$. This panel dataset is considered unbalanced because individual coastal states may be observed a different number of times depending upon the year in which a state declared its independence. So, Canada appears in the dataset from 1958-2013, and “newer” states such as Senegal, which declared independence in 1960, appears in the dataset from 1960-2013.

These types of data present some challenges. Interdependencies among the observations are likely making unbiased inference problematic. Endogeneity abounds, and so this analysis estimates the relationships using robust standard errors. Next, observational data, no matter how complete, cannot account for all possible explanations and unobserved confounding variables. Thus, this quantitative analysis may produce robust *correlations*, but it does not attempt to identify causal relationships.²³⁴ The correlations proposed would be consistent with a causal

²³³ Ibid., 440.

²³⁴ The only way to eliminate such bias would be to assign treatment at random to ensure there were no systematic reasons for the differences between countries receiving assertions and those that don't. A randomized field experiment, however, is not a feasible method for this problem. Even if it were, the tradeoff between causal identification and the substantive importance of the subject would not be worth the trouble. What may be sacrificed here in precision of identification is gained in addressing a big, policy-relevant question. For more on field

story, because the actions conducted under the Freedom of Navigation program (diplomatic protests and operational assertions) are not randomly assigned. There is bound to be bias because the Freedom of Navigation program operates under the pressures and conditions of political, economic, military, legal, and other institutional priorities.²³⁵

5.3 Correlations

Under what conditions does the United States act? This section investigates whether a correlation exists between type of disputed claim and action (by type of action). Then, I proceed to examine the relationship between types of claims and the three theoretical models. The data in Table 1 (below) pertain to the period after the formal establishment of the Freedom of Navigation program in 1979. The independent variables include prior permission, restrictions on nuclear vessels, excessive territorial sea claims, excessive straight baselines, historic claims, contiguous zone restrictions, EEZ restrictions, and environmental restrictions.

Of interest in this section are the relationships between *type of action* and *type of claim* that have substantive significance that deserve further analytical attention.²³⁶ Eight types of maritime claims are coded in the Freedom of Navigation data set. These claims include:

- 1) **Territorial sea** claims that exceed 12 nautical miles (*tsexcess*)
 - e.g. Libya, Nicaragua, Somalia
- 2) **Baseline claims** drawn with excessively straight lines not conforming to the contours of the coast (*straightbase*)
 - e.g. Guinea-Bissau, Honduras, Japan

experiments, see Alan S. Gerber and Donald P. Green, *Field Experiments: Design, Analysis, and Interpretation* (New York: W. W. Norton & Company, 2012), 4.

²³⁵ Ibid., 6.

²³⁶ I obtain a listwise correlation in Stata, which completes a listwise deletion of missing data by default. If a case has a missing value for any of the variables listed, that case is eliminated from all correlations, even if there are valid values for the two variables in the current correlation. For instance, if there were a missing value for the variable *tsexcess*, the case would still be excluded from the calculation of the correlation between *protest* and *priorperm*. This process of case elimination explains why the number of observations is (n=2,769) for all correlations. However, in this dataset, there are no missing values for the period 1979-2013.

- 3) Expansive **historic claims**, often historic bays or waters, in dispute directly with another coastal state (*historic*)
 - e.g. India, Panama, Portugal
- 4) **Restrictions** on activities (usually military activities) in a coastal state's **contiguous zone**, which extends from the outer edge of the territorial sea to 24 nautical miles (*czrestrict*)
 - e.g. Haiti, Saudi Arabia, North Korea
- 5) **Restrictions** on activities (usually military activities) in a coastal state's **exclusive economic zone**, which extends from the outer edge of the contiguous zone to 200 nautical miles (*eezrestrict*)
 - e.g. China, Iran, Kenya
- 6) **Environmental restrictions** the United States interprets as being inconsistent with international law (often because too vague/all-encompassing or restrictive of navigation) (*enviro*)
 - e.g. Canada, Italy, Seychelles
- 7) Restrictions on **nuclear-powered vessels** or nuclear cargo from entering coastal waters or requiring prior permission (*nuclear*)
 - e.g. Guyana, Mexico, Oman
- 8) **Requirement for permission** to enter a coastal state's territorial seas (*priorperm*)
 - e.g. Indonesia, Lithuania, South Korea

Table 1 displays the correlation between each type of disputed maritime claims (columns) and the actions taken by the United States (rows) during the period 1979-2013. This table addresses the questions, which type of claim is more highly correlated with disputative response by the United States? And which type of response? Across the first row, the table presents correlations between each type of maritime claim and some kind of action (either diplomatic protest or operational assertion).²³⁷ During this period, there are 5,094 observations (unit of

²³⁷ Correlations measure the strength and direction of the linear relationship between two variables. The coefficient can range from -1 to +1. A perfect one-to-one correlation receives a +1 for positive correlation, denoting that a one-unit increase in one variable corresponds to a one-unit increase in the other variable. As one increases, the other increases. If the correlation is negative, the increase in one variable corresponds to a decrease in the other. If the correlation coefficient equals 0, it indicates no correlation between the values. While heeding the warning that correlation does not equal causation, correlations have utility because they can indicate a predictive relationship that may be exploited in subsequent analysis.

analysis is country-year, $n=5,094$). In each column header, the number of disputes by type is listed in parentheses. For example during this 34-year period, here were 633 country-year instances when the United States disputed the disputed territorial sea claims of the coastal state. Similarly, there were 1,482 instances when the United States disputed the requirements issued by a coastal state for obtaining prior permission before entering a territorial sea. In each row, the strongest correlation has been bolded. An asterisk (*) indicates statistical significance at the 99.9% confidence level.²³⁸

TABLE 5-1

Correlations between action taken and types of disputed maritime claims, 1979-2013								
$n=5,094$	"Territorial" claims (1,958)			"Usage" claims (1,867)				
	Excessive Territorial Sea Claim (633)	Excessive Straight Baseline (1,313)	Historic Claim (675)	Environmental Restrict (138)	Contiguous Zone Restriction (685)	EEZ Restriction (596)	Prior Permission (1,482)	Nuclear Restriction (525)
Protest	0.03	0.12*	0.09*	0.07*	0.11*	0.09*	0.11*	0.09*
Assertion	0.16*	0.21*	0.16*	0.03	0.27*	0.23*	0.31*	0.25*
Action	0.15*	0.24*	0.18*	0.05*	0.29*	0.23*	0.31*	0.25*
Both	0.05*	0.07*	0.03	0.04	0.07*	0.08*	0.10*	0.09*

* $p < 0.001$

The results in the correlation table indicate a positive correlation between all types of maritime claims and the various actions taken under the Freedom of Navigation program. Nearly all correlations are statistically significant at the 99.9% confidence level, but some types of claims are correlated more substantively strongly than others. The dependent variable, *assertion*, has the strongest correlations in the table.

Among the possible relationships, the relationship between operational assertions and prior-permission restrictions is the strongest, positive correlation at 0.31. A moderately positive relationship exist between operational assertions and excessive straight baseline claims, contiguous zone restrictions, EEZ restrictions, and nuclear restrictions.

²³⁸ A 99.9% confidence level means that if the same population were sampled numerous times, 99.9% of all possible samples would include the true population parameter.

Shifting focus to the other dependent variable, diplomatic protests, the correlations between diplomatic protests and any type of claim are substantively weak, even though they are statistically significant. The correlations are weak, but positive. Similarly, correlations between the incidence of combined American action (protest and assertion) and any type of claim are substantively negligible, although statistically significant.²³⁹

So, the correlations in Table 1 indicate action is correlated more strongly with maritime claims that seek to infringe upon the *usage* of the sea (by restricting activities, requiring permission for entering the territorial sea, and restricting the types of vessels that may enter). United States assertion activity is less strongly correlated with *territorializing* efforts by coastal states to enlarge their territorial sea through claims that exceed 12 nautical miles or straight baselines. Conversely, protests are more strongly correlated with the historic and baseline claims, environmental restrictions, and contested continental shelf claims. In short, **operational assertions appear to be focused on maritime claims that inhibit usage or navigation**, while **protests appear to be focused on maritime claims that seek greater territory** by enlarging the states claim to the ocean and its resources.

In Table 2, disputed maritime claims are grouped into two simple categories: *territorial* claims and *usage* claims. These categorizations contrast two different legal behaviors by coastal states. *Territorial* claims are those claims by which a state may seek to enlarge its share of the ocean and expand its share. The data set includes 1,959 country-year-disputes where the coastal state's claims are territorially expansive. A coastal state may include three specific claims, such as:

²³⁹ Relationships are estimated using the following rule of thumb: If $r \geq .70$, very strong relationship. If $.40 \leq r \leq .69$, strong relationship, if $.20 \leq r \leq .39$, moderate relationship. If $.01 \leq r \leq .19$, weak or negligible relationship. For interpretations of Pearson's R coefficients, see <http://faculty.quinnipiac.edu/libarts/polsci/Statistics.html>

- 1) claiming a broader territorial sea, beyond 12 nautical miles as permitted by UNCLOS;
- 2) enlarging its claim to the sea by drawing straight baselines instead of following the shore's contours; and
- 3) claiming waters through historic rights that otherwise fail to comply with UNCLOS (such claims, usually a bay, are often disputed directly by another state).

Usage claims are those by which a coastal state seeks to prohibit or limit specified maritime activities in a zone that are otherwise permitted by UNCLOS and custom. The data set includes 1,867 country-year-disputes where the coastal state's claims seek to restrict usage.

These usage claims include five specific claims, such as:

- 1) environmental restrictions on discharge of shipboard waste;
- 2) prohibitions on nuclear-powered vessels or ships carrying nuclear cargo;
- 3) notification requirements or requirements for expressed permission prior to entry of territorial seas, and
- 4) restrictions on activities (usually military-related, surveying, or surveillance) in the contiguous zone;
- 5) restrictions on activities (usually military-related, surveying, or surveillance) in the exclusive economic zone.²⁴⁰

Of all 2,769 disputed country-years, there are 1,100 cases in which the United States disputes a coastal state making both a territorial and a usage claim. The data in Table 2 indicate that territorial claims and usage claims are almost equally correlated with the various responses through the Freedom of Navigation program (operational assertions, diplomatic protests, either action, or both actions). Moreover, all correlations are positive. Neither category of maritime claims appears to elicit a specific response more often than the other. However, looking across the rows, there are four additional insights that the data in Table 2 provides.

²⁴⁰ These categories of claims, expansive and restrictive, are my own and are employed here for analytical purposes. They do not reflect any official categories in international law or defense policy.

TABLE 5-2

Correlations between action taken and categories of disputed maritime claims, 1979-2013			
n=4,926	“Territorial” claims (1,959)	“Usage” claims (1,867)	Both Territorial & Usage Claims (1,100)
Protest	0.13*	0.12*	0.10*
Assertion	0.27*	0.29*	0.29*
Action	0.29*	0.31*	0.30*
Both	0.08*	0.08*	0.07*

* p<0.001

First, diplomatic protests are weakly, but positively correlated with disputed claims of either type. Territorial claims (0.13) and usage claims (0.12) are nearly equally correlated with diplomatic protests. This finding suggests not only the rarity of diplomatic protests, but also that they are not the favored response for one type of claim over another. These correlations are statistically significant at the 99.9% confidence level.

Second, operational assertions are positively and moderately correlated with disputed claims of either type. Operational assertions are more than *twice as strongly correlated* with territorial and usage claims than diplomatic protests are. This finding suggests that operational assertions are the more common form of action when disputes exist. However, it must be noted that inaction – doing nothing – is by far the most common response when a dispute exists. Usage claims (0.29) are slightly more highly correlated with operational assertions than territorial claims (0.29) and are correlated equally with cases when a coastal state makes a usage claim as when it makes both territorial and usage claims (0.29). These correlations are statistically significant at the 99.9% confidence level.

Third, action of either type is nearly equally correlated with either territorial claims or usage claims – and with cases in which the coastal state makes *both territorial and usage* claims. This finding is surprising because one might expect the United States to take a harder line against

more “flagrant offenders” of international law who seek to expand their territorial reach offshore by claiming more sea than legally permitted while also seeking to restrict the usage activities of foreign states in those waters. However, as the data in the far-right column indicate, the cases elicit no more or no less response than either purely expansive or purely restrictive cases. These correlations are statistically significant at the 99.9% confidence level.

Finally, the final row of Table 3 indicates there is nearly no correlation between the employment of both measures—a diplomatic protest and operational assertion—in the same year against a state making either territorial, usage, or both types of claims.

The types of disputed claims (either specific claims or general category) appear to have *some* influence on whether and how the United States responds to disputed claim of various types. However, the character of a legal dispute alone does not fully explain when and how the United States acts to contest maritime claims. More information than just the type of maritime claim is necessary to understand why the United States acts in dispute of maritime claims; other omitted variables likely explain the outcomes. In this next section, I explore three sets of explanations to explain the observed variation.

5.4 Regressions

The remainder of this chapter expands the analysis to include other independent variables as potential explanations of United States activity. Initially the regression analysis groups the independent variables according to each of the three discrete theories. The purpose of separately running regressions for Liberalism Model, the Security Model, and the Organizational Model is to determine how much independent explanatory power one model has. Then, the analysis incorporates interactions between the models. Because, as noted in the previous chapter, the observable outcomes of the Freedom of Navigation program – diplomatic protests and

operational assertions – do not result from any one theoretical explanation alone, the variation observed results from a combination of factors that interact with one another under different conditions.

Initially, I regressed the four outcomes from the Freedom of Navigation program on variables from each model using Ordinary Least Squares (OLS) and Weighted Least Squares (WLS).²⁴¹ This initial effort intended to estimate how much explanatory power one theoretical model has on its own. The benefit of using OLS and WLS is that they provide easily interpretable results, even if these methods are most often applied to interval or continuous, not dichotomous measures.²⁴² They are also useful diagnostic tools for spotting a few problems that may suggest the hypothesized models are misspecified models.²⁴³ The results do not appear in this chapter.

The results of these OLS and WLS regressions are mentioned here because they indicated possible heteroskedasticity in the model. Heteroskedasticity is a violation of one of the classical assumptions of OLS regression, that the error term has a constant variance or is homoscedastic. Heteroskedasticity, which is common in cross-sectional datasets, occurs when the variance or dispersion of an error term increases as a coefficient (Z) increases. “The variance of the distribution of the error term changes for each observation or range of observations.”²⁴⁴ By plotting the residuals and running a Breusch-Pagan test, this heteroskedasticity is confirmed. To

²⁴¹ OLS and WLS are typically used with continuous variables and logistical regression is preferred for dichotomous variables. However, some scholars insist that OLS and WLS can provide useful insights into relationships. I use OLS and WLS as a first-cut of analysis before proceeding to logit.

²⁴² These OLS and WLS tables and the .do files (Stata) are provided in the Appendix.

²⁴³ Chris Auld, “The Intuition of Robust Standard Errors,” *Economics, Econometrics, Etc.*, October 31, 2012, <http://chrisauld.com/2012/10/31/the-intuition-of-robust-standard-errors/>.

²⁴⁴ A. H. Studenmund, *Using Econometrics: A Practical Guide*, 5th ed. (Boston: Addison Wesley, 2005), 89, 93-94.

mitigate the effects of heteroskedasticity, the regressions are estimated with robust standard errors, but even this precautionary measure had effects on the results.²⁴⁵

Second, the results of these OLS and WLS regressions indicate possible multicollinearity. Collinearity violates another classical assumptions when one explanatory variable is a perfect linear function of another.²⁴⁶ Multicollinearity, perfect linear function occurring in relationships of multiple variables, may result in the following major consequences that make it difficult to interpret a standard regression model:

- 1) the variances and standard errors of the estimates will increase;
- 2) thus, the computed t-scores will fall;
- 3) estimates will become sensitive to changes in specification.²⁴⁷

These consequences were apparent in preliminary results and led to the omission of some collinear variables. Three diagnostics can determine the extent of the multicollinearity in the models. First, I perform pairwise correlation to obtain correlation matrices with Pearson correlation coefficients, which may offer evidence of high correlations between the variables. Second, I perform a variance-inflation-factors (VIF) test, which indicates when the variance of the coefficient of interest has been inflated upwards (more than twice its size). For this project, the VIF results were kept under 10.0 as a rule-of-thumb. Also, we can use Stata's variance-covariance matrix of the estimates of the coefficients in the model. Finally, I run a collinearity

²⁴⁵ Typically, robust standard errors are used to estimate progressions when heteroskedasticity is likely. However, recent literature suggests that this common practice may have some associated problems. "At best their estimators are inefficient, but in all likelihood estimators from their model of at least some quantities are biased. The bigger the difference robust standard errors make, the stronger the evidence for misspecification" (King and Roberts, 177).

²⁴⁶ Studenmund, *Using Econometrics*, 89, 94–95.

²⁴⁷ Studenmund, *Using Econometric*, 250-253.

package, *collin.ado*, in Stata written by the UCLA Institute for Digital Research and Education (ATS).²⁴⁸

Finally, the OLS and WLS regressions have low adjusted R^2 , indicating a very low amount of variance explained by any one model. Methodologically, this is not necessarily a problem, but suggests that the hypotheses as currently operationalized are less valid than my prior assumptions suggested. Theoretically, the low R^2 is not surprising as the theory section noted earlier that these models are complementary; no one model is seeking to explain empirical variation by itself.

One potential critique is that the regressions do not control for cross-country heterogeneity. There may be factors not controlled for (probably). Fixed effects would control for all country-level characteristics that are constant in the regression, but the downside of fixed effects regression is that all identification is coming from within-country variation. Therefore, we would see within-country variation over time, but not between-country variation. OLS and WLS allow us to take into account the between-country effects and permit comparison of different states. However, between-country variation is important, and the variables are so slowly moving that the only variation is between countries. The problem then is that there is unexplained heterogeneity between countries that is uncontrolled for.

5.4.1 Logistical Regression.

After completion of the OLS and WLS regressions for initial diagnostic purposes, the analysis proceeds to a more statistically appropriate method. Binomial logit is an estimation technique for binary dependent variables. The outcomes are coded in the dataset as either 0 or 1. For instance, for a given country-year, if the United States did not conduct an operational

²⁴⁸ “Institute for Digital Research and Education - UCLA,” *Institute for Digital Research and Education*, accessed November 10, 2015, <https://idre.ucla.edu/>.

assertion, a 0 is recorded. If the United States did conduct an operational assertion, a 1 is recorded.

Logit models estimate the probability of the dependent variable to be equal to 1. In this case, the estimated outcome is the probability that the event such as a diplomatic protest or operational assertion occurs. Thus, logit employs maximum-likelihood estimation, an iterative technique, which chooses coefficients that maximize the likelihood of the outcome being observed.²⁴⁹ Unlike OLS, logit regression assumes the relationship between the independent variables and the outcome (dependent variable) is nonlinear. The functional form of the relationship of the outcome to its explanatory variables is often described by an S-shaped pattern.

For the purposes of interpretation of logit results, the signs of the coefficients and the magnitude of the Student's t-statistic maintain the same importance as in OLS. However, interpretation of the magnitude of the logit coefficients differs from OLS because they are not linear relationships. Instead, the logit analysis presented in this chapter will focus on the discrete changes in predicted probabilities.

First, I regress each of the dependent variables on the 13 base independent variables according to the following equation:

$$Y = \beta_0 + \beta_1 \text{sipri_gdp} + \beta_2 \text{sipri_percap} + \beta_3 \text{log_gdp} + \beta_4 \text{nucstate} + \beta_5 \text{expand} + \beta_6 \text{restrict} + \beta_7 \text{polity_scaled} + \beta_8 \text{ratunclos} + \beta_9 \text{declare} + \beta_{10} \text{usship} + \beta_{11} \text{fleet} + \beta_{12} \text{DR_at_US} + \beta_{13} \text{DE} + \epsilon$$

In this regression equation, ϵ is an error term assumed to be independently and identically distributed. Then, after adjusting for heteroskedasticity and collinearity, I run two separate regression models—Y1 and Y2—for each of the dependent variables. The primary difference is that the regression equation for Y2 contains most dichotomous variables, whereas the equation

²⁴⁹ Studenmund, *Using Econometrics*, 455–456.

for Y1 contains more continuous variables. The dichotomous variables ease the task of interpretation of marginal effects; continuous variables are difficult to interpret in logit regressions. For example, a variable such as military spending in Model 1 appears as a continuous variable (*sipri_percap*), whereas in Model 2 it appears as a dichotomous variable coding the top 50th percentile of military expenditure (*sipri50*). Only the results of these two equations are posted in the regression table below.

$$Y1 = \beta_0 + \beta_1 \text{sipri_percap} + \beta_2 \text{log_gdp} + \beta_3 \text{nucstate} + \beta_4 \text{expand} + \beta_5 \text{restrict} + \beta_6 \text{bothER} + \beta_7 \text{democ2} + \beta_8 \text{ratunclos} + \beta_9 \text{usship} + \beta_{10} \text{fleet} + \beta_{11} \text{DR_at_US} + \beta_{12} \text{USDR_at_2} + \epsilon$$

$$Y2 = \beta_0 + \beta_1 \text{sipri50} + \beta_2 \text{gdp50} + \beta_3 \text{nucstate} + \beta_4 \text{expand} + \beta_5 \text{restrict} + \beta_6 \text{bothER} + \beta_7 \text{polity_scaled} + \beta_8 \text{declare} + \beta_9 \text{usship} + \beta_{10} \text{fleet} + \beta_{11} \text{usamb} + \beta_{12} \text{foramb} + \epsilon$$

The table contains coefficients from an analysis of *marginal effects* on the estimated outcome from toggling a binary value.²⁵⁰ This technique permits the calculation of the discrete changes in predicted probabilities. By obtaining the mean values for all independent variables, we can examine the discrete change in the dependent variable for each independent variable while holding all others constant at their mean value. For instance, we may ask how great an effect does a change in nuclear-power status have on the outcome when holding all other values constant at their mean. The marginal effects for continuous variables measure the instantaneous rate of change (defined shortly). They are popular in some disciplines (e.g. Economics) because they often provide a good approximation to the amount of change in Y that will be produced by a 1-unit change in X (change in 1 standard deviation or change from 0 to 1).

²⁵⁰ In Stata, I run the `mfx` command immediately after estimating logit regressions.

TABLE 5-3

Likelihood of US issuing diplomatic protests, conducting operational assertions, and taking both actions.							
-Two regression models (1) and (2) – with variables operationalized differently in each							
- Logistical regression estimating marginal effects (mfx) of variables from all three models							
		Protest(1)	Assert (1)	Both (1)	Protest(2)	Assert (2)	Both (2)
Security Model	Military spending (per capita) <i>sipri_percap, continuous</i>	-0.00002	-0.00002	-0.00001	---	---	---
	Military spending (top 50%) <i>sipri50, dichotomous</i>	---	---	---	0.022*	0.030	0.007
	GDP (log) <i>log_gdp continuous</i>	0.009**	-0.002	0.003*	---	---	---
	GDP (top 50%) <i>gdp50, dichotomous</i>	---	---	---	0.022*	0.025	0.011*
	Nuclear Weapons State <i>nucstate, dichotomous</i>	0.035	0.161**	0.026	0.088**	0.095*	0.053*
	Liberalism Model	Expansive Claims <i>expand, dichotomous</i>	0.023*	0.050*	0.010	0.008	0.088***
Restrictive Claims <i>restrict, dichotomous</i>		-0.013	0.099***	0.0002	0.006	0.093***	0.003
Size of Trade Rel. (I + E) <i>tradetotal, continous</i>		-1.44e-10	9.63e-10	-2.71e-11	4.6e-10	1.8e-09***	2.99e-10*
Polity Score <i>polity_scaled, continuous (0-20)</i>		-0.001	-	-	---	---	---
Autocracy Regime Type <i>autoc2, dichotomous</i>		---	---	---	omit	omit	omit
Anocracy Regime Type <i>anoc, dichotomous</i>		---	---	---	omit	omit	omit
Democracy Regime Type <i>democ2, dichotomous</i>		---	---	---	0.001	-0.079***	-0.007
Ratify UNCLOS <i>ratunclos, dichotomous</i>		0.004	-0.040	-0.006	---	---	---
UNCLOS Declaration <i>declare, dichotomous</i>		---	---	---	0.018	0.062***	0.0108*
Organization Model	# US Warships <i>usship continuous</i>	0.0001*	-0.00006	0.00001	0.0002***	0.0002**	0.00008***
	Operational Fleet HQ <i>fleet, dichotomous</i>	0.006	0.165***	0.008	0.008	0.137***	0.007
	Formal Diplo Exchange <i>DE, dichotomous</i>	-0.010	-0.060	-0.009	---	---	---
	Foreign Ambassador in US <i>foramb, dichotomous</i>	---	---	---	-0.039*	-0.010	0.005
	US Ambassador in For State <i>usamb, dichotomous</i>	---	---	---	0.018	-0.0001	-0.004
	Pseudo R ²	0.0620	0.0959	0.1139	0.0734	0.0872	0.0980
N=	1487	1487	1487	2781	2781	2781	
Wald Chi ² (degrees of freedom)	45.8 (11)	106.5 (11)	40.66 (11)	90.03 (12)	201.2 (12)	63.66 (12)	
Log likelihood (iterations)	-284.17 (5)	-669.7 (6)	-133.5 (5)	-640.8 (4)	-1239.1(4)	-294.8 (5)	

Notes: Standard Errors in parentheses (drawn from mfx plot) * p<0.05, ** p<0.01, *** p<0.001, two-tailed test
omit = omitted by regression output due to perfect collinearity
--- indicates dropped terms to correct heteroskedasticity and multicollinearity

5.5 Interpretation

Based on two regression models for each of the dependent variables (*protest* and *assert*), four variables held statistical significance at 95% confidence level or better when regressed on *protest*, and eight variables held statistical significance at 95% confidence level or better when regressed on *assert*.

5.5.1 Dependent Variable: Protest

This model uses 11 independent variables to estimate the likelihood of diplomatic protests. According to the pseudo- R^2 in the first logit model (Y1, 0.0620) and the second logit model (Y2, 0.0734), these equations explain somewhere between 6.2-7.3% of the variation in diplomatic protests. This relatively low R^2 indicates that the vast majority of variation in the dependent variable is explained by exogenous variables.

In the regression analysis, four variables held statistical significance at 95% confidence level or better: GDP (*log_gdp* and *gdp50*), expansive claims (*expand*), United States Warships (*usship*), and Foreign Ambassador in United States (*foramb*). The marginal effects are positive for GDP (0.009), expansive claims (0.023), and U.S. warships (0.0001). The marginal effects are negative for the presence of a foreign ambassador in the United States (0.039). According to these findings, the United States is more likely to issue diplomatic protests to coastal states with higher levels of wealth per capita and those that make territorial claims, when the United States has more warships. However, the United States is less likely to conduct an operational assertion when a foreign ambassador is present in the United States. These results are statistically significant, but they lack substantive significance. These coefficients (listed parenthetically in this paragraph) are very small and indicate a very small marginal effect for each variable when all others are held at their mean value. They do encourage further analysis in the next chapter.

One of the most striking results is the apparent unimportance of variables such as military spending, size of trade relationship, or polity type.

5.5.2 Dependent Variable: Assert

This model uses 12 independent variables to estimate the likelihood of operational assertions. According to the pseudo- R^2 in the first logit model (Y1, 0.0959) and the second logit model (Y2, 0.0872), these equations explain somewhere between 8.7-9.6% of the variation in operational assertions. As above, this low R^2 indicates that the vast majority of variation in the dependent variable is explained by exogenous variables.

Eight variables held statistical significance at 95% confidence level or better: nuclear weapons state (*nucstate*), expansive claims (*expand*), usage claims (*restrict*), total size of the trade relationship (*tradetotal*), democratic regime type (*democ2*), UNCLOS declaration (*declare*), United States warships (*usship*), and Operational Fleet Headquarters (*fleet*). The marginal effects are negative for democracies (-0.079), which shows that the United States is 7.9% less likely to conduct operational assertions against coastal states with democratic governments with which it has a maritime dispute.

The marginal effects are positive for states with active nuclear programs (0.095, 0.161 for Y1 and Y2), expansive claims (0.050, 0.088), usage claims (0.099, 0.093), issued a declaration upon ratification of UNCLOS (0.062), in a region with an operational fleet headquarters (0.165, 0.137). Thus, the United States is more likely to conduct operational assertions against coastal states with active nuclear weapons programs, states that make either expansive or usage claims, issued a declaration at UNCLOS ratification, and in regions where it has an operational fleet headquarters.

The marginal effects for military spending point in two directions, but neither is substantively significant. When military expenditure is measured per capita, the results are positive, but extremely weak and not statistically significant. But when measured as a dichotomous variable as top 50th percentile of military expenditure

These statistics yield the following three insights. First, expansive claims, such as territorial seas beyond 12 nautical miles or excessive straight baseline claims and historic claims, are less likely to prompt American response under the Freedom of Navigation program – all else held constant. In 2013, the United States disputed the maritime claims of 80 coastal states, of which 19 disputes were due to expansive claims.²⁵¹ The marginal effect of expansive claims on the likelihood of action – either diplomatic protest or operational assertion – is no more than 8%. And when the United States does respond to territorial claims, it is more likely to conduct an operational assertion than to issue a diplomatic protest. These findings are consistent with stated U.S. policy since the Reagan administration and will be discussed in further detail in the next chapter.

Second, a coastal state that possesses an active nuclear-weapons program and makes a declaration upon ratification of UNCLOS is likely to provoke an American response under the Freedom of Navigation program. This interactive variable (discussion of statistics in next section) has a stronger effect than the base variable for a coastal state in possession a nuclear weapons program (*nucstate*). Empirically, there are only *four* among the 48 coastal states that have issued declarations upon ratification of UNCLOS and possess nuclear-weapons programs: China, France, India, and Pakistan. The United States contests the maritime claims of each these

²⁵¹ Benin, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Eritrea, Gabon, Greece, Guinea-Bissau, Honduras, Japan, Mauritania, Panama, Peru, Philippines, Russian Federation, Togo, Tunisia.

states, except France. Subsequent chapters discuss American action vis-à-vis these states in greater detail.

5.6 Interactions

Next, 31 interactive terms are included in the analysis to examine the interaction between variables across the security model, liberalism model, and organization model. They are added to the base variables from the previous step. Each of these terms and the .do file that created them are listed in the appendix, but 20 of 31 were eliminated from the regression model due to heteroskedasticity and multicollinearity. 11 interactive terms appear in Table 5. These terms are:

- **strong_restrict** - interaction of military spending per capita (*sipri_percap*) and whether the coastal state makes usage maritime claims (*restrictive*).
- **richlog_restrict** – interaction of the natural log of GDP (*log_gdp*) and whether the coastal state makes usage maritime claims (*restrictive*).
- **nuc_declare** – interaction of whether the coastal state has an active nuclear weapons program (*nucstate*) and whether it makes a declaration at UNCLOS ratification whether the coastal state makes a declaration upon ratification of UNCLOS (*declare*).
- **nuc_rat** – interaction of whether the coastal state has an active nuclear weapons program and whether the coastal state has ratified UNCLOS (*ratunclos*).
- **polity_restrict** – interaction of a coastal state’s polity score (*polity_scaled*) and whether the coastal state makes usage maritime claims (*restrictive*).
- **polity_rat** – interaction of a coastal state’s polity score (*polity_scaled*) and whether the coastal state has ratified UNCLOS (*ratunclos*).
- **rat_declare** – interaction of coastal state whether the coastal state has ratified UNCLOS (*ratunclos*) and whether the coastal state makes a declaration upon ratification of UNCLOS (*declare*).
- **wealth_autoc** – interaction of the natural log of a coastal state’s GDP (*log_gdp*) and the coastal state’s polity score (*polity*).
- **wealth_rat** – interaction of the natural log of a coastal state’s GDP (*log_gdp*) and whether the coastal state has ratified UNCLOS (*ratunclos*).
- **strong_autoc** - interaction of military spending per capita (*sipri_percap*) and the coastal state’s polity score (*polity_scaled*).
- **fleet_dip** – interaction of whether the United States Navy maintains an operational fleet headquarters in the region of the coastal state (*fleet*) and the level of diplomatic representation from the coastal state to the United States (*DR_at_US*).

TABLE 5-4

	Protest	Assert	Action	Both
sipri_percap	-0.003***	-0.008**	-0.005**	0.001*
nucstate	0.676	1.923***	0.935***	1.827*
expansive	1.332***	1.052***	1.539***	0.286
restrictive	---	17.555***	14.651***	0.220
polity_scaled	---	-0.629***	-0.501***	-0.024
ratunclos	-7.422***	-10.326***	-8.247***	-2.422*
DR_at_US	---	---	-0.126	---
strong_restrict	0.003***	0.009***	0.006***	---
richlog_restrict	---	-0.626***	-0.504***	---
nuc_declare	1.015	12.083***	---	10.441***
nuc_rat	---	-13.937***	---	-10.407***
polity_restrict	---	-0.077*	-0.072**	---
polity_rat	---	-0.056*	---	---
rat_declare	---	1.439***	0.993***	2.713*
wealth_autoc	-0.001	0.029***	0.022***	---
wealth_rat	0.286***	0.403***	0.301***	---
strong_autoc	---	-0.0003***	-0.0002***	-0.0004***
fleet_dip	0.243***	0.574***	0.599***	0.357***
cons	-3.981	-5.045***	-4.221***	-4.921***
Pseudo R ²	0.1093	0.3291	0.2775	0.2167
N=	2286	2286	2286	2326
(lstat)				
LR Chi ²	82.16(9)	2254.40(17)	294.24(15)	1393.13(13)
(degrees of freedom)				
Log likelihood (iterations)	-287.92	-570.31(11)	-674.018(7)	-122.17 (10)

* p<0.05, ** p<0.01, *** p<0.001

Generally speaking, the introduction of the interactive terms increases the explanatory power of the models, but at the expense of trading noise for higher statistical fit, let alone theoretical parsimoniousness. Statistically, the amount of variance explained by the addition of these interactive terms increased by approximately 10%. (as expressed by Pseudo R²). This result is a big increase, doubling the explanatory power of the base model. Qualitatively, the interactive terms indicate some additional factors that warrant analytical attention in the case studies.

5.7 Evaluation of Hypotheses

5.7.1 Liberal Model

H1a. Because maximum compliance with customary international law and the UNCLOS treaty is the desired outcome, the United States will conduct operational assertions against as many states as possible regardless of geographic situation.

On the surface, we must reject this hypothesis. Not only does the United States not assert against all disputant coastal states each year (or even each decade), but in some cases, the United States has refrained from performing and announcing an operational assertion when it actually had a ship available in the area (e.g. Argentina, Strait of Magellan). The United States tends to act more often when it disputes the coastal state's *usage* claim. This is a robust finding. Changing this usage variable (*restrictive*) from a 0 to a 1 increases the likelihood by 99% that the United States will conduct an operational assertion. This finding is far stronger than when the coastal state makes an *expansive* claim.

The correlation tables (see Table 1 and 2) show statistically significant correlations between assertions and usage claims. The data show that the United States response is correlated at a comparable rate when the disputed maritime claims are either territorially expansive or attempting to restrict usage. However, the United States is more likely to act against usage claims, which would infringe upon economic liberties or military mobility. The next chapter will expand on this finding by focusing on international straits which most acutely affect both.

H1b. The United States will use operational assertions as outward expressions promoting its domestic political order and will be more likely to conduct operational assertions to contest the claims of autocratic states than institutionalized democracies.

The empirical results appear to confirm Hypothesis 1b. Polity score is negatively correlated with operational assertions, and it is statistically significant at 99.9%. Thus, autocratic states are more likely than democratic states to receive operational assertions from the United States. The regression results also show that democracies with which the United States has a dispute are less likely to receive an assertion than non-democracies with which the United States has a dispute. To be clear, this is not an endogeneity resulting from a correlation between democracies and compliance with international law.²⁵² The statistical finding here focuses on the policy choice the United States makes to respond to noncompliance. Given an existing dispute, the United States is more likely to assert against autocratic states than democratic states. However, when we create dummy variables for each category of polity (autocracy = -10 to -6, anocracy = -5 to +5, and democracy +6 to +10) and test the marginal effects of toggling each dummy variable from 0 to 1 while holding all other values at their mean, then the results are substantively weak, but statistically significant nonetheless.

5.7.2 Security Model

H2a. The United States will conduct operational assertions to challenge claims, which restrict freedom of movement in areas most vital to American military security or commercial security. The strategic chokepoints are the highest priority transit zones.

The empirical results confirm Hypothesis 2a, but this finding is very similar to H1a. To differentiate these findings, we turn to the correlations in Table 2, which show the correlations by type of maritime claim. The positive, statistically significant correlations between itemized

²⁵² George W. Downs, David M. Rothe, and Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?," *International Organization* 50, no. 3 (July 1, 1996): 379–406; Simmons, "Compliance With International Agreements"; Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 04 (1998): 887–917.

usage claims such as 1) Prior Permission claims (requiring permission for warships to enter a Territorial Sea), 2) Contiguous Zone claims, which state use to extend unlawfully their security jurisdiction, and 3) Exclusive Economic Zone claims, which seek to limit military operations in the EEZ – together build a body of evidence that the United States is likely to act to preserve its military freedom of movement. More generally speaking, as seen earlier in the regression output, the marginal effects of toggling the usage variable (*restrictive*) from 0 to 1 while holding all other values at their mean, is 99.8%. This means that the United States is 99.8% more likely to perform an operational assertion (all else held constant) when the disputed maritime claim aims to restrict usage in some way. In contrast, the marginal effects of toggling the territorial claim variable (*expansive*) from 0 to 1 while holding all other values at their mean, is 1.9%.

H2b. The United States will conduct operational assertions to challenge the emergence of a regional hegemon and rising regional powers.

The data reject the hypothesis that the United States conducts operational assertions to challenge regional hegemons. Insofar as regional hegemons are measured by higher levels of wealth or military spending, the regression results do not support this hypothesis. This is a surprising finding which demands more analysis in the following chapter. However, the marginal effects of being a nuclear-weapons state increase the likelihood of receiving an assertion by approximately 6-16%. This likelihood increases to approximately 99% for nuclear-weapons states that have made declarations upon ratification of UNCLOS (interaction term—nuclear and declaration). Only four countries fit into this latter category: China, North Korea, India, and Pakistan. This is a very strong finding which will receive more attention in the next chapter.

In the meantime, it is important to call attention to three details. First, in the regression output, not only is military spending (as a percentage of GDP) not statistically significant

(positive relationship), but also military spending (per capita) which is statistically significant at the 95% confidence level has a very small beta coefficient and a negative relationship. In sum, the results are very small, insignificant, and pointing in different directions. Additionally, the measure of state wealth – a proxy for state power based on the fungibility of wealth into hard power – has a negative coefficient, but is not statistically significant either. These findings are surprising given the frequent arguments that the United States uses the Freedom of Navigation program as a stratagem for balancing rising powers and threats. I will explore this further in the qualitative case studies.

5.7.3 Organizational Model.

H3a. The United States will conduct Freedom of Navigation operations when an operational headquarters exists to plan and execute them.

The regression output provides statistically significant evidence to support this hypothesis. The existence of an operational fleet headquarters increases the likelihood of conducting an operational assertion by 3.5%. This finding is statistically significant at the 99.9% level. This marginal effect is not substantively large, though, and it likely reflects the fact that the Navy is more likely to place operational headquarters in places where they intend to conduct more operations anyway. This endogeneity bias likely produces a higher result.

But while the existence of a fleet headquarters predicts a small increase in the likelihood of FONOPS, the total number of ships in the Navy does not appear to have a significant effect on FONOPS. From 1989 to 2013, the total number of warships declined steadily from nearly 597 ships to 289. Yet, the number of operational assertions does not decrease. Instead, the frequency of operational assertions peaked during the Clinton administration in 1998, when 28 assertions were conducted. In the logit regression results from the entire period 1979-2013, the number of

warships had a small and negative effect, *but it was not statistically significant*. Thus, counter to intuition, the total number of warships in the United States fleet has no significant relationship with observed operational assertions.

H3b. The United States will not conduct Freedom of Navigation assertions when political sensitivities dictate—as expressed by Department of State or National Security Council.

The statistical results from this chapter do not address H3b. These hypotheses are addressed in the next chapter.

H3c. The United States will conduct Freedom of Navigation operations when diplomatic relations are in tact.

The regressions include three different measures for considering the effect of diplomatic relationships on the likelihood of either diplomatic protests or operational assertions, but none of the variables is significant—substantively or statistically. Neither the presence of a U.S. Ambassador in a coastal state nor the presence in the United States of a foreign ambassador changes the likelihood of either a diplomatic protest or an operational assertion. Even the most basic dichotomous measure of formal diplomatic exchange (ambassadorial presence in either country) does not affect the outcomes. The case study of Oman and Iran in Chapter 6 provides a closer look at this relationship.

5.8 Conclusion.

First, the quantitative results show that the variables of the Security Model as operationalized in terms of military expenditure and GDP have little to no effect on protests or assertions under the Freedom of Navigation program. The only variable of the Security Model with any statistical significance is a nuclear weapons capability. The marginal effect of a state's possession of nuclear weapons is substantial, as much 16% greater likelihood of receiving an operational assertion (holding all other variables at their mean value), depending on the

regression equation. This means that the United States is 8-16% more likely to protest or assert against the disputed claims of a state with nuclear weapons compared to a non-nuclear state (when holding all other values at their mean value). This finding is important, and it underscores nuclear weapons as one of the top two strongest variables in predicting action by the United States. This finding raises the question of whether the attention to nuclear states is due to an American response to rising (or risen) powers, or some other concern.

Second, the quantitative results indicate that the effect of the Liberalism Model—operationalized in terms of types of claims, domestic polity type, treaty activity, and value of trade relationship has little effect. Both usage and territory claims have statistically significant effects on assertions, with usage claims having a slightly higher substantive effect than territory claims. In other words, usage claims are more likely to provoke American assertions than territory claims, however the difference is slight. In terms of polity type, the United States is approximately 8% less likely to conduct a FON assertion against a democracy than a polity of an autocratic regime or weakly institutionalized anocracy. States that issue a declaration upon ratification of UNCLOS are approximately 6% more likely to receive an assertion. This seems intuitive because the declaration is like waving a red flag in defiance of the treaty. Finally, the effect of the total size of the bilateral trade relationship is statistically significant, but substantively near zero; so we can say with high level of certainty that it hardly matters.

Third, the quantitative results indicate the effect of the Organization Model—as operationalized in terms of available resources (total warships in Navy), existence of an operational fleet headquarters, and diplomatic representation—is worthy of further study due to three surprising findings. First among these is that the number of warships in the United States Navy has nearly no effect on whether it asserts its freedom of navigation with a FONOP. The

demonstrated effect of warships is statistically significant, but the substantive effect is close to zero even though the number of ships declines by nearly half over the time period. Another counterintuitive finding is the apparent insignificance of diplomatic representation on the United States' conducts the Freedom of Navigation program. Neither the existence of a diplomatic exchange nor the posting of a full ambassador is substantively or statistically significant in this study. Finally, by contrast, the existence of an operational fleet headquarters, often referred to as a Numbered Fleet or a Maritime Component Command increases the likelihood of assertions by 13-16%. The significance of a fleet headquarters indicates the importance of command-and-control relationships and organizational capacity for coordinating policy with other departments and agencies. This result also suggests an endogeneity or a bias for action in locations where the United States' security interests have led to the establishment of these headquarters in the first place.

CHAPTER 6. FREEDOM OF NAVIGATION IN THE STRAIT OF HORMUZ (IRAN, OMAN)

6.1 Introduction

Chapter 6 builds on the statistical work in Chapter 5 and selects a pair of cases for qualitative examination. The results from the large- n statistical analysis in the previous chapter offer some insight into the utility of explanations of liberalism, security, and organization for the United States' behavior under the Freedom of Navigation program. That quantitative analysis, however, yields weak and mixed results, and the statistical results suggest avenues for further analysis.

These findings from Chapter 5 are summarized in the following flow diagrams, which indicate positive or negative relationships between the likelihood of operational assertions and the independent variable on the left. The sign indicates the positive or negative effect of the independent variable. The substantive effect or magnitude of the variables is not annotated.

Nuclear weapons $\rightarrow +$
Territory < Usage Claims $\rightarrow +$
Fleet HQs $\rightarrow +$
Democracy $\rightarrow -$

Power (Military, Wealth) $\rightarrow 0$
Economic Interdependence $\rightarrow 0$
Warships in U.S. Navy $\rightarrow 0$
Diplomatic Representation $\rightarrow 0$

In the cases of the variables in the right column, the relationships are either statistically or substantively insignificant. Overall, these results may be due in part to the challenges of operationalizing particular variables. Nevertheless, this quantitative analysis suggests both the limitations of the models presented and, in a few cases, the need for a closer, qualitative examination of selected relationships.

The quantitative analysis demonstrated the importance of one variable from each model, which receive priority in this chapter. First, the quantitative results showed the marginal effect of a state's possession of nuclear weapons was the most significant (positive) of the security variables. By contrast, the statistical operationalization of military power—with different measures of military expenditure and state wealth (GDP) as proxies—fails to capture the ways that coastal states field military capabilities to restrict or deny coastal waters in an asymmetric or relatively inexpensive way. Historical intuition and operational experience suggest that these variables remain important, and this chapter attempts to account for the conditions under which that may be so.

Second, the quantitative results showed that the regime type of a disputant coastal state had a marginal effect (negative) on the likelihood of an operational assertion. This was the only variable from the Liberalism model that demonstrated significance. Democracies with which the United States has a maritime dispute are less likely to receive operational assertions than non-democracies. Also, usage claims were slightly more likely to provoke American assertions than expansive claims. A number of variables from the Liberalism model had no meaningful effect on the outcome according to the regression analysis. The total size of the bilateral trade relationship had little substantive effect on the likelihood of assertions. Yet, like the Security

model above, intuition and experience suggest that these variables have some explanatory value, and this chapter attempt to explain the conditions under which that may be so.

In this chapter, organizational politics, in particular, comes to the fore as the strongest explanation for the variation in freedom of navigation assertions. Specifically, I highlight the relationship between 1) organizational doctrine and standard operating procedures within the United States Navy, and 2) the Navy's relationship to Presidential power (e.g. the National Security Council) that activates and/or constrain the Navy under various circumstances. The selected cases in this chapter demonstrate not only the extent to which the Navy operates as a efficient and effective instrument for achieving the specialized goals assigned to it, but also how this organization's goals may diverge from the desired objectives of its political masters.

In the quantitative analysis of the Organization Model, the number of warships in the United States Navy produced no statistically significant effect on freedom of navigation assertions, nor did the existence of diplomatic exchange or levels of diplomatic representation. However, the existence of an operational fleet headquarters, often referred to as a Numbered Fleet or a Maritime Component Command, had a marginal effect approximately as strong as that of nuclear-weapons states. Thus, this chapter pays close attention to the importance of this organizational feature and considers how, why, and under what conditions the politics of the organization may be significant.²⁵³

The Liberalism and Security models provide some explanatory power, but these models are likely active under sensitive political situations. More often than not, the organizational incentives of the Navy and the politics inside the organization entrusted with the exercise of the Freedom of Navigation program—where the planning, coordinating, and executing of the

²⁵³ Due to the likely bias for action in locations where the United States' security interests have prompted the establishment of these headquarters in the first place, this chapter selects cases to control for endogeneity.

operations occurs—explain the why the United States conducts operational assertions against some countries and not others. Thus, the Navy’s organizational missions, its operational objectives and specialized abilities, its standard operating procedures, and its requirements of coordination and for command-and-control feature anticipate the majority of navy activity.²⁵⁴

Under normal conditions, standing doctrine and standard operating procedures are likely to account for most activity under the freedom of navigation program. However, when disputes arise or when disputed claims arise in politically sensitive areas, we should expect variables of the Liberalism or Security Models to have a greater role. These expectations align closely with Posen’s theory about the relationship between organization theory and balance of power theory: Whereas organization theory leads one to expect a tendency toward stagnant (often offensive) military doctrines dislocated from politics, balance of power theory suggests a “greater heterogeneity in military doctrine dependent on reasonable appraisals by each state of its political technological economic and geographical problems and possibilities in the international political system.”²⁵⁵

6.2 Delegation, Standard Operating Procedures, and Organizational Politics

A 1982 policy document, providing guidance for the Freedom of Navigation program, was signed in the same week as the conclusion of the United Nations Convention on the Law of the Sea, which the United States did not sign. The timing of this policy document is significant as it aimed to:

[...] protect U.S. navigation, overflight, and related security interests in the seas through the vigorous exercise of its rights against excessive maritime claims. The current uncertainty in the law of the sea and the U.S. decision not to become a

²⁵⁴ Graham Allison and Philip Zelikow, *Essence of Decision: Explaining the Cuban Missile Crisis*, 2nd ed. (New York: Pearson, 2009), 143–196.

²⁵⁵ Barry R. Posen, *The Sources of Military Doctrine: France, Britain, and Germany Between the World Wars*, Cornell Studies in Security Affairs (Ithaca, NY: Cornell University Press, 1986), 59, 41–67.

party to the Law of the Sea (LOS) Convention make all the more necessary a clear assertion of our rights and a revitalized and more effective navigation and overflight program.²⁵⁶

A prioritization scheme emerged from NSDD-72, and all subsequent directives (NSDD-83 (1983), NSDD-265 (1987), NSD-49 (1990), NSD-62 (1991), and PSD-32 (1995)) reiterated the same commitment to freedom of navigation and prioritization for dealing with different types of claims.

Levels of priority for action are expressed in terms of how little coordination is required before exercising navigational freedoms in international straits. As a matter of organizational politics, the level of autonomy delegated to a service is an important consideration for explaining where and when the United States Navy is likely to exercise Freedom of Navigation.²⁵⁷

International straits receive top priority as expressed by the autonomy authorized to the Department of Defense: “International straits will be used by both naval ships and aircraft freely and frequently as directed by the Department of Defense.”²⁵⁸ Thus, one expects the navy to maintain its global presence and to operate forward conducting transit passage through these strategic chokepoints where the territorial seas of coastal states overlap in an international strait. According to the regime of transit passage, the policy authorizes “the submerged transit of submarines, overflight of military aircraft, and surface transit of warships/naval auxiliaries, without prior notification or authorization.”²⁵⁹ Only navigation in and over international straits is exempt from review for politically sensitive areas by Department of State and the Assistant to

²⁵⁶ Ronald Reagan, “National Security Decision Directive 72 (NSDD-72)” (The White House, December 13, 1982), 1, <http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDDS/NSDD72.pdf>.

²⁵⁷ Morton H Halperin, Priscilla Clapp, and Arnold Kanter, *Bureaucratic Politics and Foreign Policy*, 2nd ed. (Washington, D.C.: Brookings Institution Press, 2006), 51–56, 101–109.

²⁵⁸ Reagan, “National Security Decision Directive 72 (NSDD-72),” 2.

²⁵⁹ *Ibid.*, 1.

the President for National Security Affairs.

Expansive territorial sea claims that exceed 12 nautical miles receive the next level of priority. NSDD-72 states, “The Department of Defense will routinely assert U.S. rights against territorial sea claims and other claims to jurisdiction over maritime areas in excess of twelve miles.”²⁶⁰ It is worth noting two details pertaining to this category of expansive territorial sea claims. First, the majority coastal states claiming a territorial sea in excess of 12 nautical miles is in Central/South America or Africa; exceptions include Albania (until 1990), Germany (until 1993), Greece (excessive airspace claim), Philippines, and Syria (until 2003). These claims require no prior coordination or approval. Second, the majority of coastal states claiming unlawful jurisdiction over a different class of maritime area beyond 12 nautical miles is in Asia. Most coastal states claim a Contiguous Zone (12-24nm offshore) for preventing and punishing infringement of customs, laws and regulations in the Territorial Zone. The Contiguous Zone acts as sort of external buffer zone prior to entering the territorial sea. However, some coastal states seeks to securitize the Contiguous Zone, meaning that they extend claims of sovereignty that apply only to the Territorial Sea to this outer region also. Many Asian states attempt to securitize these Contiguous Zones, and 21 coastal states world wide currently impose some kind of unlawful restriction on activities in their Contiguous Zone. Thus, in these areas, NSDD-72 and later documents authorize the Navy to operate according to doctrine and standard operating procedures, and the rest of the bureaucracy defers to the Navy’s organizational expertise to determine when and how to conduct these missions.²⁶¹

All other situations require review and approval. NSDD-72 requires the Department of Defense to “submit in advance to the Department of State and the Assistant to the President for

²⁶⁰ Ibid., 2.

²⁶¹ Halperin, Clapp, and Kanter, *Bureaucratic Politics and Foreign Policy*, 151–155.

National Security Affairs a proposed schedule for asserting U.S. rights” against prior permission claims in for attention to “politically sensitive areas,” NSDD-72 tasks the Department of State with advising the Department of Defense when operations may be politically inadvisable for a limited time. The National Security Advisor may also determine that assertions are no longer required against excessive claims “after a reasonable number of assertions” have been conducted.

These articulated guidelines for the Freedom of Navigation program lead one to expect that the U.S. Navy will exercise liberally navigational freedom at will in the Strait of Hormuz without the need for much coordination with other organizations. In the South China Sea, however, some interdepartmental review and coordination are necessary before exercising freedom of navigation against the claims of China and Vietnam. The remainder of this chapter takes a closer look at the cases of Iran and Oman and the pattern of activity by the United States.

6.3 Case Selection

The cases selected for this chapter enable the study of the two variables which the quantitative analysis finds are most significant—nuclear weapons and existence of Fleet HQs. The nuclear variable and the democracy variable are constant across this pair of cases, as neither state possesses nuclear weapons during this period and both states remain non-democratic for the entire period (although Iran experienced intermittent periods of liberalization). Variation occurs on the level of diplomatic representation as the United States had normal diplomatic relations with Oman, but no formal diplomatic ties with Iran during the period. If diplomatic representation were to have a significant effect, this case selection should highlight it. In terms of military organization, both Iran and Oman fall within the same geographic region of organization for the United States military. But this organization varies over the period of the case and offers

analytical opportunity for two reasons. First, the formal establishment of U.S. Central Command occurs in 1983, which offers variation on an important organizational factor. Moreover, the relationships between U.S. Central Command, and the maritime component responsible for action in the maritime theater also vary during this period. Together, these changes provide an opportunity to understand to what extent freedom of navigation activities change due to these organizational factors. If these particular factors have a meaningful impact, then we should expect to see both Iran and Oman affected by them; otherwise, some other explanation may be more salient.

In these cases, nuclear powers do not provoke more or fewer assertions. Democracies or democratization efforts do not appear to increase or decrease the likelihood of operational assertions.²⁶² The presence or absence of formal diplomatic representation does not appear to factor strongly either. The organizational alignment of fleet headquarters, their geographic combatant commands, and the higher coordination between agencies demonstrate an important effect across the cases.

This chapter proceeds in three movements. First, I provide an overview of the importance of the Strait of Hormuz. Second, I examine the United States' operational behavior under the Freedom of Navigation program that presents a puzzle. Third, I consider variables from each of the three models outlined in Chapter 2, and then expand the Organizational variable. Finally, the chapter concludes with a return to the strategic context of the Strait of Hormuz and its place in the greater worldwide struggle for power between the United States and the Soviet Union.

Pairing contiguous states offers offer analytical power through controlled comparison and by

²⁶² In 2013, the United States disputed the claims of 40 coastal states coded as democracy. During the period 1979-2013, the US Navy conducted FONOPS against 28 of 40.

doubling the set of cases.²⁶³ The paired selection assumes that ships available for FON operations against one coastal state are available for operations against its contiguous neighbor. These case selection selections also recognize the variation in legal claims disputed by the United States and the possibility that some claims are of higher priority than others.

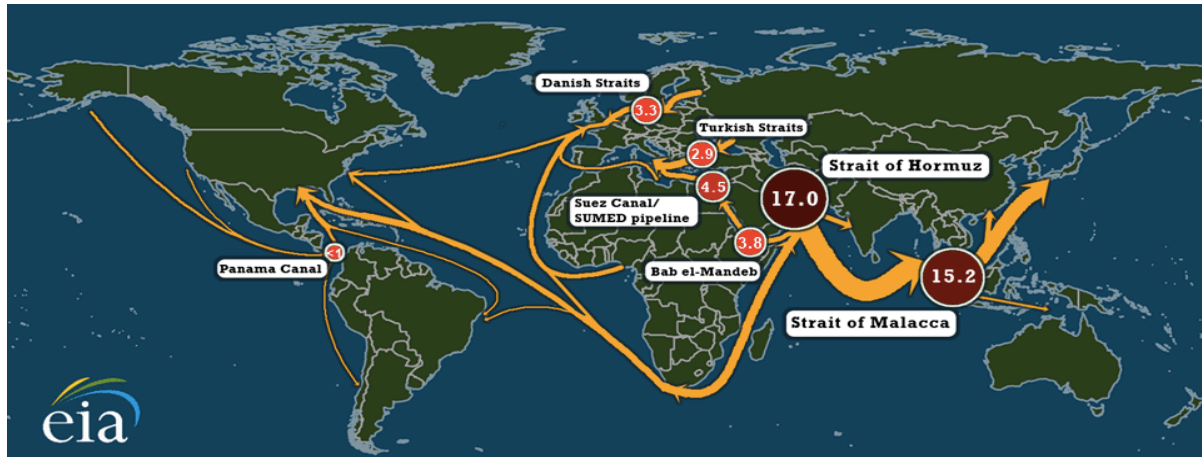
6.4 Disputed Claims in International Straits: Iran-Oman

The Strait of Hormuz divides Iran and Oman—by 21 miles at its narrowest point as it connects the Gulf of Oman and the North Arabian Sea with the Persian Gulf. The Strait of Hormuz is the most vital of the maritime shipping routes. Throughout the period from 1979 to 2013, the secure transit of energy resources out of the Persian Gulf region has been a constant imperative, not only for the United States, but also for the rest of the industrialized world. According to the U.S. Energy Information Administration, the Strait of Hormuz is the world's most important chokepoint. Each day, approximately 17 million barrels of oil flow through the Strait of Hormuz (equivalent to 30% of all seaborne-traded oil). The energy resources seem to dominate the American mind as the primary vital interest of the United States, however, in reality 85% of the crude oil that moves through the Strait of Hormuz is bound for Asia markets, especially Japan, India, South Korea, and China.²⁶⁴ This evidence suggests that American efforts may be more altruistic than many would first think. This volume of oil and its transit locations are depicted in the graphics below (Figures 1, 2). The Strait of Hormuz is a case where national interests of the United States—preservation of a liberal order for international trade and the security interests—are at stake.

²⁶³ Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca, NY: Cornell University Press, 1997), 56–58.

²⁶⁴ “World Oil Transit Chokepoints” (U.S. Energy Information Administration, November 10, 2014), http://www.eia.gov/beta/international/analysis_includes/special_topics/World_Oil_Transit_Chokepoints/wotc.pdf.

FIGURE 6-1



All estimates in million barrels per day. Includes crude oil and petroleum products. Based on 2013 data.

FIGURE 6-2

Location	2009	2010	2011	2012	2013
Strait of Hormuz	15.7	15.9	17.0	16.9	17.0
Strait of Malacca	13.5	14.5	14.6	15.1	15.2
Suez Canal and SUMED Pipeline	3.0	3.1	3.8	4.5	4.6
Bab el-Mandab	2.9	2.7	3.4	3.7	3.8
Danish Straits	3.0	3.2	3.3	3.1	3.3
Turkish Straits	2.8	2.8	3.0	2.9	2.9
Panama Canal	0.8	0.7	0.8	0.8	0.8
World maritime oil trade	53.9	55.5	55.6	56.7	56.5
World total oil supply	84.9	87.5	87.8	89.7	90.1

Notes: All estimates are in million barrels per day. Data for Panama Canal is by fiscal years.

Sources: U.S. Energy Information Administration analysis based on Lloyd's List Intelligence, Panama Canal Authority, Eastern Bloc Research, Suez Canal Authority, and UNCTAD, using EIA conversion factors.

American leaders in the 1970s anticipated a growing interest in the Indian Ocean region, and the Persian Gulf area more specifically. Declassified documents from the Nixon administration clearly articulate energy interests not only as the primary interest in the Indian Ocean region, but the *only* vital national interests in the area at the time. Over the course of the next three decades,

however, the direct military activity of the United States increased in the region: the Fall of the Shah and the Iranian hostage crisis, Praying Mantis and the Tanker Wars, Desert Storm, Southern Watch and period of Iraqi containment, and the 2003 Iraq War represent just a handful of the flashpoints which required American attention and resources. Nevertheless, the purpose of the engagement remained primarily about unfettered access to energy resources, the maintenance of a Westphalian system and defense of state sovereignty, and defense of a free international strait for the movement of oil that our allies and we depend upon.

Indeed, upon the outbreak of the Iran-Iraq War in 1980, freedom of navigation and the unimpeded flow of resources from the Persian Gulf was the top strategic priority for the United States in the region. Secretary of State Muskie advised President Carter in 1980 (emphasis mine):

With regard to the sea lanes in the Persian Gulf and elsewhere, *our only concern was that they be left open*. In the first days of the war we were concerned that the Iranians were going to seek to ‘regulate’ shipping in the Straits of Hormuz [...] *If shipping and the flow of oil were to be seriously disrupted, our vital interests would be so seriously affected that we would need to consider what steps to take* [...] The Iranians have stated that they too want to protect the open sea lanes; in fact much of their normal shipping flows through the Persian Gulf. Nonetheless, we continued to discuss possible options that would be available to us because of the serious consequences of a disruption of shipping.²⁶⁵

For the Carter Administration, even in the early days after the 1979 Iranian Revolution and the hostage crisis, the policy was not “to take sides in the conflict and that it was important that we not be perceived by either of the combatants to be taking sides.”²⁶⁶ The Reagan administration echoed this imperative two years later in specific policy terms. The formulation of the Freedom of Navigation program, created in 1979 and articulated in National Security

²⁶⁵ Edmund S. Muskie, “Message from Secretary of State Muskie to President Carter,” October 5, 1980, Plains File, President’s Personal Foreign Affairs File, Carter Library, <https://history.state.gov/historicaldocuments/frus1977-80v06/d303>.

²⁶⁶ Ibid.

Decision Directive Number 72 (13 December 1982) frees the Navy to assert navigation freedoms liberally in international straits. This document requires coordination with the State Department and approval from the Assistant to the President of National Security Affairs before conducting most Freedom of Navigation operations “to ensure that the execution of the program gives appropriate consideration to the possibility of damage to bilateral or other relations” (NSDD-72). International straits, however, are exempt from this requirement: “International straits will be used by both naval ships and aircraft freely and frequently as directed by the Department of Defense” (NSDD-72). Empirical evidence shows that the United States has indeed exercised its navigational freedoms routinely. In fact, annual reports on the Freedom of Navigation program reflect the implementation of this guidance. For instance, the DOD 1998 *Annual Report to the President and the Congress* states (emphasis below is mine):

In FY 1998, U.S. armed forces conducted operational assertions challenging the excessive maritime claims listed in the accompanying table. In addition, *military vessels and aircraft frequently conducted routine transits through international straits, such as the Straits of Gibraltar, Hormuz, and Malacca*. Air and surface units also transited the Indonesian Archipelago in archipelagic sea lanes passage on 20 occasions and transited the Philippine Archipelago by exercising high seas freedoms, transit passage, and innocent passage, as applicable, on 32 occasions. Combined with robust and highly visible routine operations by U.S. forces on, over, and under the world's oceans, and scrupulous adherence by the United States to the navigational provisions of the UN Law of the Sea Convention, Freedom of Navigation operations have continued to underscore the U.S. commitment to a stable legal regime for the world's oceans (Appendix I-1).²⁶⁷

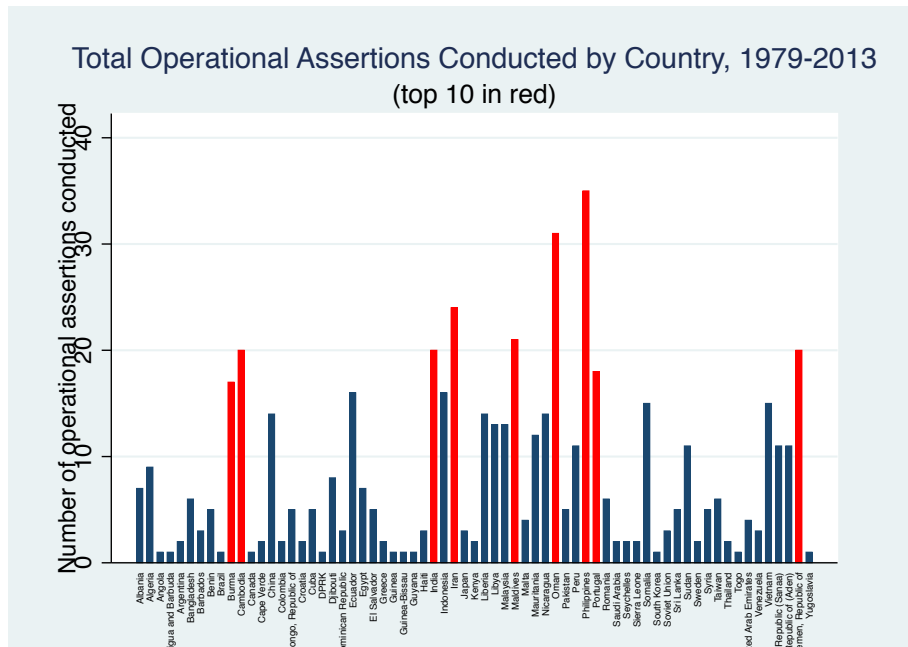
Thus, given the American presence in the region and the strategic importance placed on the Strait of Hormuz, one expects the United States to conduct assertions often and consistently against both Iran and Oman who border either side of the strait.

²⁶⁷ Williams S. Cohen, “Annual Report to the President and the Congress (FY1998)” (Government Printing Office, 1999), I-1, <http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/FY1998%20DOD%20Annual%20FON%20Report.pdf>.

6.4.1 Dependent Variables: Diplomatic Protests and Operational Assertions

The United States has been relatively active in demonstrating its refusal to acquiesce to the maritime claims of Iran and Oman. Compared to other coastal states whose maritime claims the United States disputes, Iran and Oman are among the most frequently challenged states. Since 1979, the United States has conducted operational assertions to demonstrate its refusal to acquiesce to the claims of Oman in 31 of 34 years. Only Philippines has received more operational assertions from the United States. Iran has received operational assertions with the third highest annual frequency of 25 of 34 years.

FIGURE 6-3



At first glance, there appears to be little difference in the United States’ approach to these two coastal states. Upon closer inspection, however, the variation in the behavior of the United States raises questions, especially given the similarity of Iranian and Omani maritime legal claims and their nearly identical geographic situation—astride the Strait of Hormuz and within

the same current area of responsibility for U.S. Central Command, the geographic combatant command responsible for that region of the world. Additionally, both Iran and Oman are assigned to the naval component commander, NAVCENT responsible for naval activities in this region.²⁶⁸ So, why is the number of operational assertions not identical? What accounts for the variation in these two seemingly identically situated states? The United States advertises a universal commitment to freedom of the seas, and perhaps more than any other place in the world this universal commitment could be manifest, so this inconsistency in behavior is puzzling.

During the period 1979 to 2013, the United States issued diplomatic protests against the maritime claims of Iran in three years (1983, 1987, and 1994) and against the maritime claims of Oman in one year (1991).²⁶⁹ More often than not, each of the United States' diplomatic communiqués responded to legal/diplomatic actions by the respective coastal states. In December, 1982 Iran appended its signature of UNCLOS with a declaration of Iran's unlawful requirement for notification by warships prior to exercise of innocent passage through the territorial sea and which a condition for extending the rights of the UNCLOS treaty only to its signatories. The United States responded in 1983 with a diplomatic protest. Later when Iran updated its maritime claims in May 1993 with the *Act of the Marine Areas of the Islamic*

²⁶⁸ The Maritime Component Commander for U.S. Central Command is Commander, Naval Forces Central Command (NAVCENT). This three-star admiral is dual-hatted as Commander, U.S. Fifth Fleet. This dual distinction reflects his responsibilities as a commander of operational forces (NAVCENT) and his responsibilities for readiness and availability of forces in a geographically assigned region (Fifth Fleet).

²⁶⁹ I observe a discrepancy in sources on diplomatic protests for Iran. The *Digest of United States Practice in International Law, 1991-1999* includes only one diplomatic protest against the maritime claims of Iran. It refers to a diplomatic note dated January 11, 1994 in which "the United States objected to Iranian legislative provisions inconsistent with these requirements and to a requirement for prior authorizations." There is a non-specified reference, however, listed in the *Maritime Claims Reference Manual* published by the Judge Advocate General of the U.S. Navy on behalf of the Department of Defense, to a diplomatic protests issued against Iran in CY1993 and CY1994. Due to lack of corroborating information, the dataset includes only CY1994 record.

Republic of Iran, the United States responded with a diplomatic note in 1994.²⁷⁰ In August 1991, the United States sent a diplomatic note to Oman to protest the unlawful requirement for prior notification of innocent passage that Oman articulated in its ratification of UNCLOS.

The significance of these diplomatic protests lies in their rarity, their responsiveness, and the United States' choice of medium for communicating its dispute. First, compared to the assertions that occur annually, the diplomatic protests are rare events. Second, in a sort of tit-for-tat response pattern, each time the disputant updated its maritime claims or deposited a declaration at the United Nations, the chosen response of the United States was diplomatic. As such, these protests are responsive to the legal actions of the coastal state, but they reveal a sort of “grooved thinking” which produces a routine response to a single perceived change.²⁷¹ This type of response may represent the complexity of the situation facing American diplomats, such that they decompose the complex problem into manageable parts and respond to one facet of the problem in a preprogrammed way.²⁷² Alternatively, this type of response may reveal simply a discrete channeling of communication to reduce ambiguity of signals.²⁷³ Thus, messages received via one medium will be responded to in the same medium—legal responses to legal actions—to ensure clarity of communication and to prevent misperception.

The pattern of activity for operational assertions is strikingly different. The United States has acted consistently against the maritime claims of Oman – conducting operational assertions

²⁷⁰ The text of the Iranian claim and the American analysis claim are available in the following sources: “Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993” (United Nations (DOALOS/OLA), May 1993), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN_1993_Act.pdf; J. Ashley Roach, John T. Oliver, and Robert W. Smith, “Limits in the Seas, No. 114: Iran’s Maritime Claims” (Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, March 16, 1994).

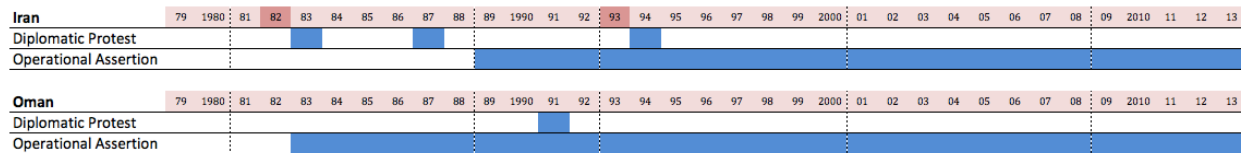
²⁷¹ Halperin, Clapp, and Kanter, *Bureaucratic Politics and Foreign Policy*, 22–23.

²⁷² Halperin, Clapp, and Kanter, *Bureaucratic Politics and Foreign Policy*.

²⁷³ Jervis, *The Logic of Images in International Relations*.

annually since 1983 without exception, and in the case of Iran since 1989. This activity is depicted in Figure 4 below.²⁷⁴

FIGURE 6-4



6.4.2 Independent Variables: Explaining the Variation in Operational Assertions

The quantitative analysis from the preceding chapter suggests three variables for explaining the variation in operational assertions. First, nuclear weapons, which tend to increase the likelihood of an operational assertion, do not factor in this case. Neither Iran nor Oman possesses nuclear weapons during this period. Other variables within the security model which proxy for state power, such as military expenditure and GDP, are not statistically or substantively significant in the quantitative study, and they are not particularly relevant in this qualitative study either because they are relatively the same for each state.²⁷⁵ Both states rank in the top 50th percentile of states by Gross Domestic Product drawn from the World Bank national accounts data and OECD national accounts data files.²⁷⁶ Additionally, the annual military spending

²⁷⁴ The cells containing years are coded by color to denote legal disputes. The cell receives a pink tinting if the United States has an active dispute over maritime claims. In the year when the coastal state issues new legal decree to updates or adds dispute provisions, the year tinting appears red. Two rows appear below to represent two categories of response from the United States: diplomatic protests and operational assertions. A blue tint is applied to the years in which the United States conducts one of these measures (no annotations for multiple protests or assertions in a given year).

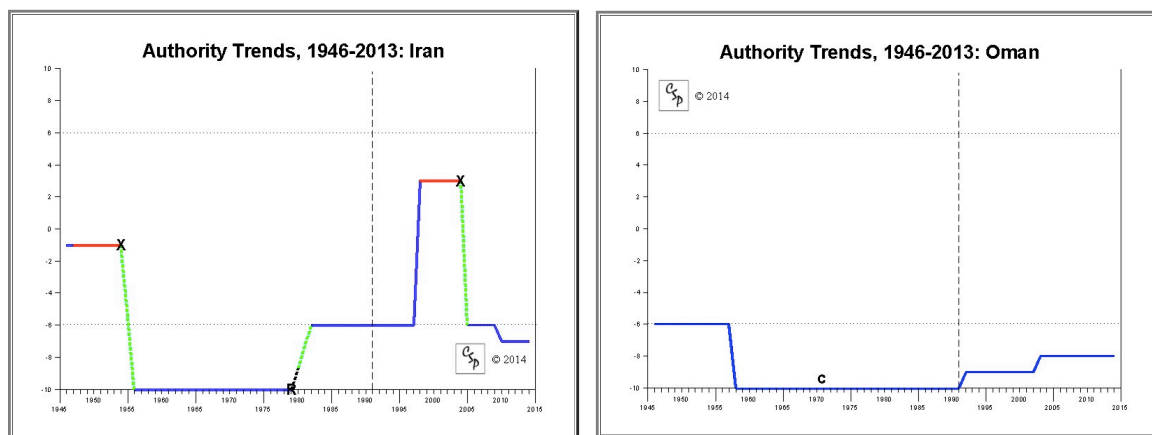
²⁷⁵ Although Iran and Oman fall within the top 50th percentile for military spending, Iran’s development of an asymmetric naval ability to threaten to deny access to its coastal sea has been cause for much American concern. Relatively low-cost weapons such as naval mines and anti-ship cruise missiles, and fast attack craft have provided Iran’s naval forces a formidable capability that present a greater threat than Oman.

²⁷⁶ Iran’s GDP lists in the top 25th percentile worldwide and outpaces the Omani GDP over the entire time period by an average of \$8-10 billion annually (in 2011 constant currency).

(expenditure in total dollars) of Iran and Oman ranks in the top 50th percentile of all states.²⁷⁷

Second, the quantitative analysis shows that an institutionalized democratic form of government tends to decrease the likelihood of an operational assertion, but both Iran and Oman are autocratic governments. Iran does experience a brief period of relative liberalization of its autocratic government between 1997 and 2005, but this does not forestall the operational assertions by the United States in Iranian Waters (Figure 5). In terms of the caveats of NSDD-72 and subsequent policy documents—PSD-32 was in force during the brief periods of political liberalization—there were no “transient political events” that were considered so sensitive by State or the National Security Advisor so as to preclude the conduct of freedom of navigation assertions.

FIGURE 6-5

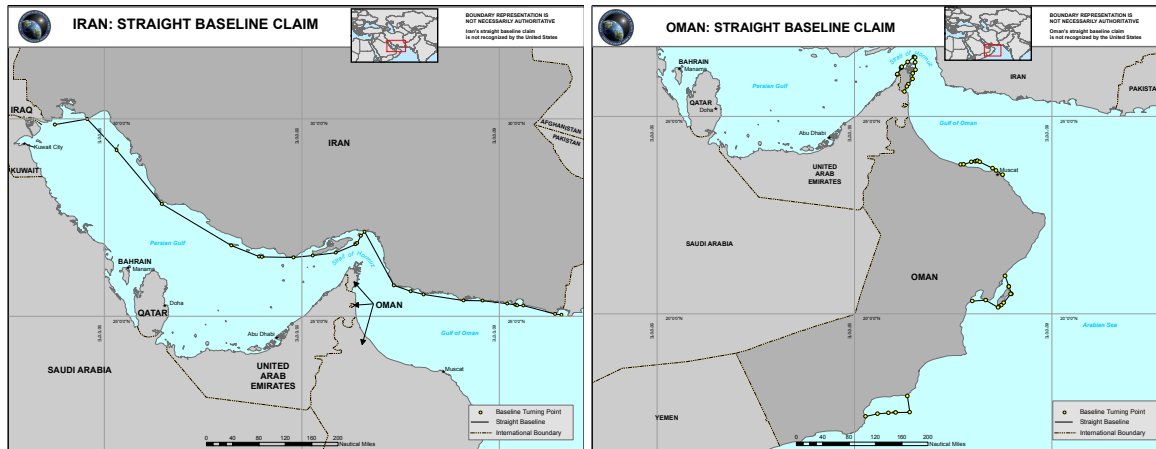


In terms of other variables within the Liberalism Model, both Iran and Oman make nearly identical types of maritime claims. The claims of both Iran and Oman seek to limit passage through the Strait of Hormuz to the regime of innocent passage, rather than transit passage. Also, each state makes straight baseline claims that the United States disputes (depicted below in

²⁷⁷ Iran’s military spending outpaces Oman’s spending by \$2-10 billion annually over the course of the study. However, Oman’s military spending exceeded Iran’s in 2011 and 2012.

Figure 6).²⁷⁸ Oman draws four distinct areas with straight lines, and Iran traces straight lines along its entire coastline, both in the Persian Gulf, in the Strait of Hormuz, and out into the North Arabian Sea.

FIGURE 6-6



The maritime claims of Iran and Oman differ in one respect: Article 16 of Iran’s 1993 *Act of the Marine Areas of the Islamic Republic of Iran* prohibits “foreign military activities and practices in the EEZ.”²⁷⁹ This is a sweeping, restrictive claim; Oman makes no similar claim.

Furthermore, Iran submitted a declaration to the United Nations upon the event of its signature of the UN Convention on the Law of the Sea, stating that the privileges of the convention were of a *quid pro quo* – not of customary law – and shall be entitled to “only states parties to the Law of the Sea Convention.”²⁸⁰ Thus, in expectation, Iran’s EEZ claim appears more likely to prompt protests and assertions from the United States than do the maritime claims of Oman after 1982 and certainly after 1993 when its EEZ claim went into effect.. Nevertheless, this difference

²⁷⁸ “Maritime Claims Reference Manual.”

²⁷⁹ “Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea, 1993.”

²⁸⁰ “Islamic Republic of Iran: Interpretative Declaration on the Subject of Straits” (United Nations, December 10, 1982), http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Iran Upon signature.

cannot explain why the United States asserts freedom of navigation against Omani claims prior to 1989 but not Iranian claims.

Finally, within the Organization model, only one variable emerges from the quantitative analysis as having significance—existence of an operational fleet headquarters. Regardless of the number of warships available in the Navy, a fleet headquarters constitutes the institutional capacity for planning of operations and the communication and coordination with other entities, whether other joint forces, allied forces, or government agencies. Although diplomatic representation seems intuitively important in sensitive matters such as when diplomatic protests or driving warships are options, the existence of a diplomatic exchange does not have statistical significance nor does it appear to factor in this case either. Over the period from 1979-2013, the United States has maintained an uninterrupted, formal diplomatic relationship with Oman but not with Iran. The United States initiated formal diplomatic relations in April 1972 and established its embassy in Muscat in July 1972. The first resident Ambassador to Oman, William D. Wolle, presented his credentials to the Sultanate in July 1974 and an Ambassador (Envoy Extraordinary and Minister Plenipotentiary) has served in residence continuously since then.²⁸¹ By contrast the United States terminated its official diplomatic relationship with Iran on 7 April 1980 after the seizure of the American Embassy and hostages in Tehran in November 1979.²⁸² Since the formal severing of diplomatic communications, Switzerland has served as an interlocutor on behalf of the United States to Iran and the Embassy of Pakistan in Washington D.C. represents the

²⁸¹ “A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations, by Country Since 1776: Oman” (Office of the Historian, Department of State, n.d.), <http://history.state.gov/countries/oman>.

²⁸² “A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Iran” (Office of the Historian, Department of State, n.d.), <http://history.state.gov/countries/iran>.

interests of Iran.²⁸³ Given the consistency of American assertions since 1989, the variation in diplomatic status has no demonstrable effect on observed activity. But the absence of diplomatic relations with Iran during the period 1979-1989 may account partially for the lack of American activity against Iran during those years. This consideration receives more attention later in the chapter.

The existence of a naval headquarters appears to have significance, and in this case the command-and-control relationships bear mentioning because they are the organizations within which three important functions occur. First, the fleet headquarters is the primary location for horizontal coordination with other joint forces and vertical coordination with higher political and military agencies for sensitive operations. Second, the fleet headquarters generates, adapts, or approves of standard operating procedures for units operating in its area of responsibility. Third, the fleet headquarters is the primary location for the initial planning of Freedom of Navigation operations. This is where staff officers review the status of maritime claims by coastal states in their area of responsibility, consider the recent history of assertions against these disputants, and nominate countries for action in the subsequent year. These nominations receive at least two levels of scrutiny and coordination. First, the fleet commander must prioritize the many competing operational tasks and apportion limited resources to accomplish those missions of highest priority first. Second, the fleet commander must submit for review by the State Department any nominations designated politically sensitive areas. The binary coding for the existence of a fleet headquarters in the dataset, however, fails to capture this level of detail, and so the qualitative analysis permits a closer examination of the significance of this variable.

So why do the operational assertions begin in 1983 for Oman, but not for Iran? The

²⁸³ Bureau of Near Eastern Affairs, Department Of State, "U.S. Relations With Iran," Press Release|Fact Sheet, *US Bilateral Relations Fact Sheets*, (March 10, 2015), <http://www.state.gov/r/pa/ei/bgn/5314.htm>.

United States Central Command (CENTCOM) was established on January 1, 1983, and since then Oman and Iran have been located within the boundaries of the area of responsibility (AOR) assigned to CENTCOM.²⁸⁴ Thus, it is not surprising that operational assertions against Oman begin in 1983.²⁸⁵ Secondly, NSDD-72, which provided the necessary detailed guidance to implement the Freedom of Navigation program, was signed in December 1983. Third, both states signed the U.N. Convention on the Law of the Sea by 1983—each maintaining unlawful claims that conflicted with the treaty. Iran immediately signed the treaty in December 1982 with a declaration that “only parties to the Convention shall be entitled to benefit from the contractual rights created therein,” and Iran claimed to limit transit passage right in Strait of Hormuz to signatories of 1982 Convention. Oman signed the treaty in July 1983, but maintained Omani Royal Decree No. 15/81, restricting ships to innocent passage, rather than transit passage through the international strait.²⁸⁶ All else equal, one would expect assertions to begin in 1983 for both Iran and Oman (if not sooner for Oman). The reason for the variation lies in the politics within and between the organizations tasked with executing the Freedom of Navigation program

One factor related to the command-and-control of naval assets. During the period in question, the fleet commander supporting the CENTCOM commander has changed, and until 1989 the organizational lines for commanding naval forces were messy. The U.S. Navy’s headquarters in Bahrain has directed operations in the Persian Gulf since the early 1971, when

²⁸⁴ This change was the sixth revision to the 1975 Unified Command Plan, for more detail see Drea et al., *The History of the Unified Command Plan, 1946-2012*, 39–42, 44–47.

²⁸⁵ Prior to the formal establishment of CENTCOM in 1983, Iran and Oman fell under the purview of Commander, Rapid Deployment Joint Task Force (RDJTF), which held responsibility for planning and operations in the Middle East and Africa as a subordinate element of United States Readiness Command (USREDCOM). However RDJTF did not have Combatant Command of forces.

²⁸⁶ “Royal Decree Concerning the Territorial Sea, Continental Shelf and Exclusive Economic Zone” (United Nations (DOALOS/OLA), February 1981), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/OMN_1981_Decree.pdf.

the Royal Navy ended its defense commitments “east of Suez” and withdrew its forces from the Persian Gulf.²⁸⁷ But even as the U.S. Navy matured its organizational capacity for action over the next decade, it experienced tension with other commands in charge of adjacent locations. In 1983, concurrent with the establishment of CENTCOM, the maritime component commander for CENTCOM, known as NAVCENT assumed the operational responsibilities for the Fifth Fleet area of operations in the Persian Gulf and the Red Sea. But the southerly waters of the Gulf of Oman, Gulf of Aden, and North Arabian Sea remained assigned to United States Pacific Command (PACOM) along with the remainder of the Indian Ocean, which had been assigned to PACOM on 1 May 1976.²⁸⁸ According to the history of Fifth Fleet, “On 30 December 1983, the Joint Chiefs of Staff (JCS) directed CINCCENT to coordinate with Commander in Chief, Pacific Command (CINCPAC) for contingency plans to integrate the Middle East Force into Pacific Command’s Indian Ocean battle force, Task Force 70, during certain crises. To make matters even more confusing, for the rest of the 1980s, the Middle East Force flagship remained homeported in Bahrain, while COMUSNAVCENT headquarters stood in Pearl Harbor, Hawaii.”²⁸⁹

This organizational tension reflected a service-level competition between the U.S. Army and Navy over which of the two services would command naval forces at sea or control forces in the vast Indian Ocean region.²⁹⁰ The establishment of CENTCOM, a predominantly land-centric theater, led to concerns by naval leaders in PACOM, a predominantly maritime theater, about whether anyone but a naval officer possessed the technical knowledge or experience to command

²⁸⁷ Robert J Schneller, Jr, *Anchor of Resolve: A History of U.S. Naval Forces Central Command/Fifth Fleet* (Washington: Naval Historical Center, 2007), 7–9, <http://www.history.navy.mil/content/dam/nhhc/browse-by-topic/War%20and%20Conflict/operation-praying-mantis/AnchorOfResolve.pdf>.

²⁸⁸ Drea et al., *The History of the Unified Command Plan, 1946-2012*, 33–34.

²⁸⁹ Schneller, Jr, *Anchor of Resolve: A History of U.S. Naval Forces Central Command/Fifth Fleet*, 11.

²⁹⁰ Drea et al., *The History of the Unified Command Plan, 1946-2012*, 63.

naval vessels.

The Goldwater-Nichols Act of 1986 responded to this growing tension focused on ships operating in the Western Indian Ocean areas. Goldwater-Nichols called attention to the geographic boundaries of the combatant commanders and directed a “revision of geographic area[s] for which the United States Central Command has responsibility so as to include the ocean areas adjacent to Southwest Asia.”²⁹¹ Until 1989, two different organizations of the United States military divided the responsibilities for operational forces in this region. With the creation of Central Command (CENTCOM) in 1983, most of the area of responsibility was consolidated, and both Oman and Iran were included in the new organization. But the land and the water remained divided. The waters of the Persian Gulf belonged to CENTCOM and everything outside the Persian Gulf (including the Gulf of Oman, North Arabian Sea, etc.) was assigned to Pacific Command. This organizational division reflected a service-level tension between the Army and the Navy. CENTCOM, a land-oriented theater, had been commanded by an Army officer, while PACOM, comprised of a maritime-centric area of responsibility spanning 51% of the globe, had traditionally been led by a naval officer. Admirals in Hawai’i were loath to let Generals command-and-control warships in the Gulf of Oman. This battle between the Army and the Navy – or CENTCOM and PACOM was not resolved until 1989.

²⁹¹ 99th Congress, *Goldwater-Nichols Defense Reorganization Act of 1986*, 10, vol. 111, 1986.



FIGURE 6-7

In 1989, CENTCOM gained responsibility for the waters north of 5 deg N latitude and west of 068 deg E, while PACOM retained authority over U.S. forces operating in the remainder of the Indian Ocean region. This division has persisted until today and is represented in Figure 7 (above).

This organizational tension offers the clearest and most parsimonious explanation for this puzzling variation between Iranian and Omani assertions during the 1979-2013. But naval officers with experience transiting the Strait of Hormuz know the traffic separation scheme is the same for all large surface vessels to enter and exit the Persian Gulf. All ships have been required to traverse the published traffic separation scheme as part of the COLREGS updated in 1979.²⁹² This traffic separation scheme has two parts: ships transiting inbound to the Gulf will pass first

²⁹² “Traffic Separation Schemes” (Inter-Governmental Maritime Consultative Organization, February 2, 1978), COLREG.2/Circ.1, <http://www.navcen.uscg.gov/pdf/imo/COLREGSCirculars/COLREG2-Circ1.pdf>; “Amended Traffic Separation Scheme in the Strait of Hormuz” (Inter-Governmental Maritime Consultative Organization, June 7, 1979), COLREG.2/Circ.11, <http://www.navcen.uscg.gov/pdf/imo/COLREGSCirculars/COLREG2-Circ11.pdf>; “New and Amended Traffic Separation Schemes” (Inter-Governmental Maritime Consultative Organization, June 9, 1994), COLREG.2/Circ.40, <http://www.navcen.uscg.gov/pdf/imo/colregscirculars/colreg2-circ40.pdf>.

through the portion of the international strait in Omani waters, then through the portion of the international strait in Iranian waters. Thus, a ship transiting the Strait of Hormuz is going to enter both segments of the traffic separation scheme (depicted in Figure 8).

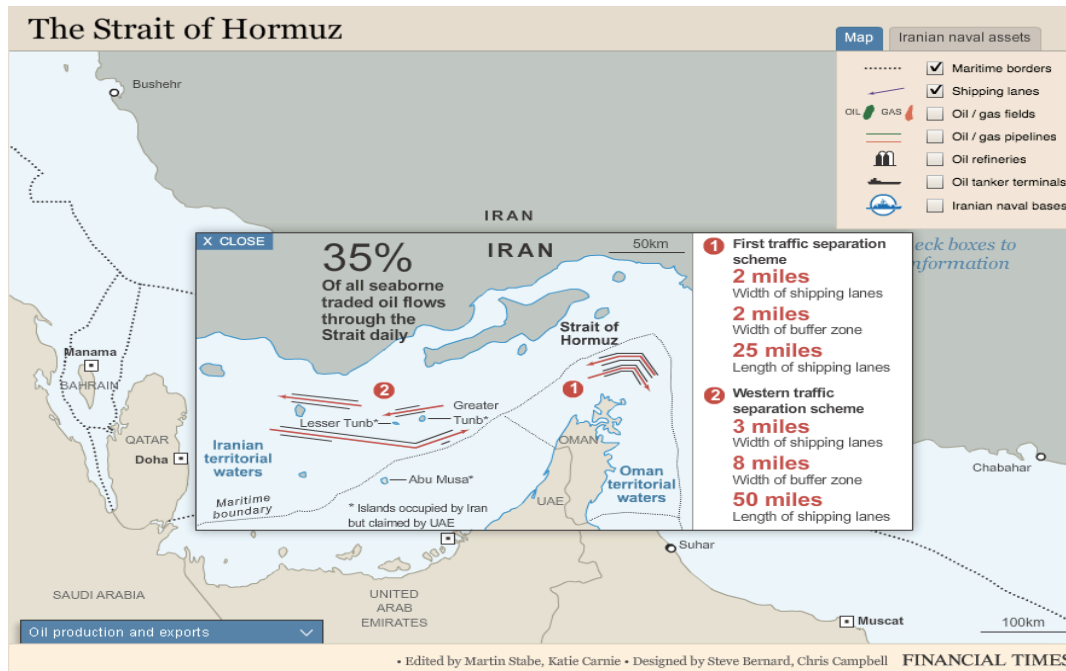


FIGURE 6-8

Thus, it remains a puzzle why the United States asserts against Oman and not Iran—especially given the proverbial *carte blanche* by NSDD-72 in 1983 as discussed earlier. Moreover, the Reagan administration reiterated this guidance in 1987 with NSDD-265 (16 Mar 1987), which offered program guidance to the Department of Defense stating, “International straits and archipelagic sea lanes will be used by both military ships and aircraft freely and frequently as directed by the Department of Defense.”

Solving this puzzle demands consideration of the United States’ sensitivity to the ongoing conflict between Iran and Iraq. Having begun in 1980, the Iran-Iraq War reached a level of international concern such that it prompted the United Nations Security Council Resolution 540 (1983). This resolution, adopted by a vote of 12 votes to none, provided the context for an

explanation of American restraint from conducting assertions against Iran in the years 1983-1988.

UNSCR 540 Article 3 “affirms the right of free navigation and commerce in international waters,” and calls attention to “sea-lanes and navigable waterways.” However, Article 6 calls on “all other states to exercise the utmost restraint and to refrain from any act which may lead to a further escalation and widening of the conflict.” This call for restraint explains why the United States may have refrained from Freedom of Navigation Operations. The UN called further international attention to the importance of freedom of navigation less than next year later with UNSCR 552 (1984). In the immediate aftermath of Iranian attacks on Iraqi tankers, the United Nations Security Council issued another resolution calling upon all states “to respect in accordance with international law the right of free navigation and which reaffirmed the right of free navigation in international waters and sea lanes for shipping en route to and from all ports and installations” (UNSCR 552, 1 Jun 1984).

This context raises questions about why the United States may have abstained from conducting operational assertions to contest legal claims, but instead took the more involved and escalated measure of reflagging 11 Kuwaiti tankers and escorting them through the Strait of Hormuz during Operation Earnest Will in 1987. The reflagging and escort missions were seen widely as a break with neutrality and an unpersuasive use of “freedom of navigation” as an excuse to intervene in the conflict under a false pretense.²⁹³ Indeed, as early as 1981, Iraq had begun attacking Iranian commercial ships, and yet the UN Security Council did not address these attacks. Iran’s first attacks on shipping occurred in 1984 when it attacked 18 ships, but by that

²⁹³ “Reflections on Reflagging,” *The New York Times*, June 21, 1987, sec. Opinion, <http://www.nytimes.com/1987/06/21/opinion/reflections-on-reflagging.html>.

time, Iraq had already attacked 43 ships.²⁹⁴ In 1982, two resolutions, UNSCR 514 and 522, were silent on issues such as maritime attacks or freedom of navigation as was the 1980 resolution on the Iran-Iraq War. The number of attacks in shipping in 1986 (111) more than doubled the 1985 totals (47) and they increased again in 1987 to 179.²⁹⁵ Moreover, the threat to U.S. warships increased with the 1986 shipment of Chinese Silkworm anti-ship missiles to Iran and the May 1987 attack on *USS Stark* by an Iraqi F-1 with a French Exocet missile.²⁹⁶

By 1987, President Reagan refreshed his guidance on Freedom of Navigation, issuing National Security Decision Directive 265 (NSDD 265), which amplified the existing policy. It would be implemented for the first time against Iran in 1989, but not until the Iran-Iraq War had concluded. In the meantime, aggressive naval support was provided to ensure safe transit of oil tankers and to provide certainty in the energy markets and insurance rates at Lloyds of London. Thus, the use of the Freedom of Navigation program after the war appears to be about maintaining American naval presence under the justification of international law for the purposes of deterring aggression and assuring allies and regional partners. This justification reflects the U.S. Navy's earlier operations including the first time it sailed an aircraft carrier into the Persian Gulf.

6.4.3 Past as Prologue: Balance of Power or Organization?

According to Jack Anderson in the New York Times, Kissinger had visited Tehran “prepared to treat the Shah as a military ally and protector of U.S. interests in the Gulf. Kissinger [was] counting heavily upon the Shah’s goodwill to lower oil prices.” Since October

²⁹⁴ O’Rourke, “The Tanker War.”

²⁹⁵ Ibid.

²⁹⁶ Michael H. Armacost, “U.S. Policy in the Persian Gulf and Kuwaiti Reflagging (Testimony Before the Senate Foreign Relations Committee, Current Policy No. 978)” (U.S. Department of State, June 16, 1987), <http://www.disam.dsca.mil/pubs/Vol%2010-1/Armacost.pdf>.

1973, the price of oil had quadrupled. Henry Kissinger concluded talks with the Shah of Iran on 1 November 1974, securing an agreement to lower oil prices by 20 to 25%.²⁹⁷ The U.S. Navy's MIDLINK 74 operations were likely offered as a security concession in exchange for lower oil prices.

In the case of 1974, the transit of an aircraft carrier into the Persian Gulf at the Strait of Hormuz appears to be less about the legal assertion of freedom of navigation. There is no indication that the transit of a naval vessel constituted an ostensible refusal to acquiesce to Iranian maritime claims. Rather, *USS Constellation* performed a show of naval presence as an outward sign of American military commitment to Iran, an ally who assessed the Soviet Navy to be the major threat to the Persian Gulf.²⁹⁸ The presence of the United States Navy was intended as a signal of credible strength to the Soviet Union on its southern flank. Moreover, this kind of periodic presence represented a necessary supplement to bolster the otherwise symbolic force stationed at MIDEASTFOR headquarters in Bahrain, consisting of “a converted seaplane tender flagship and two destroyer-type vessels.”²⁹⁹

According to a Memorandum from Secretary of State Kissinger to President Nixon that conveyed the perspectives of Ambassador Helms, “The Shah secretly urged the sheikh of Bahrain to permit the U.S. to continue our naval presence (MIDEASTFOR) at Bahrain, as a

²⁹⁷ Henry Kissinger, “Backchannel Message From Secretary of State Kissinger to the President’s Deputy Assistant for National Security Affairs (Scowcroft)” (FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976 VOLUME XXVII, IRAN; IRAQ, 1973-1976, DOCUMENT 87, November 1, 1974), Box CL-153, Iran Trips, 1-3 November 1974. Secret; Sensitive; Immediate; Exclusively Eyes Only, Library of Congress, Manuscript Division, Kissinger Papers, <https://history.state.gov/historicaldocuments/frus1969-76v27/d87#fn1>.

²⁹⁸ B.E. Spivy, “Memorandum From the Joint Chiefs of Staff to the Assistant Secretary of Defense for International Security Affairs (Warnke)” (Foreign Relations of the United States, 1964-1968 Volume XXII, Iran, Document 300, June 25, 1968), RG 330, OSD Files: FRC 73 A 1250, Iran 400, 25 June 68. Secret., Washington National Records Center, <https://history.state.gov/historicaldocuments/frus1964-68v22/d300>.

²⁹⁹ “National Intelligence Estimate (NIE 30-1-71)” (Foreign Relations of the United States, 1969-1976 Volume XXIV, Middle East Region and Arabian Peninsula, 1969-1972; Jordan, September 1970, Document 96, April 1, 1971), NSC Files, Box 1276, Saunders Files, Persian Gulf. Secret., National Archives, Nixon Presidential Materials, <https://history.state.gov/historicaldocuments/frus1969-76v24/d96>.

counter to increasing Soviet naval activity. [...] The Soviet Union has increased its naval activity in the Indian Ocean. The Soviets signed a Treaty of Friendship with Somalia, providing Somalia with tanks and MiG-21 aircraft in exchange for a 10,000-foot airstrip which can be used by Soviet aircraft for reconnaissance over the Indian Ocean.”³⁰⁰ Earlier in the summer of (July) 1974, the U.S. Ambassador discussed the future of United States military presence in the Persian Gulf, specifically with regard to the MIDEASTFOR establishment in Bahrain. During those talks, Bahraini Court Minister Alam asserted “it would be ‘terrible’ for United States Navy to leave Persian Gulf at time when Soviets were augmenting their presence and activities.”³⁰¹ However, despite these security concerns, a 1971 National Intelligence Estimate on the Persian Gulf after the British departure assessed that the “main United States interest in the Gulf resides in assuring the unimpeded flow of oil from the region to consuming countries.”³⁰² Interdiction of the Strait of Hormuz with the intent to prevent passage was less a concern to the United States Navy. This natural chokepoint was sufficiently wide and deep that even the deliberate sinking multiple tankers would not inexorably impede the flow of commercial oil tanker traffic in and out of the Persian Gulf. The more concerning vulnerability raised by the study was the overall

³⁰⁰ Henry Kissinger, “Memorandum from Secretary of State Kissinger to President Ford” (FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976 VOLUME XXVII, IRAN; IRAQ, 1973-1976, DOCUMENT 77, September 6, 1974), Ford Library, National Security Adviser, Presidential Country Files for Middle East and South Asia, Box 12, Iran (1). Secret; Sensitive., <https://history.state.gov/historicaldocuments/frus1969-76v27/d77>.

³⁰¹ Jesse Helms, “Telegram From the Embassy in Iran to the Department of State and the Embassy in Bahrain” (Foreign Relations of the United States, 1969-1976 Volume XXVII, Iran; Iraq, 1973-1976, Document 64, July 11, 1974), NSC Files, Box 603, Country Files—Middle East, Iran, Vol. VI, January 1974-. Secret; Niact; Immediate; Exdis. Repeated to Cairo, Jidda, and Kuwait., National Archives, Nixon Presidential Materials., <https://history.state.gov/historicaldocuments/frus1969-76v27/d64>.

³⁰² “National Intelligence Estimate (NIE 30-1-71).”

political stability in the region, according to Navy studies from the period.³⁰³ These concerns about obstruction of the international strait persist for decades.³⁰⁴

Ultimately, international straits are the corridors of economic trade. The volume of commercial traffic flowing through international straits is massive. Additionally, international straits are the pathways for the projection of American power around the world. Through the straits transits American military power – not only conventional military forces, but also nuclear ballistic missile submarines which are the survivable leg of the nuclear triad. The United States motivation to maintain open international straits reflects an interest in providing a global public good—underwriting a global system of trade that benefits all participants. This is a liberally motivated interest in maintaining the economic order of the world. However, American motivations are not altruistic. Of course, the United States derives great private benefit from this order due to its large participation but other states do as well.

After the 1973 oil crisis, the United States updated its assessment of the political and military situations in the Indian Ocean region. National Security Memorandum (NSSM) 199 and subsequent reports found that American interests in the region were “not vital or extensive”-- save for the American “dependence on Middle East oil.” However, the operational implications assessment led to interagency tensions that persist today. These tensions stemmed from two conditions.

On one hand, economic and political threats dominated the attention of the analysts who saw energy prices and threat of embargo as the most acute challenges to national security.

³⁰³ “Vulnerability of Oil Facilities -- Impact on Contingency Planning” (Department of the Navy, August 1975), OSD Files: FRC 330–79–0049, Box 82, Saudi Arabia. Unclassified, Washington National Records Center, <https://history.state.gov/historicaldocuments/frus1969-76v37/d57>.

³⁰⁴ Caitlin Talmadge, “Closing Time: Assessing the Iranian Threat to the Strait of Hormuz,” *International Security* 33, no. 1 (2008): 82–117.

Malign Soviet military intentions paled before this overarching concern. Moreover, analysts believed the naval force posture in the Indian Ocean could do little to influence access to petroleum.

On the other hand, two military conditions warranted some measure of caution. First, if the Soviets were to achieve a predominant position in the Indian Ocean region, then energy security may be threatened, but such a situation was viewed as unlikely. Second, the Soviets could seize upon the “indisputably vulnerable” tanker routes from the Persian Gulf or sea lines of communication through the Indian Ocean, but these possibilities were also deemed “highly unlikely” – as the Soviet Union would have to accept a high risk of escalation locally and more broadly.³⁰⁵ The crux of the dispute was whether a regional military presence was *necessary* to deter these Soviet threats.

Soviet Navy Commander Admiral Sergei Gorshkov’s writings had articulated “a new, activist naval policy in pursuit of global interests.”³⁰⁶ If left unchallenged, Soviet hegemony over the entire region seemed certain. Thus, an increased conventional naval presence was seen as necessary because the existing nuclear deterrent was less than credible for these concerns that fell far below the top priority of national survival. Thus, the United States sustained a naval posture in the Indian Ocean region to preserve access to the littorals and to ensure stability for commerce. At first glance, this naval presence represented one line of effort in maintaining our visibility in the Arabian Sea area, while “also help[ing to] deter lesser threats to the sea routes,

³⁰⁵ “Study Prepared in Response to National Security Study Memorandum 199, ‘Indian Ocean Strategy’” (Foreign Relations of the United States, 1969–1976 Volume E–8, Documents on South Asia, 1973–1976, Document 77, undated), Box H-090, Senior Review Group Meetings, August 15, 1974–February 12, 1976. Secret; NOFORN., Ford Library, NSC Institutional Files (H-Files), <https://history.state.gov/historicaldocuments/frus1969-76ve08/d77>.

³⁰⁶ Ibid.

e.g., from a small state or radical faction bent on exploiting the vulnerability of the tankers.” But this naval presence addressed the more immediate “challenges by the littorals.”³⁰⁷

By the mid-1970s, the United States increasingly viewed its imperative in the Indian Ocean region to ensure access. Primary challenges to its “right to navigate the Ocean” necessitated that the United States “maintain some force level to preserve our contingency access.” The introduction of *USS Constellation* to the Persian Gulf in 1974 and the commitment to continued naval presence in the Indian Ocean region generally, and at Bahrain more specifically, performed double (or triple) duty. Not only did this presence provide assurances to partners like the Shah, but also this force posture signaled American commitment to the Soviets while pursuing a lesser-included requirement of ensuring freedom of navigation in the region.³⁰⁸ Multilateral exercises such as MIDLINK 74 accomplished this task in November of 1974 with the aircraft carrier, *USS Constellation* leading an eight-ship force from the United States participating in the Central Treaty Organization Exercise. This exercise marked the largest naval exercise ever held in the Arabian Sea. Participating were forces from the United States, United Kingdom, Iran, Pakistan, and Turkey.³⁰⁹

6.5 Conclusion

A decade that had begun with a 1971 United Resolution to establish the “Indian Ocean as a Zone of Peace” and which called on great powers to halt expansion in and eliminate bases from the Indian Ocean region, had resulted in the opposite. By the end of the decade, the strategic situation in the Indian Ocean region had shifted and the United States saw a need for a sustained

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Ship History: USS CONSTELLATION (CV 64), Navy History and Heritage Command, <http://www.navy.mil/navydata/ships/carriers/histories/cv64-constellation/cv64-constellation.html>

military presence. The Soviets had sponsored Cuban proxies in Ethiopia, engineered a coup in Afghanistan, and had increased their influence in South Yemen (Aden). By the time of the overthrow of the Shah, the United States would not have a regional proxy to serve as a regional policeman to safeguard its interests. The Iran-Iraq War in the 1980s only exacerbated this concern. Moreover, the moderate Persian Gulf states criticized the United States for failing to take action to support the Shah and expressed their concern that the United States lacks the commitment and resolve to oppose Soviet inroads in the region.

Thus, the Posen argument that balance of power politics may trump organizational politics seems to apply here. The Security Model did not appear to offer much by way of explanation because it focused on Iran, but as the aperture opened to include the entire southern flank of the Soviet Union in the Persian Gulf region, the petty organizational politics shrank in comparison to the primary security concern of the United States. This concern with balancing the Soviets also overshadows the importance of international trade flowing through the Strait of Hormuz. In the following excerpt taken from President Reagan's speech at the memorial service for the fallen crew of *USS Stark*, that strategic chokepoint through which the greatest volume of energy flows, became something more—it had become a chokepoint for freedom:

Peace is at stake here, and so too is our own nation's security and our freedom. Were a hostile power ever to dominate this strategic region and its resources, it would become a chokepoint for freedom -- that of our allies and our own. And that's why we maintain a naval presence there. Our aim is to prevent, not to provoke, wider conflict, to save the many lives that further conflict would cost us.³¹⁰

³¹⁰ Ronald Reagan, "Remarks at a Memorial Service for Crewmembers of the U.S.S. Stark in Jacksonville, Florida," May 22, 1987, <http://www.reaganlibrary.gov/major-speeches-index/35-archives/speeches/1987/6861-052287a>.

CHAPTER 7. WHITHER FREEDOM OF NAVIGATION? DEFENDING LAW OR SIGNALING POWER

“The defence of the *status quo* is not a policy which can be lastingly successful. It will end in war as surely as rigid conservatism will end in revolution. ‘Resistance to aggression,’ however necessary as a momentary device of national policy, is no solution; for readiness to fight to prevent change is just as unmoral as readiness to fight to enforce it. To establish methods of peaceful change is therefore the fundamental problem of international morality and of international politics [...] Since the party which is able to bring most power to bear normally emerges successful from operations of peaceful change, we shall do our best to make ourselves as powerful as we can.”³¹¹ - E.H. Carr

“We cannot tolerate a situation where other nations and groups of nations establish conflicting claims that can only be settled by force [...] We will have in 15 years a struggle like the competition for territory during the colonial period.”³¹² - Henry Kissinger

7.1 Introduction

The preceding case of Iran and Oman demonstrates the effect of organizational politics and their routine operations and standard operating procedures. The consistency of operational assertions conducted by the United States against Oman during its routine transits of the Strait of Hormuz from 1983 to 2013 is perhaps the clearest example in the Freedom of Navigation program of organizational politics effecting outcomes. With available forces and an operational headquarters to direct and coordinate activities, the U.S. Navy employed its expertise in accordance with policies and doctrine. Similarly, the consistency of operations against the claims of Iran during the period from 1989 to 2013 conforms to the same explanation. However the period from 1983 to 1988 in Iran highlights the importance of security concerns and balance of power politics affecting the decisions to use the navy. During that five-year period, the

³¹¹ Carr, *The Twenty Years' Crisis*, 191–202.

³¹² Ford, Kissinger, Scowcroft, Memorandum of Conversation, Washington, October 7, 1975, 9:40–10:18 a.m., <https://history.state.gov/historicaldocuments/frus1969-76ve03/d21>

routine military operations delegated to the U.S. Navy and Department of Defense took a backseat to high politics during the Iran-Iraq war. The example of Iran and Oman suggests conditions under which routine military operations may be restrained by higher political concerns.

In this chapter, balance of power features prominently as a force that *prompts* rather than restrains freedom of navigation operations. I argue that such instances of the Freedom of Navigation program, when routine military operations may seem to be less likely due to political sensitivities or transient political events, leaders may use operational assertions as a legal pretext for signaling American power. One example of such signaling exists in the South China Sea where the United States in late 2015 conducted multiple assertions of its navigational freedom. These assertions ostensibly demonstrated the right to operate freely in the waters around Subi Reef, where China had created an artificial island atop a mostly submerged land formation. This “low-tide elevation” is not entitled to a territorial sea, according to Article 60 of the United Nations Convention on the Law of the Sea. As an artificial island, the land formation receives only a 500m security perimeter. The purpose of the transit was to demonstrate freedom of navigation.

In October 2015, *USS Lassen*, an Arleigh Burke-class guided-missile destroyer, transited within 12 nautical miles of the artificial island in a freedom of navigation assertion that received a great amount of attention from the press. This operation was notable for the following reasons. First, *USS Lassen's* transit was not routine. It had been nearly two years since the U.S. Navy had conducted previous operational assertions against China, and never before had the United States sailed so close to this particular land formation. Second, unlike the majority of other routine navigational assertions, this transit was forewarned by nearly two weeks. The effect of such an

announcement was to put China on alert and to attract the attention of regional partners and allies, most of whom commented in the press about freedom of navigation. Third, the United States does not provide prior notification for routine operational assertions. The goal of assertions is to act deliberately non-confrontational. More often than not, the coastal state is never aware that the U.S. Navy was there. Perhaps in this case, the United States anticipated a Chinese response and sought to prevent misperception and miscalculation by the Chinese. Finally, this event was coordinated at the highest levels of government and received presidential authorization and public commentary. In a strained public effort to appear routine, the freedom of navigation transit of the *USS Lassen* was perceived by many as a conspicuous attempt to respond to growing concerns about China's territorialization of the South China Sea and its capability to deny the entire area to outsiders. The concern looming was whether this dispute with a nuclear power over a matter of international would escalate into a larger crisis.

US Navy's show of force

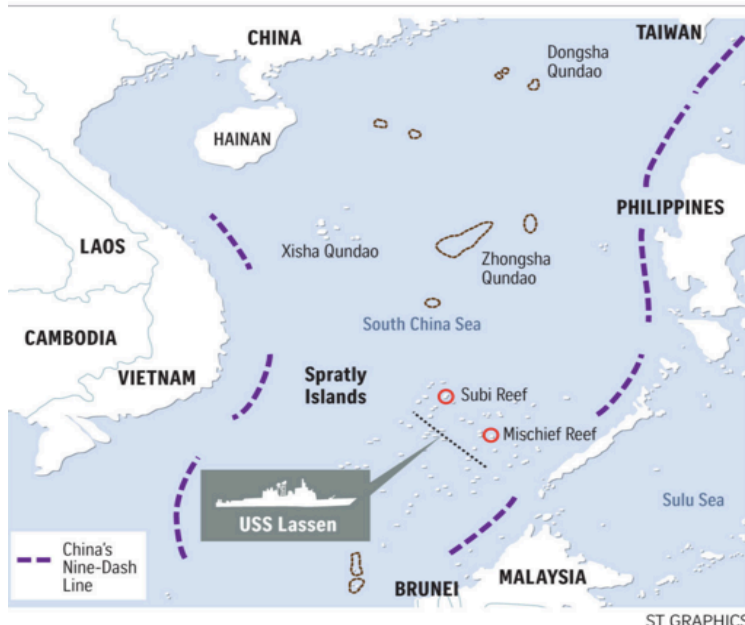


FIGURE 7-1³¹³

³¹³ Figure 1 Source: Cheng Wee, Teo, "Beijing's Restrained Response Won't Make a Difference, Straits Times, October 28th, 2015, <http://www.straitstimes.com/asia/beijings-restrained-response-wont-make-a-difference>

In many ways, the non-routine, high-profile transit in near Chinese land formations in the South China Sea resembles transits against Soviet claims decades earlier. On 12 February 1988, two warships of the United States Navy entered Soviet territorial waters southwest of the Crimean Peninsula in the Black Sea. They were conducting Freedom of Navigation operations. The Soviet Union had established a claim to these territorial seas according to new provisions in the UN Convention on the Law of the Sea of 1982. However, the United States did not dispute this claim to sovereignty. Rather, the United States contested the Soviet Union's limitation of navigation on foreign warships in Soviet territorial seas.³¹⁴ The *USS Caron* and *USS Yorktown*, a Spruance-class destroyer and a Ticonderoga-class guided-missile cruiser, proceeded from international waters into Soviet territorial seas, then exited again. *Caron* and *Yorktown* asserted their right to conduct *innocent passage* within 12 nautical miles of the Crimean coast.³¹⁵ Soviets argued that the passage of the United States warships was not "innocent" because it was gratuitous; *Caron* and *Yorktown* could have proceeded through international waters; their passage was not necessary. The United States conceded that the passage of *Caron* and *Yorktown* through Soviet territorial seas was not *necessary*, but it was *legal*. In 1988 as today, the threat of escalation over matters of international law looms in the background. At that point in the Cold

³¹⁴ John W. Rolph, "Freedom of Navigation and the Black Sea Bumping Incident: How Innocent Must Innocent Passage Be," *Military Law Review* 135 (1992): 139. Rolph cites two Soviet domestic laws: the *1982 Law on the State Border* and the *1983 Soviet Navigation Rules*, which limited innocent passage of foreign warships to predetermined locations in the Baltic Sea, Sea of Japan, and the Sea of Okhotsk only. The omission of the Black Sea implied a restriction on navigation against which the United States Navy conducted operational assertions.

³¹⁵ United Nations Convention on the Law of the Sea of 1982. Part II, Section 3, "Innocent Passage in the Territorial Sea." According to UNCLOS, "Ships of all States [...] enjoy the right of innocent passage through the territorial sea. Passage means navigation through the territorial sea for the purpose of traversing [...] or proceeding to or from internal waters. Passage shall be continuous and expeditious [...]. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coast State."

War, aggressive interactions at sea were nothing new. Chicken games between military forces on routine deployments were common.

Unlike, textbook chicken games in which collision is a dominated strategy for each player, the games in the Black Sea ended with in an infamous bumping (or shouldering) incident. When two Soviet ships intercepted *Caron* and *Yorktown* inside Soviet territorial waters, they escorted the transiting American warships and then accelerated deliberately into them causing a collision. In this case, the aggressive interactions did not spiral out of control. These actions represent a sort of coda to dangerous interactions between the forces of the Soviet Union and United States throughout the Cold War. In fact, this event led to a landmark, eight-point agreement signed at Jackson Hole, Wyoming by the United States and Soviet Union in September 1989. The two states harmonized their positions on innocent passage with the 1982 United Nations Convention on the Law of the Sea with their own “Uniform Interpretation of Rules of International Law Governing Innocent Passage” agreeing that warships enjoyed the right to traverse the territorial sea of another coastal state. In this case, the threat of escalation did not come to fruition.

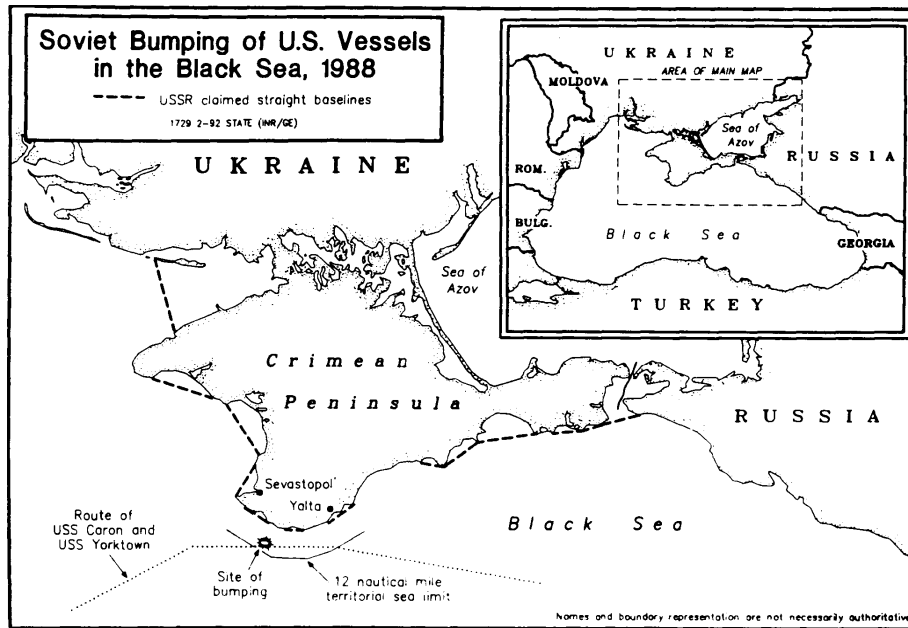


FIGURE 7-2³¹⁶

The threat of escalation concerns non-nuclear states as well, not just nuclear powers. As discussed in Chapter 5, Iran sits astride the world's most important strategic chokepoint for the flow of energy resources, and Iran has threatened to disrupt the traffic through the narrow corridor. Each day, 17 million barrels of oil (35% of seaborne traded oil) passes through the Strait of Hormuz on tanker ships.³¹⁷ For this reason, the fear of escalation is real. A dispute over maritime legal claims may not lead to war, but it may disrupt the flow of strategic resources. Iran's interpretative declaration on the subject of the strait, expressed upon signature of UNCLOS in 1982, claims the right to withhold passage through this international strait from any

³¹⁶ Figure 2 Source: U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Limits in the Seas: United States Responses to Excessive National Maritime Claims," No. 112, March 9 1992, <http://www.state.gov/documents/organization/58381.pdf>, p. 58.

³¹⁷ U.S. Energy Information Administration, "Strait of Hormuz is the Worlds Most Important Oil Transit Chokepoint," 4 January 2012, <http://www.eia.gov/todayinenergy/detail.cfm?id=4430>

state that has not signed the treaty.³¹⁸ The Tanker War of 1987-1988 indicates the seriousness of the Iranian threat and the possibility of escalation caused by a dispute over international law.

The threat of escalation is perhaps most acute in Southeast Asia where the People's Republic of China claims nearly all of the South China Sea and unlawfully restricts activities within it. Some compare the Chinese actions in the EEZ to the Soviet restrictions placed upon navigational activities in the Soviet territorial sea during the Cold War.³¹⁹ The so-called "nine-dashed" line represents an a Chinese claim to nearly the entire area of South China Sea, including the Pratas Islands, the Paracel Islands, the Macclesfield Bank, the James and Scarborough Shoals, and the Spratly Islands. Somewhat mysterious in origin and ambiguous in legal meaning, the line can be found on Chinese maps dating back to 1947.³²⁰ Regional neighbors (Brunei, Cambodia, Indonesia, Malaysia, Philippines, and Vietnam) challenge China's claim; in early 2013, Philippines filed suit with the International Court of Justice against Chinese claims to the Scarborough shoals.³²¹ This claim is a resource claim, but it has implications for navigation as well, and it underscores the current relevance of this research. In late 2012, the competition for resources in the South China Sea also renewed a concern about navigational rights, when China issued new passports depicting China and the entire South China Sea within the nine-dash line.³²² Subsequently, coastal Chinese provinces issued international warnings of

³¹⁸ United Nations Division for Ocean Affairs and Law of the Sea, "Declarations and Statements," 10 April 2013, http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Iran%20Upon%20signature

³¹⁹ Ronald Neubauer, "The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union," *Naval War College Review*, Spring, 1988, 56.

³²⁰ LI Jinming and LI Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note," *Ocean Development & International Law* 34, no. 3-4 (2003): 287.

³²¹ "Manila 'Taking Sea Row to Court,'" *BBC*, January 22, 2013, sec. Asia, <http://www.bbc.co.uk/news/world-asia-21137144>.

³²² Reuters, "The Philippines: China's Passport Map Sets Off Protest," *The New York Times*, November 23, 2012, sec. World / Asia Pacific.

their intent to stop and seize vessels “illegally entering” Chinese waters,³²³ which prompted India and Vietnam to announce patrols in these waters.³²⁴

7.2 Commitment, Images, and Costs

As the United States seeks to maintain navigational freedoms in the global commons, it must contend with the basic question about China’s intentions regarding the South China Sea: whether China’s designs for the maritime region are peaceful and under what conditions disputed claims may lead to armed conflict. Two factors confound accurate inference of China’s intent in the South China Sea.

First, China’s rapid military modernization over the last decade has been significant. For over three decades, China has transformed all aspects of its military into a modern force, and Chinese military expenditures have increased annually at an average 11.8 percent since 2000.³²⁵ In naval terms, the Chinese navy has recapitalized its fleet – not only exceeding the total fleet size of any other Asian country, but also replacing antiquated ships with a modernized assortment of surface combatants (e.g. destroyers and frigates), submarines, and fast-attack craft (e.g. missile-armed patrol craft). According to the Office of Naval Intelligence, China initiated construction on over 60 naval ships in 2014 and again in 2015. Simultaneously, China has improved the sensor suites and weapons systems of these platforms with particularly robust anti-ship missile capabilities. For example the C802/YJ-83 family of anti-ship cruise missiles are

³²³ Matthew Bigg, “ASEAN Chief Voices Alarm at China Plan to Board Ships in Disputed Waters,” *Reuters*, November 30, 2012, <http://www.reuters.com/article/2012/11/30/us-china-seas-idUSBRE8AT01B20121130>.

³²⁴ “Vietnam to Send Out Sea Patrols,” *BBC*, December 4, 2012, sec. Asia, <http://www.bbc.co.uk/news/world-asia-20591084>.

³²⁵ Eric Heginbotham et al., “The U.S.-China Military Scorecard Forces, Geography, and the Evolving Balance of Power, 1996–2017” (RAND Corporation, 2015), http://www.rand.org/pubs/research_reports/RR392.html. China officially reports a 9.5% growth (adjusted for inflation) for the period 2005-2014 according to the 2015 U.S. Department of Defense *Annual Report to Congress: Military and Security Developments Involving the People’s Republic of China*, http://www.defense.gov/Portals/1/Documents/pubs/2015_China_Military_Power_Report.pdf

lethal to 65-100nm depending on variant. They are ubiquitous and frequently exported. The C602/YJ-62 family of missiles offer lethality at nearly double the range, 150 nm,) and air-defense systems (e.g. Luyang II/III destroyers have fielded phased-array radars and the formidable HHQ-9 surface-to-air missile system). The Chinese submarine force is composed of primarily diesel submarines optimized for SLOC defense. Nuclear submarines continue to expand in number.³²⁶

Second, the activity of China's naval and maritime law enforcement forces has grown more assertive. As mentioned, recent naval modernization has increased ability to deny access to China's "near seas." Moreover, the People's Liberation Army Navy (PLAN) possesses the capacity for sustained operations, not only in its near seas within the first island chain, but also the PLAN has increased its operations beyond its local waters (e.g. anti-piracy operations of the Naval Escort Task Forces in the Gulf of Aden off the Horn of Africa, evacuation of Chinese nationals in Libya and Yemen, and a 2013 goodwill deployment to the Mediterranean Sea, etc.).³²⁷ In each of these cases, Chinese naval deployments have served narrow national interests and have not contributed to the security interests of a broader community or coalition. To some observers, these Chinese naval operations have matched claims that China's national rejuvenation is a "peaceful rise." Yet, there is growing evidence of aggressive behavior that belies Beijing's rhetoric of harmony.³²⁸ The behavior China's regional neighbors experience offers a different view of Chinese maritime power. Operating in the South China Sea, the PLAN and Chinese maritime security forces frequently threaten the interests and sovereignty of

³²⁶ "The PLA Navy: New Capabilities and Missions for the 21st Century" (Office of Naval Intelligence, 2015), <http://www.oni.navy.mil/Intelligence-Community/China>.

³²⁷ Heginbotham et al., "The U.S.-China Military Scorecard Forces, Geography, and the Evolving Balance of Power, 1996-2017."

³²⁸ Thomas J. Christensen, "Posing Problems without Catching up: China's Rise and Challenges for U.S. Security Policy," *International Security* 25, no. 4 (April 1, 2001): 5-40.

neighboring states. These threats emanate from naval and non-naval forces. Maritime law enforcement patrols, the establishment of an Air Defense Identification Zone in the East China Sea, and unprecedented land reclamation projects with dual-use features in the South China Sea (including deployment of tactical fighter aircraft and HQ-9 surface-to-air missiles in February 2016) have prompted questions about China's benign intentions with respect to disputed maritime claims specifically and navigational rights within international law more broadly. China's verbal assurances about peaceful intentions do not appear to be consistent with China's actions in the South China Sea. After all, intentions can change, but capabilities remain.

The basic question about China's intentions regarding the South China Sea--whether China's designs for the maritime region are peaceful and under what conditions disputed claims may lead to armed conflict—may be posed in an alternative way: how *committed* is China to extending sovereignty over its claim of the nine-dashed line? (As a corollary, one might also ask how committed is the United States to maintaining open and free seas in Southeast Asia?) To understand the credibility of commitments, one must sort examine Chinese signals and indexes to distinguish cheap talk from more credible indices of Chinese maritime power.³²⁹ Specifically, this chapter recalls the work of Schelling and Fearon to examine the case of Chinese maritime disputes and consider the likelihood of conflict over disputes in the South China Sea.³³⁰

Schelling offers two types of commitment for consideration. First, to illustrate this point in contrast, Schelling presents West Berlin as an example of a commitment that was *inescapable* for the United States. The United States' commitment to the status quo in West Berlin was inescapable because it was well defined and a physically occupied commitment. The positioning

³²⁹ Jervis, *The Logic of Images in International Relations*, 28.

³³⁰ James D. Fearon, "Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs," *The Journal of Conflict Resolution* 41, no. 1 (February 1, 1997): 68–90.

of American forces in West Berlin sufficiently raised the political cost of backing down to the Soviets in the event of attack. To renege on defense promises was not politically feasible, as it figuratively lashed them like Odysseus to the mast of the German project. Schelling's second characteristic of commitment describes the type of action required of the agreement. The American commitment in Berlin was open-ended and one in which circumstances committed the actors to tit-for-tat exchanges anytime one provoked the other. American commitment demanded response to Soviet aggression; to fail to respond was to lose credibility – not only in the minds of the Soviets, but also in the minds of Germans and alliance members anticipating American protection. This kind of situation is “dynamic and uncertain.” Action and response, however, is certain. In situations of brinkmanship, provocation is likely to develop a momentum of its own and may quickly get out of hand. According to Schelling's analogy of two men rocking a canoe in which each risks tipping of the canoe and pushing each other to the brink, the threat is credible. In taking risks that leave something to chance, threats are credible when each occupant of the canoe risks getting himself wet, too.

Second, a state may choose an “ill defined and ambiguous” commitment. Such commitments may permit the state to make a graceful exit should it need to relieve itself of the burden. By contrast to the “inescapable” Berlin, the Chinese claim to the South China Sea is neither well defined nor able to be occupied observably. Whereas the borders of West Berlin were clearly defined by occupying forces in accordance with the Potsdam agreement, the borders of the South China Sea are less well understood. The maritime boundaries of the nine-dashed line are of questionable veracity, and the competing historical claims on various terrestrial features are considered dubious. Additionally, in size West Berlin is a mere fraction of the South China Sea. All of Berlin measures 10,000 square miles—far smaller than the South China Sea,

which comprises vast area of 1.35 million square miles. Additionally, an obvious but important point is that West Berlin was an inhabitable location; the South China Sea is not a finite objective to be held as such. The three to four battalions that comprised U.S. Army Berlin actually *held* the location they defended for years. Although this small fighting force represented more of a tripwire than a stopping force to halt the Soviet horde advancing through central Europe, this unit made a symbolic but sustained encampment on their objective. The nature of the sea is markedly different.

The primary obstacle or hindrance to “holding” the South China Sea is the “stopping power of water.”³³¹ Because land forces historically have been the primary force of conquest, and because water (in its various natural forms) presents a challenging obstacle to the mobility and efficacy of land combat forces, it is assumed to be generally true that water stops armies. Whereas one of the doctrinal purposes land combat forces is to seize and hold land objectives, maritime forces rarely enjoy command of the sea. Sea forces that do enjoy some command of the sea increase their risk as they move closer to shore and enter the weapons range of shore-based weapons. Moreover, sea control, as discussed by naval theorists such as Julian Corbett, is inherently ephemeral. Unlike Alfred Thayer Mahan whose theory focused on the concentration of naval forces for decisive naval battles and blockade in order to win command of the sea, Corbett argued that sea control is a temporary objective and naval forces should focus instead on protecting sea lines of communication and temporarily enabling operations on land.³³² Corbett argued that a country cannot conquer the sea as it can conquer an objective on land, because the sea is not susceptible to ownership.

³³¹ Mearsheimer, *The Tragedy of Great Power Politics*.

³³² Sir Julian Stafford Corbett, *Some Principles of Maritime Strategy*, Classics of Sea Power (Naval Institute Press, 1911), 16.

For Schelling, the question is which side takes the political-military initiative and places itself in a position from which escape graceful retreat would not be possible without duress.³³³ West Berlin clearly fulfilled these conditions. However, if China cannot leverage the South China Sea as a physical objective from which it cannot retreat, then China may be able to raise the political price of compromising.

By coupling its capabilities to the objective, China can incur a political obligation by committing its national honor and diplomatic reputation to the entire South China Sea. The creation of artificial islands in the South China Sea in 2015 raises the ante. The question however is whether this is an accurate and costly signal. In Schelling's example of Quemoy, the political commitment of the United States to Chiang Kai-Shek was not just a signal to the Chinese Nationalist leader but to a third-party, the USSR. To the Soviets, the United States signaled that it would not back down without significant loss of prestige—as evidenced by its commitments to the Formosa Resolution of 1955 and the subsequent military assistance agreements. Commitments like Quemoy are not cheap. According to Schelling, “we cannot let the Soviets or Communist Chinese think that they can grab large chunks of the earth and its population without a genuine risk of violent reaction.”³³⁴

Like the United States commitment to Quemoy, Chinese commitment to the South China Sea may be inferred as ambiguous.³³⁵ Despite incidents of acting tough, China's claim actually may be perceived as weak. The same may be true of the United States in 2015. Either side may be able to create advantage or signaling opportunity from weakness. Schelling suggests, weak commitments appear strong, whereas strong commitments appear implicitly weak. Thus, one

³³³ Schelling, *Arms and Influence*, 48–49.

³³⁴ *Ibid.*, 51.

³³⁵ Schelling, *Arms and Influence*.

way to strengthen one's signal is to employ a force that acts as a tripwire, although it is not clear how this would be manifest in a maritime situation. To do this, both states will struggle with the problem of sea control discussed above and the inability to actually hold a maritime objective. China's "great wall of sand" accomplishes that task. Similarly, a capital ship that embodies Chinese resolve and symbolizes the pinnacle of naval effort in the region could communicate a level of commitment that other forces cannot achieve. Thus, China appears to have a signaling advantage. The United States will not create more real estate in the South China Sea; the best it can do is deploy three acres of sovereign American territory atop an aircraft carrier.

Whether China is willing to make a commitment, as Schelling describes, depends to some degree on whether China views the South China Sea as a "core interest." Holsti explains core interests as those objectives for which a state is willing to make ultimate sacrifices such as self-preservation of the political unit, territorial integrity, strategic frontiers or defensive buffer zones, and other sacrosanct political objectives upon which the state depends for its security. However, Holsti warns that core values can change. Worse, core values can be misinterpreted. Whether the South China Sea represents a core interest for the People's Republic of China is not clear, nor is it a fixed value. The value of this maritime zone is likely to vary with domestic politics, China's other "core interests," and as China's position in its region changes.

Jervis argues that states demonstrate interest in specific issues because of the conclusions others will draw.³³⁶ What conclusions other states draw from China's stance on the South China Sea will affect China's pursuit of other goals. Jervis points to the ephemeral goals pursued by politicians that are aspects of a state's image contribute greatly to its pursuit of other goals. States may pursue various objectives for reasons such as a) autonomy and controlling spheres of

³³⁶ Jervis, *The Logic of Images in International Relations*, 7.

influence, b) well-being or wealth, c) ideological or interactive milieu goals, and d) pursuit of glory or defense of honor, but the primary objective in anarchy is security. Thus, China's pursuit of its primary security goals may occur through indirect and occasionally problematic or controversial means. Yet, one should expect China to signal toughness on these lesser-related objectives. Likewise, the United States will likely display toughness on issues like navigation, not just for its intrinsic value but also as a demonstration of commitment to regional allies, partners, and fence-sitters. As Jervis states, "To get others to believe an image, a state must fully act out that image."³³⁷ Thus, as the observer attempts to infer China's level of commitment to the South China Sea, the observer may be mistaken in his beliefs about the costs and risks China is willing to take. The observer may also underestimate the utility to the actor of a desired image.³³⁸

When viewed through a purely rational lens, Chinese interest in the South China Sea does not appear to be the type of commitment worth making. In terms of natural resources, China is not likely to gain much more than it already legitimately claims. According to the United States Energy Information Administration, the South China Sea contains approximately 11 billion barrels of oil and 190 trillion cubic feet of natural gas in proved and probable reserves.³³⁹ The majority of these current reserves exist in relatively shallow waters and the more easily explored depths near the shore. These maritime areas are largely uncontested, thus it is not exactly clear what China might find so valuable in their claim. However, prospect theory suggests that if China believes it "owns" the South China Sea, then China may be more likely to fight for it than

³³⁷ Ibid., 8.

³³⁸ Ibid., 46.

³³⁹ "South China Sea: International Energy Data and Analysis," February 7, 2013, <https://www.eia.gov/beta/international/regions-topics.cfm?RegionTopicID=SCS>.

for something they merely covet.³⁴⁰ Despite the instrumental value of an object or issue, Jervis argues that states demonstrate interest in specific issues because of the conclusions others will draw. States may not demonstrate interest because of the intrinsic value of the object.³⁴¹ If China were to elevate the South China Sea such that it must be protected at all costs, China would be establishing a goal of astonishing scope.³⁴² For centuries, states have sought to control the seas adjacent to their shores. Whether for reasons of security, economic access for fishing and resources, protection of trade, regional autonomy, or due to a vision of a world or milieu goal they hope to achieve, states have extended some measure of state sovereignty offshore to their near seas.³⁴³ As a security goal, the ocean surface and undersea territory of the South China Sea is a valuable area to control, but it probably not possible in the near term.

Fearon proposes two types of signals to communicate a state's willingness to use force in a dispute. First, it can send a "tying hands" signal. By tying hands, a state increases the cost of backing down to a challenge, but the state incurs no cost if it receives no challenge. In these cases, a state may lay its national prestige on the line, risk audience costs, or even invest in small tripwire costs. Second, a state can send a "sunk-cost" signal. By sinking costs, states make costly actions that do not necessarily affect the value of fighting versus acquiescing.³⁴⁴

The extent to which China has "tied its hands" over the South China Sea is relatively low, and China may be able to side-step any perceived commitments quite easily without gravely affecting other core interests. Recent diplomatic statements of Chinese foreign ministers indicate

³⁴⁰ Ibid.

³⁴¹ Jervis, *The Logic of Images in International Relations*, 7.

³⁴² Toshi Yoshihara and James R. Holmes, "Can China Defend a 'Core Interest' in the South China Sea?," *The Washington Quarterly* 34, no. 2 (2011): 46.

³⁴³ Holsti, *International Politics: A Framework for Analysis*, 138–140.

³⁴⁴ Fearon, "Signaling Foreign Policy Interests."

some level of commitment to the South China Sea, but ambiguous. The explicit level of commitment pales in comparison to Taiwan and other “core interests. If Chinese hands are tied depends on whether the Chinese people perceive the South China Sea claim to be linked to other priority claims like Taiwan and Tibet. The sunk costs of the Chinese Navy, however, urge observers to consider seriously whether the South China Sea is indeed a core interest for which China is prepared to fight.

Consider the massive sunk cost of the Chinese Navy. The PLAN is a necessary, but perhaps not sufficient, means to denying the South China Sea to foreign interests. As a semi-enclosed sea or a so-called “Chinese lake,” the South China Sea represents a maximal goal to China. This might be possible through naval presence and antiship missiles based at the north end of the sea on Hainan Island, but even these measures may be insufficient. The PLA Second Artillery Corps’ recently developed DF-21D antiship ballistic missile represents the greatest of these land-based maritime threats as a “carrier-killing” capability with striking ranges that cover nearly all of the South China Sea. Additionally, shorter-ranged antiship cruise missiles (supersonic and subsonic) can hold foreign warships at risk in at least one-third of the maritime operating area. By coupling the capabilities of land-based, precision-guided missiles, maritime aircraft, distributed sensors, and improved surface combatant ships, the PLAN have fielded a force which threatens to deny large maritime areas of China’s near seas.

Chinese shipbuilding has accelerated and has produced more plentiful and lethal ships such as the swift, Type-022 Hubei fast-attack missile boats, the *Jiangkai II*-class guided missile frigates, and Type-052 *Lanzhou*-class guided missile destroyers. These surface vessels are complemented by a rapidly growing fleet of Chinese submarines. The twelve diesel-electric *Kilo*-class submarines acquired from Russia are well suited to coastal defense missions, while the

Yuan and *Shang*-class indigenously submarines will complement the *Song* submarines in patrolling farther from shore and increasingly beyond the second island chain. Additionally, more advanced (quieter, better sensors, improved propulsion) submarines are currently in production.³⁴⁵ Also, although largely symbolic at the time of this writing, the recently completed aircraft carrier, *Liaoning*, may soon add to the projection of Chinese naval power with an embarked air wing of fourth-generation naval strike- fighter aircraft.

According to Fearon's theory, sunk-cost signals are costly for a state to make in the first place, but they do not affect the relative value of fighting versus acquiescing.³⁴⁶ Unlike the cost of tying of hands, which the actor pays only when backing down from a challenge, the actor sends its signal in paying a cost. One may think of the Chinese naval modernization as that cost. However, to be effective, the sunk cost must be so great – and the deterrent capability of the purchased fighting force must be so substantial – that no state is willing to challenge. In equilibrium, Fearon's model suggests that actors don't bluff; the actor will fight with certainty if challenged. There is little value in a sending a "part-way signal." If a defender has "put his money where his mouth is" by making significant sunk costs to signal his type, he must act accordingly when challenged. As Jervis states, the "To get others to believe an image, a state must fully act out that image."³⁴⁷

Whether Chinese naval modernization is a sufficient sunk cost to signal Chinese commitment to the South China Sea, thus, depends on how China acts when push comes to shove. We must ask to what extent observers are influenced by Chinese naval modernization and

³⁴⁵ Ronald O'Rourke, "China Naval Modernization: Implications for U.S. Navy Capabilities" (Congressional Research Service, April 26, 2013), 11–15, <http://www.crs.gov>.

³⁴⁶ Fearon, "Signaling Foreign Policy Interests," 70.

³⁴⁷ Jervis, *The Logic of Images in International Relations*, 8.

increased activity. Additionally, how do observers separate indices of behavior from information derived from signaling or reputations? Knowing that states can and do project images “on the cheap,” and recognizing that the sunk cost of naval modernization may simply be the high price of “cheap talk, one wonders whether China is willing to sink ships to signal credibly its commitment to claims in the South China Sea.

As the Chinese continue their military modernization, Chinese brinksmanship at sea is likely. The theory of sunk costs suggests that in order to uphold the signaling credibility of the Chinese fleet, China must be willing to sink a few ships—or at least to operate aggressively. To be believed, states must act out their type. Thus, at the very least, we expect the Chinese to create opportunities in which they allow for the possibility of escalation. Possibility of escalation is the essence of brinksmanship. According to Schelling, “it means exploiting the danger that someone may inadvertently go over the brink, dragging the other with him.”³⁴⁸ This uncertainty is the essence of deterrence.

7.3 Problems of Signaling on the Cheap

The United States’ use of the Freedom of Navigation program in October 2015 in the South China Sea ostensibly sought to communicate—through clear action—the United States’ commitment to Freedom of Navigation. In many ways, it represented the most recent move in a decades-long effort to maintain Grotius’ *mare liberum* as the status quo. A legal act, an assertion demonstrates a refusal to acquiesce to another’s disputed maritime claim. But this assertion attempted to do more than demonstrate persistent objection to a unlawful claim. By putting the Chinese on warning weeks prior to the operation, the transit had a signaling intent, and different audiences have received different messages. Just as eyewitnesses at the same crime scene can produce contradictory Rashomon-like accounts of what occurred, disagreement continues about

³⁴⁸ Schelling, *Arms and Influence*, 99.

what *USS Lassen's* 72-mile transit around Subi Reef really meant. As Jervis warns, "Actions are not automatically less ambiguous than words. Without an accompanying message it may be impossible for the perceiving actor to determine what image the other is trying to project."³⁴⁹

This legal signal, however it was intended, lacked clarity. It is seductive to think that a freedom of navigation assertion can convey a discrete unambiguous legal message.

Despite deliberate efforts to be non-confrontational, *USS Lassen's* transit stirred controversy and clouded, not clarified, the terms of the dispute. The United States intended to exercise high-seas freedoms around an artificial island in a manner consistent with customary international law and Articles 60 and 87 of the United Nations Convention on the Law of the Sea, but some argue *USS Lassen* was too careful in her transit. In an effort to avoid provocation, *USS Lassen* appeared to have conducted Innocent Passage. The ship's activity within 12 nautical miles of Subi Reef was so non-provocative, it appeared *too innocent*. The transit had gone to such lengths to avoid any activity "prejudicial to the peace, good order or security of the coastal state" (Art 19) that its transit was indistinguishable from Innocent Passage and had the unintended consequence of suggesting a de facto recognition of a territorial sea around Subi Reef, and thus inadvertently undermining navigational freedom³⁵⁰

Signaling is particularly problematic (or profitable) when actors are incentivized to send signals on the cheap. From job candidates and their future supervisors, to leaders on the

³⁴⁹ Jervis, *The Logic of Images in International Relations*, 19.

³⁵⁰ The regime of Innocent Passage applies only within territorial seas—12 nautical miles from the baseline of continental landmasses, juridical islands, and life-sustaining rocks. Subi Reef is none of these according to the "Regime of Islands" in Article 121. Therefore, all ships of all states may exercise high-seas freedoms and overflight outside of a 500-meter safety zone because the land feature has no territorial sea. However, China has not clarified what it has constructed at Subi Reef or what China's claims around the landmass are. This ambiguity adds to the confusion. Had *USS Lassen* discharged weapons, dumped its bilges, launched or recovered aircraft and other military devices, or other activities listed in the exhaustive definition of Innocent Passage under Article 19, the ship may have prevented confusion about whether its activity was Innocent Passage.

battlefield and gridiron, the incentives for misrepresenting capabilities and intentions are well demonstrated.³⁵¹ Following the transit of *USS Lassen*, Defense Secretary Ash Carter visited *USS Theodore Roosevelt*, underway in the South China Sea. Whether his visit intended to send a message of American resolve to China and those facing China's intimidation is clear from his press statements. Speaking aboard the nuclear-powered aircraft carrier, nicknamed "Big Stick," Carter underscored "the critical role the United States' military power plays in what is a very consequential region for the American future."³⁵² But as convincing a force as American naval power has been over the last century, multiple audiences likely wonder whether this signal is increasingly cheap talk to a rising China. International politics can be unforgiving in cases of signaling confusion. "Great dangers arise if an aggressor believes that the status quo power is weak in capability or resolve."³⁵³ Playing chicken and manipulating risk may be a valid strategy, but it changes the game from one about navigational freedoms and international law into something very different.

7.4 Conclusion

An operational assertion aims to conduct legal business, not warring business. Yet it is no small detail that the ships assigned to conduct operational assertions are warships and not rowboats. The deployment of a naval warship constitutes what Morgenthau refers to as a display

³⁵¹ Michael Spence, "Job Market Signaling," *The Quarterly Journal of Economics* 87, no. 3 (August 1, 1973): 355–74.

³⁵² Ash Carter, "Media Availability with Secretary Carter at the ASEAN Defense Minister-Plus Meeting in Kuala Lumpur, Malaysia," *U.S. Department of Defense*, November 4, 2015, <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/627598/media-availability-with-secretary-carter-at-the-asean-defense-ministers-plus-me>.

³⁵³ Robert Jervis, *Perception and Misperception in International Politics* (Princeton, N.J.: Princeton University Press, 1976), 58.

of military force. The mobility of navies and their ability to show the flag and project power far beyond the borders of a state make them a favored instrument for a “policy of prestige.”³⁵⁴

Implementing the Freedom of Navigation assertions in sensitive areas require civilian control of otherwise routine operations. Despite the obvious connotation of military force that a warship implies as an implement of statecraft, many career naval officers would argue that a navy ship conducting navigational assertions does not present a threatening force. To them, it is merely a transiting vessel that intends no harm. Moreover, one ship cannot hold maritime space in the same way that a deployed army can hold decisive terrain on land. The limits of sea control are well established, and one ship can control very little—and then only for a limited time.³⁵⁵ One ship may not seem like much, but the significance of sending a warship and not a merchant or fishing vessel deserves more scrutiny—both within the Department of Defense, Department of State, and at higher levels. First, the Freedom of Navigation program is rarely used. Although annual reports of operational assertions tally up to an average of approximately 15 states each year, these assertions are often against the “usual suspects” many of whom are along the U.S. Navy’s most efficient transoceanic transit routes. As the data in Chapters 3 and 4 demonstrate, merely 10% of disputants, in terms of country-year-disputes, receive operational assertions. The United States issues diplomatic protests even less frequently. Second, a warship’s capacity for clear messaging is poor. They do not send “statements or actions the meaning of which are established by tacit or explicit understandings among the actors.” To some audiences a warship is like “big stick,” which backs up a spoken message with military muscle.³⁵⁶ But not

³⁵⁴ Morgenthau, *Politics Among Nations*, 89.

³⁵⁵ Corbett, *Some Principles of Maritime Strategy*, 93.

³⁵⁶ Hendrix, *Theodore Roosevelt’s Naval Diplomacy*.

all military demonstrations or maneuvers convey what they might appear to convey. Finally, control of forces through doctrine, standing orders may suffice for standard operational assertions – those routine transits that are simply legal in nature. But national leaders who employ the Freedom of Navigation program for balance of power politics would do well to consider the political objective as well as the strategy or concept of operations that govern the employment of navies.³⁵⁷ History shows us that problems often arise that create friction and complicate even the simplest operations.³⁵⁸

The Black Sea shouldering incident provides a good example of Soviet brinksmanship at sea, and it is the type of behavior we should expect more of from the Chinese due to the potential for escalation into major conflict. In 1988 as in 2015, the threat of escalation over matters of international law looms in the background. In 1988, waiting for the U.S. ships were two Soviet Navy warships, *Bezzavetny* and *SKR-6*, a Krivak-class frigate and a Mirka-class frigate. These Soviet ships intercepted *Caron* and *Yorktown* at approximately 8 nm from shore. Then, during the escorted transit, the Soviet vessels deliberately collided with the United States' warships.³⁵⁹ At that point in the Cold War, aggressive interactions at sea were nothing new. In fact, *Caron* and *Yorktown* had conducted the same operations in the same territorial sea in 1986. That event prompted the exchange of formal diplomatic protests between the United States and Soviet Union.³⁶⁰ Two years later, however, “push” literally had come to “shove.”³⁶¹ For decades, the

³⁵⁷ Bouchard, *Command in Crisis*, x, xv–xvi.

³⁵⁸ Carl von Clausewitz, *On War*, ed. Michael Howard and Peter Paret, Indexed Edition (Princeton, NJ: Princeton University Press, 1984).

³⁵⁹ Rolph, “Freedom of Navigation and the Black Sea Bumping Incident.”

³⁶⁰ Smith and Roach, “Limits in the Seas: United States Responses to Excessive National Maritime Claims, No. 112,” 57.

navies of the two superpowers had been engaged in similar games of “chicken,” but often the results were not so benign. Many interactions led to loss of life and costly damage—both in terms of materiel and diplomatic relations. The threat of escalation was ever present. Some reckless interactions were the result of aggressive or inexperienced sailors and airmen, but policy often directed these interactions occur as in the case of the *Caron* and the *Yorktown*.³⁶² Threat of escalation is a matter of great concern when the bumping ships belong to nuclear states.

China has already established a precedent for brinkmanship at sea. For example, in 2001 China signaled toughness when asserting its sovereignty during two aggressive intercepts in the EEZ. Within one week in 2001, on 23 March and 1 April, a Chinese frigate intercepted *USNS Bowditch* conducting hydrographic research in the Chinese EEZ approximately 70 nautical miles south of Hainan Island.³⁶³ Then, a Chinese F-8 jet intercepted and collided with American EP-3 aircraft killing the Chinese air force pilot and leading to the destruction of the EP-3 and the detention of the crew for 11 days.³⁶⁴ Many more events have occurred since 2001, such as *USNS Impeccable* incident in 2009, which transpired similarly to *USS Bowditch* incident in 2001.³⁶⁵ In each of these incidents, China aggressively employed its armed forces and signaled toughness. These naval conflicts thus offer no threat of conquering. Rather, they offer a mechanism for hurting and raising costs. Naval conflict is a bargaining process of “endurance, nerve, obstinacy,

³⁶¹ Two videos taken by the crew of USS *Caron* and USS *Yorktown* are available online. See *USS Caron Getting Rammed by the Russians in the Black Sea - Feb 1988*, 1988, https://www.youtube.com/watch?v=Hg_WySqTTnE; *1988 Soviet Ramming USS Yorktown CG 48 in Black Sea*, 1988, <https://www.youtube.com/watch?v=SME4w037FgA>.

³⁶² Jervis, *The Logic of Images in International Relations*.

³⁶³ Eckholm, “China Complains About U.S. Surveillance Ship.”

³⁶⁴ “U.S. PLANE IN CHINA AFTER IT COLLIDES WITH CHINESE JET - New York Times.”

³⁶⁵ Pedrozo, “Close Encounters at Sea: The USNS *Impeccable* Incident.”

and pain.”³⁶⁶ The likelihood of a shouldering incident in the South China Sea is not a matter of whether; it’s a matter of when.

In the 2015 episode, *USS Lassen’s* transit showed too much caution to effectively manipulate risk for signaling purposes. It demonstrated a high sensitivity to the risk and an unwillingness to rock the boat lest the situation escalate. As a signaling effort, it risked communicating weakness. Moreover, the transit was so innocent, it failed to accomplish its objective as a legal device.

In their search for security, states have an incentive to signal strength and resolve. For observers the challenge becomes separating cheap talk from accurate indexes of power. As China’s rise continues, the United States and regional neighbors attempt to draw inferences about the extent to which China poses a threat to their various national interests and the liberal Western order. The South China Sea represents one area in which China appears most likely to clash with neighboring states. Nathan and Scobell acknowledge the rapid modernization of the PLAN, but argue there is no near-term prospect that the PRC can achieve its maximum goal of controlling all of the island groups and the EEZ.³⁶⁷ The plan to create a blue-water navy articulated in 1982 by Chinese Admiral Liu Huaqing proceeds on pace, but given the vast area of the South China Sea, such a goal may not be achievable. Given China’s rhetorical ambiguity regarding the South China Sea, the best indication of China’s commitment to the South China Sea as a core interest is its willingness to resort to use force. The modernizing PLAN forces represent an index of Chinese power, and that relative strength of that index is growing. Realists have opined that although “Asian countries would be exceedingly leery of attacking each other's homelands, naval

³⁶⁶ Schelling, *Arms and Influence*, 7.

³⁶⁷ Andrew James Nathan and Andrew Scobell, *China’s Search for Security* (Columbia University Press, 2012), 145–146.

and air battles over distant islands are precisely the sort of military exchange one might use to demonstrate resolve and capability but at little or no risk of escalation.”³⁶⁸ States with interests in the South China Sea must be willing to rock the boat. To infer accurately whether threats of force are merely bluffs one must be willing to take initiate a process that risks getting both actors wet. This objective does not align well with the Freedom of Navigation program.

Some may argue in the contemporary age, that a legal provision for innocent passage is unnecessary. After all, the vast majority of traded goods in the global economy travel by sea with few if any perturbations. To most minds, security at sea is like oxygen; one only notices it when its supply is disrupted. Seizure of goods at sea has been a problem for the maritime community for centuries. For as long as ships have moved valuable cargo, merchants have risked losing their valuable cargo to storms, shipwreck, pirates, and state seizure. Even Shakespeare knew well the perils lurking offshore, both natural and criminal: *Merchant of Venice* opens with a consideration of risks to a merchant’s fortune sailing at sea, and even Hamlet fell prey at sea to “pirate[s] of very warlike appointment” (*Hamlet*, IV.6.5-10). To most contemporary minds, however, ship seizures and piracy are the stuff of literature and the stage. Today, maritime security is taken for granted.³⁶⁹ Even those who depend on foreign trade tend to overlook the substantial challenges to freedom at sea that the seafaring states once faced.

The importance of overseas trade to the United States in its first half-century or today cannot be overestimated. In the early decades of American independence, the future of the

³⁶⁸ Stephen M. Walt, “Good News: World War I Is over and Will Not Happen Again,” *Foreign Policy Blogs*, February 8, 2013, http://walt.foreignpolicy.com/posts/2013/02/08/good_news_world_war_i_is_over_and_will_not_happen_again?wp_login_redirect=0.

³⁶⁹ For a brief period (approximately 2007-2011), Somali pirates created havoc on commercial shipping in the Indian Ocean region by hijacking vessels transiting the waters off the Horn of Africa. However, this contemporary outbreak of piracy, while notable, did not cause a significant disruption global shipping in terms of cargo volume, value, or other measures. International efforts to secure commercial traffic in the Gulf of Aden tamped down the threat they presented.

republic rested on the viability of international commerce. The majority of consumers of American goods were overseas. Leaders such as Hamilton and Jefferson understood that the priority of trade with as many nations was paramount; the future of American trade was pursued by “unshackling it rather than directing it.”³⁷⁰ The Jay Treaty recognized that the future of America lay in the security of oceanic commerce, and it allied the United States with the dominant naval power even though it meant cozying up to our enemy of American Revolution.³⁷¹ This diplomacy averted (or delayed) a subsequent war, while leading to massive commercial growth through increased trade. America’s first foreign war against the Barbary pirates, who preyed on American commercial shipping, was distinguished by Jefferson’s willingness to use naval force. Jefferson advocated for the use of force to ensure access through sea lanes of communication, and the War of 1812 confirmed American willingness to fight to secure passage for its shipping.³⁷²

As China asserts its claim to increased trade, secure supply of resources, and access to markets, the tensions produces by its growth and friction with the current order constitutes “one of the great dramas of the twenty-first century.” Whether “China will overthrow the existing order or become part of it” was the inspiration of this dissertation.³⁷³ As the United States considers what to do to maintain its position, the task is to encourage China to embrace existing institutions and to promote Chinese growth as a mature member of the liberal western world order. Yet, the decision not to intervene or to challenge disputed claims of states like China, but

³⁷⁰ Bradford Perkins, *The Cambridge History of American Foreign Relations: Volume 1, The Creation of a Republican Empire, 1776-1865* (New York: Cambridge University Press, 1995), 7–8.

³⁷¹ Edel, *Nation Builder*, 76–77, 96.

³⁷² George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776*, 1st edition (New York: Oxford University Press, 2008), 97–100.

³⁷³ G. John Ikenberry, “The Rise of China and the Future of the West: Can the Liberal System Survive?,” *Foreign Affairs* 87, no. 1 (January 1, 2008): 23.

also states less powerful, risks the establishment of a new legal precedence. After all, silence is consent. Now more than ever, a thoughtful, consistent, and simplified approach to legal action under the Freedom of Navigation program is necessary. Brinkmanship will continue to have a role, but the United States must take greater care not to mix its signals.

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