

*Mare Imperium: The Evolution of Freedom of the Seas Discourse  
in U.S. Foreign Policy - An Addendum to Critical Security Studies  
Literature*

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(ABSTRACT)

This dissertation conducts a genealogy of freedom of the seas discourse in United States foreign policy in order to problematize the contemporary representation lying at the heart of American political-military strategy in the Western Pacific. This project aims to accomplish two goals. First, this project aims to show that freedom of the seas is not an enduring historical principle consistently championed by the United States, as is often claimed in contemporary governmental publications. Rather, it shows that the current understanding is a recent phenomenon that emerged after the Second World War. By highlighting the contingency of the contemporary understanding of freedom of the seas, this work seeks to show that such discourse is not a necessary foundation on which to place American political-military strategy. The second objective of this genealogical analysis is to show that the contemporary freedom of the seas discourse in U.S. foreign policy is not an altruistic principle championed on behalf of the global community, but rather facilitates American control over the global ocean space. By showing that freedom of the seas is a mechanism of sea control, this work aims to show that in an era of maritime great power competition, strategies predicated upon the discourse are more dangerous than would otherwise appear. Together, this genealogical analysis, and the two goals that are made possible by it, will make a substantive contribution to the critical strategic studies literature, in conjunction with the wider critical security studies literature, by showing that American political-military strategy in the South China Sea can and should be reconceptualized.

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(GENERAL AUDIENCE ABSTRACT)

Currently, the United States is locked in a fierce competition with China in the South China Sea. The United States believes that Chinese actions in the region, such as claiming large swaths of maritime territory, constructing militarized artificial islands, and deploying weaponry designed to endanger American forces operating in the region, violates the principle of freedom of the seas. The United States asserts that it has consistently championed the principle freedom of the seas because it is the essential foundation of international peace and prosperity. Due to this, the U.S. claims that it will continue to defend the principle of freedom of the seas against Chinese depredations. However, this dissertation argues that the United States' political-military strategy in the Western Pacific is misrepresenting the concept of freedom of the seas and therefore failing to see the dangers at stake in the regional confrontation. To show this, this work writes a history of how the concept of freedom of the seas has been used in U.S. foreign policy over the course of American history. Such a history shows that the concept of freedom of the seas has not been consistently championed by the United States and is not an altruistic principle defended on behalf of international peace and prosperity. Instead, this project shows that the concept of freedom of the seas is used by the United States to facilitate control over the world's oceans on behalf of U.S. interests. It is problematic to portray the pursuit of American national interests as a universal altruistic good because it does not leave room open for compromise. In a time where China is rapidly developing their military forces to control sea themselves, basing American political-military strategy on the concept of freedom of the seas is increasingly dangerous.

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# Introduction

This work aims to demystify the discourse of freedom of the seas which underpins United States political-military strategy in the contemporary Sino-American South China Sea dispute. To accomplish this, a genealogy of freedom of the seas discourse in U.S. foreign policy will be conducted. By conducting a genealogical intellectual history of the American understanding of freedom of the seas, this dissertation seeks to accomplish two goals. First, this project aims to de-monumentalize the discourse by showing that freedom of the seas is not an enduring historical principle consistently championed by the United States, as is often claimed in contemporary governmental publications.<sup>1</sup> Rather, it shows that the current understanding is a recent phenomenon that emerged after the Second World War. By highlighting the contingency of the contemporary understanding of freedom of the seas, this work seeks to show that such discourse is not a necessary foundation on which to place American political-military strategy. The second objective of this genealogical analysis is to problematize the contemporary freedom of the seas discourse in U.S. foreign policy by showing that it is not an altruistic principle championed on behalf of the global community, but rather is a mechanism to facilitate American control over the global ocean space. By showing that freedom of the seas is a mechanism of sea control, this work aims to show that in an era of maritime great power competition, strategies predicated upon the discourse are

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<sup>1</sup>The Asia-Pacific Maritime Security Strategy - Achieving U.S. National Security Objectives in a Changing Environment, 2015, URL: [https://dod.defense.gov/Portals/1/Documents/pubs/NDAA50A-P\\_Maritime\\_Security\\_Strategy-08142015-1300-FINALFORMAT.PDF](https://dod.defense.gov/Portals/1/Documents/pubs/NDAA50A-P_Maritime_Security_Strategy-08142015-1300-FINALFORMAT.PDF), p. 1; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017, 2017, p. 2; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2018, 2018, p. 2; The Department of Defense Indo-Pacific Strategy Report - Preparedness, Partnerships, and Promoting a Networked Region, June 1, 2019, URL: <https://media.defense.gov/2019/Jul/01/2002152311/-1/-1/1/DEPARTMENT-OF-DEFENSE-INDO-PACIFIC-STRATEGY-REPORT-2019.PDF>, p. 43; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress, R43784, February 6, 2020, p. 4.

“more dangerous than would otherwise appear.”<sup>2</sup> Together, this genealogical analysis, and the two goals that are made possible by it, de-monumentalization and problematization, will show that American political-military strategy in the South China Sea can change and should change. That it is possible to reconceptualize the American strategies that currently rest on freedom of the seas discourse, and that such a reconceptualization is necessary in the contemporary Sino-American South China Sea dispute.

## The South China Sea Dispute at a Glance

This section will provide a brief overview of the contemporary Sino-American dispute in the South China Sea. Chapter 1 will offer a more robust account of the ongoing confrontation from the perspective of the United States. From the perspective of the United States, the contemporary problem in the South China Sea is driven by Chinese violations of the principle of freedom of the seas. While the term has not been defined by international law, the United States uses freedom of the seas to mean the “rights, freedoms, and uses of the sea and airspace guaranteed to all nations by international law,” specifically the right for both civilian and military vessels to access and transit the high seas unimpeded.<sup>3</sup> The United States asserts that this 400 year old “historic” principle has been championed throughout American history and must continue to be defended against Chinese transgressions today.<sup>4</sup> The Chinese actions that concern the United States include expansive maritime territorial

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<sup>2</sup>David Garland: What is a “history of the present”? On Foucault’s genealogies and their critical preconditions, in: *Punishment & Society* 16.4 (2014), pp. 365–384, here p. 372.

<sup>3</sup>Department of State: Department of State Maritime Security and Navigation. URL: <https://2009-2017.state.gov/e/oes/ocns/opa/maritimesecurity//index.htm>; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), pp. 2–3; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), pp. 4, 11–12.

<sup>4</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 1; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), p. 2; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2018 (see n. 1), p. 2; The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 4.



claims, the militarization of such territorial claims, and the application of domestic law on the high seas surrounding Chinese territorial possessions.

In 2009, China sent a Note Verbale to the United Nations asserting “indisputable sovereignty” over the entirety of the South China Sea, including its islands, waters, and subsoil rights.<sup>5</sup> The claim was not demarcated by precise coordinates but rather loosely indicated by a line, comprised of nine dashes, drawn on a map attached to the Note Verbale.<sup>6</sup> In U.S. foreign policy, the claim is treated as a blatant violation of the UN Convention on the Law of the Sea (UNCLOS) and therefore is perceived as an illegitimate territorial assertion.<sup>7</sup> UNCLOS is the principle body of international law that delineates international maritime territorial possessions and ascribes rights to state actors operating in territorial waters and on the high seas.<sup>8</sup>

To defend their expansive territorial claim, China has been expanding militarily throughout the region.<sup>9</sup> China has both taken island territorial possessions from neighboring states by force and constructed its own artificial island outposts as far south as the Spratly Island Chain in the South China Sea.<sup>10</sup> China has built infrastructure and placed substantial military assets on these island features in order to facilitate the defense of China’s territorial sovereignty.<sup>11</sup> In the waters surrounding these far flung military outposts, as well as the

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<sup>5</sup>The Permanent Mission of the People’s Republic of China to the United Nations: Note Verbale - South China Sea Claims, 2009, url: [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/vnm37\\_09/chn\\_2009re\\_vnm.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf); United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs: Limits in the Sea, url: <https://www.state.gov/e/oes/ocns/opa/c16065.htm>.

<sup>6</sup>The Permanent Mission of the People’s Republic of China to the United Nations: Note Verbale - South China Sea Claims (see n. 5); United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs: Limits in the Sea (see n. 5).

<sup>7</sup>A Free and Open Indo-Pacific, Advancing a Shared Vision, November 4, 2019, p. 23.

<sup>8</sup>Arnd Bernaerts: Bernaerts’ Guide to the 1982 United Nations Convention on the Law of the Sea: Including the Text of the 1982 Un Convention & Agreement Concerning Part XI of 1994, 2006.

<sup>9</sup>Andrew S Erickson: America’s Security Role in the South China Sea, in: Naval War College Review 69.1 (2016), pp. 7–21, here p. 9.

<sup>10</sup>Conor M Kennedy/Andrew S Erickson: China Maritime Report No. 1: China’s Third Sea Force, The People’s Armed Forces Maritime Militia: Tethered to the PLA, in: 2017, p. 99; Craig Snyder: The implications of hydrocarbon development in the South China Sea, in: International Journal 52.1 (1997), pp. 142–158, here p. 143; Erickson: America’s Security Role in the South China Sea (see n. 9), pp. 7, 9.

<sup>11</sup>Annual Report to Congress: Military and Security Developments Involving the People’s Republic of

waters off of its continental shores, China asserts the right to prevent foreign military vessels from approaching within 200 nautical miles.<sup>12</sup> From the perspective of China, only commercial trading vessels have the right of innocent passage as specified in UNCLOS.<sup>13</sup> The United States asserts that the curtailment of military navigation rights is a fundamental violation of the principle of freedom of the seas.<sup>14</sup>

In response, the United States conducts freedom of navigation operations (FONOPs).<sup>15</sup> U.S. FONOPs function by transiting warships through areas of sea space, such as within 200 nautical miles of Chinese territorial possessions, in defiance of the unilateral restrictions on military navigation. This is done in order to contest encroachments on the principle of freedom of the seas, and by doing so, defend the rules-based international order upon which freedom of the seas is predicated.<sup>16</sup> The defense of freedom of the seas lies at the heart of the Trump administration's political-military strategy for the South China Sea region. The regional strategy, titled, "A Free and Open Indo-Pacific," asserts that the United States must maintain a military presence in the region in order secure the "freedom of the seas and airways" and defend the liberal rules-based international order against the "repressive vision of the future international order," that China is supposedly seeking.<sup>17</sup> The strategy states that if China were allowed to establish this "repressive vision" of international order, international trade through the region would be fundamentally jeopardised.<sup>18</sup> Therefore a

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China 2017, 2017, url: [https://dod.defense.gov/Portals/1/Documents/pubs/2017\\_China\\_Military\\_Power\\_Report.PDF](https://dod.defense.gov/Portals/1/Documents/pubs/2017_China_Military_Power_Report.PDF), p. 10; Erickson: America's Security Role in the South China Sea (see n. 9), p. 9.

<sup>12</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 43.

<sup>13</sup>Ibid., pp. 10–11.

<sup>14</sup>Ibid., pp. 10–11.

<sup>15</sup>Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), p. 2.

<sup>16</sup>Department of State: Department of State Maritime Security and Navigation. (see n. 3); Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), pp. 2–3; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), pp. 4, 11–12.

<sup>17</sup>A Free and Open Indo-Pacific, Advancing a Shared Vision (see n. 7), p. 5.

<sup>18</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 2.

robust U.S. military presence in the region is perceived as required to safeguard global commerce.<sup>19</sup>

However, the way in which the United States represents the problem in the South China Sea is problematic. First, while the United States claims to defend the 400 year old principle of freedom of the seas it actually asserts a position contrary to what Hugo Grotius argued in 1609.<sup>20</sup> Grotius' conception of freedom of the seas, like the contemporary Chinese position, only pertained to unhindered commercial trade between nations.<sup>21</sup> In fact, Grotius explicitly stated that innocent passage did not apply to armed military vessels as the United States today claims.<sup>22</sup> Further, the United States' concern that Chinese actions will threaten commerce does not take into account the immense stake that China itself has in ensuring stable trade through the South China Sea. While China has militarized the region, there has never been an instance of interference with trade navigation.<sup>23</sup> This raises a number of questions about the use of freedom of the seas discourse to underpin contemporary American political-military strategy.

## Research Questions

Because of this, the primary question this work seeks to address is how has the U.S. conception of freedom of the seas evolved over time to become problematic with Chinese maritime assertions in the South China Sea? This dissertation seeks to understand how freedom of the seas, defined as the altruistic defense of universal maritime access for merchant vessels and

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<sup>19</sup>Ibid., p. 2.

<sup>20</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 1; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), p. 2; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2018 (see n. 1), p. 2; The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43.

<sup>21</sup>Hugo Grotius: Hugo Grotius *Mare Liberum* 1609-2009: Original Latin Text and English Translation, ed. by Robert Feenstra, 2009, p. 25.

<sup>22</sup>Ibid., p. 93.

<sup>23</sup>Daojiong Zha: Security in the South China Sea, in: *Alternatives* 26.1 (2001), pp. 33–51, here pp. 36–37.

warships alike, became the conventionally understood representation in U.S. foreign policy and to uncover what representations of the concept have been excluded from the contemporary discourse. By tracing the discourse in U.S. foreign policy, this work aims to determine whether the historical conditions underpinning the contemporary American discourse of freedom of the seas still provide an adequate foundation on which to base U.S. political-military strategy in the South China Sea today. Additionally, this project seeks to answer the secondary research question of how it came to be that the American political-military strategy predicated on freedom of the seas and the U.S. naval service's stated objective of control of the sea, coexist unproblematically.<sup>24</sup> These questions are undertaken to understand how the discourse of freedom of the seas functions in U.S. foreign policy today and its implications for the international security situation in the contemporary Sino-American South China Sea dispute.

## Genealogical Method

To prosecute these questions, this work will conduct a genealogical analysis of the concept of freedom of the seas in U.S. foreign policy. Genealogy is a method and “historical perspective” that seeks to critique the present and offer a diagnosis.<sup>25</sup> Rather than studying history to understand the past, genealogy utilizes history to understand, and re-think, the present.<sup>26</sup>

First articulated by Friedrich Nietzsche in his *Untimely Meditations*, Genealogy seeks to subvert presentist or teleological historical representations in order to bring the past to bear on the present.<sup>27</sup> Nietzsche articulated genealogy in opposition to what he calls ‘mere history,’

<sup>24</sup>Commander United States Surface Forces: Surface Force Strategy: Return to Sea Control, January 9, 2016, url: <https://www.navy.mil/strategic/SurfaceForceStrategy-ReturntoSeaControl.pdf>; Joint Maritime Operations, JP 3-32, June 8, 2018, p. x.

<sup>25</sup>Vincent P Pecora: Nietzsche, genealogy, critical theory, in: *New German Critique* 1991, pp. 104–130, here p. 109; Úna Crowley: Genealogy, method, in: 2009, p. 2.

<sup>26</sup>Garland: What is a “history of the present”? On Foucault's genealogies and their critical preconditions (see n. 2), p. 373.

<sup>27</sup>Friedrich Nietzsche: On the Uses and Disadvantages of History for Life. *Untimely Meditations*, in:

a way of writing history that aims to provide an objective, or scientific, representation of the past.<sup>28</sup> Nietzsche argued that such claims of objectivity serve only to “naturalize the values and presumptions of the present, stifling the potential for criticism, creativity and change.”<sup>29</sup> As opposed to historical traditions, particularly the history of philosophy, which aims to dig through the past to find the “pristine origin” of a concept before it had been perverted by “culture and history,” Nietzschean genealogy aims to trace the concept back to show that there is nothing pristine to be found at the origin.<sup>30</sup> Nothing is “suprahistorical.”<sup>31</sup> Instead, genealogy shows that everything exists within historical, cultural, and practical interpretation.<sup>32</sup> It is humans who ascribe value to concepts, at a particular time and for a particular reason, rather than value being an ontological property of the concept itself.<sup>33</sup> Thus, it is not history and culture that has tarnished an otherwise pure concept, history and culture were necessarily there at the beginning and the concept has never been pure. By finding no pure thing at the origin of a value, Nietzschean genealogy aims to show that all naturalized values are willful creations imbued with “human violence and weakness” that are worthy of being destroyed.<sup>34</sup> Therefore, Nietzsche stressed the need to ‘take a knife to the roots of the past’ and “trample over every kind of piety.”<sup>35</sup> “History,” Nietzsche stated, “must itself resolve the problem of history, knowledge must turn its sting against itself.”<sup>36</sup>

Michel Foucault reinterpreted, and popularized, Nietzsche’s conception of genealogy in

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Trans. RJ Hollingdale. Cambridge: Cambridge University Press 1983, pp. 57–123.

<sup>28</sup>Idem: *On the Uses and Disadvantages of History for Life. Untimely Meditations* (see n. 27), p. 77; Philippe Bonditti et al.: *Genealogy*, in: *Critical Security Methods*, 2014, pp. 175–204, here p. 6.

<sup>29</sup>Idem: *Genealogy* (see n. 28), p. 6.

<sup>30</sup>Michael Mahon: *Foucault’s Nietzschean genealogy: Truth, power, and the subject*, 1992, p. 82.

<sup>31</sup>Nietzsche: *On the Uses and Disadvantages of History for Life. Untimely Meditations* (see n. 27), p. 120; Mahon: *Foucault’s Nietzschean genealogy: Truth, power, and the subject* (see n. 30), p. 82.

<sup>32</sup>Nietzsche: *On the Uses and Disadvantages of History for Life. Untimely Meditations* (see n. 27), p. 120; Mahon: *Foucault’s Nietzschean genealogy: Truth, power, and the subject* (see n. 30), p. 82.

<sup>33</sup>Idem: *Foucault’s Nietzschean genealogy: Truth, power, and the subject* (see n. 30), p. 83.

<sup>34</sup>Nietzsche: *On the Uses and Disadvantages of History for Life. Untimely Meditations* (see n. 27), p. 76.

<sup>35</sup>*Ibid.*, p. 76.

<sup>36</sup>*Ibid.*, p. 103.

his study of discourse.<sup>37</sup> Foucault too sought to subvert teleological representations of phenomena in order to bring the past to bear on the present. However, rather than striving to expose the corruption present at the origin of values, Foucault rejects the notion of origins entirely.<sup>38</sup> For Foucault, the purpose of genealogy is to examine and show the continual emergence of “self-evident” phenomena and thus destabilize what was thought to be concrete.<sup>39</sup> To do this, genealogy writes a critical ‘history of the present’ in order to “trace the forces that gave birth to our contemporary practices and to identify the historical conditions upon which they still depend.”<sup>40</sup> Foucault describes this history of the present as an “effective history.”<sup>41</sup> Effective history sets itself apart from the presentist, or teleological, mere history that Nietzsche spoke against. “Effective history,” Foucault states, “differs from traditional history by being without constants.”<sup>42</sup> Foucault continues,

History becomes “effective” to the degree that it introduces discontinuity into our very being... Effective history deprives the self of the reassuring stability of life and nature, and it will not permit itself to be transported by a voiceless obstinacy toward a millennial ending. It will uproot its traditional foundations and relentlessly disrupt its pretended continuity. This is because knowledge is not made for understanding; it is made for cutting.<sup>43</sup>

Genealogy intends to show that what is presented as stable in the present was produced, and continues to be produced, by a series of “haphazard conflicts.”<sup>44</sup> It shows that the present is not a manifestation of an inherent *telos*, the work of a guiding destiny, or the product

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<sup>37</sup>Michel Foucault: Nietzsche, genealogy, history, in: Paul Rabinow (ed.): The Foucault reader, 1984, pp. 76–97, here p. 79; Giorgio Agamben: The signature of all things: On method, 2009, p. 83.

<sup>38</sup>Foucault: Nietzsche, genealogy, history (see n. 37), p. 77; Mahon: Foucault’s Nietzschean genealogy: Truth, power, and the subject (see n. 30), p. 110.

<sup>39</sup>Foucault: Nietzsche, genealogy, history (see n. 37), p. 77.

<sup>40</sup>John Baylis/Steve Smith/Patricia Owens: The globalization of world politics: an introduction to international relations, in: 2011, p. 171; Garland: What is a “history of the present”? On Foucault’s genealogies and their critical preconditions (see n. 2), p. 373.

<sup>41</sup>Foucault: Nietzsche, genealogy, history (see n. 37), p. 88.

<sup>42</sup>Ibid., p. 87.

<sup>43</sup>Ibid., p. 88.

<sup>44</sup>Ibid., pp. 80, 88.

of structural “regulative mechanisms,” but that it emerged through the “singular randomness of events”.<sup>45</sup> In this way, Foucault treats his objects of study as emergent phenomena; assemblages formed through the contingent intermingling of historical accidents.<sup>46</sup>

For Foucault, genealogy traces the emergence of phenomena through these conditional historical struggles in order to “illuminate the contingency of what we take for granted, to denaturalize what seems immutable, to destabilise seemingly natural categories as constructs ... and to open up new possibilities for the future.”<sup>47</sup> The genealogist tracks the evolution of the phenomena and records “its jolts, its surprises, its unsteady victories and unpalpable defeats,” in order to show that the present concept, in this case the freedom of the seas, is not natural but rather is fundamentally rooted in historical processes.<sup>48</sup> In this way, genealogy “undermines the self-evidences of the present” and exposes the gradual, contingent, and powered processes by which contemporary phenomena came into being.<sup>49</sup> By shining a light on the “contingency of the present and the openness of the future,” genealogy seeks to expose new avenues of freedom and change in order to intervene in the present.<sup>50</sup>

By fracturing representations in the present and “dissolving the doxa we unquestioningly dwell in,”<sup>51</sup> genealogies present taken for granted concepts, such as freedom of the seas, as

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<sup>45</sup>Ibid., p. 88.

<sup>46</sup>Ibid., pp. 80–81.

<sup>47</sup>Todd May: *Between genealogy and epistemology: Psychology, politics, and knowledge in the thought of Michel Foucault*, 1993, p. 75; Crowley: *Genealogy, method* (see n. 25), pp. 2–3.

<sup>48</sup>Mahon: *Foucault’s Nietzschean genealogy: Truth, power, and the subject* (see n. 30), pp. 80, 110.

<sup>49</sup>Idem: *Foucault’s Nietzschean genealogy: Truth, power, and the subject* (see n. 30), p. 85; Ann Genovese: *How to Write Feminist Legal History: Some Notes on Genealogical Method, Family Law, and the Politics of the Present*, in: *Past Law, Present Histories*, 2012, pp. 139–152, here p. 146; Bonditti et al.: *Genealogy* (see n. 28), pp. 8–9, 22; Kevin C Dunn/Iver B Neumann: *Undertaking discourse analysis for social research*, 2016, p. 70.

<sup>50</sup>Foucault: *Nietzsche, genealogy, history* (see n. 37), pp. 82, 95; Mahon: *Foucault’s Nietzschean genealogy: Truth, power, and the subject* (see n. 30), pp. 122, 101; Lene Hansen: *Discourse analysis, post-structuralism, and foreign policy*, in: *Foreign policy: Theories, actors, cases 2* (2012), pp. 94–112, here p. 105; **bonditti2014genealogyf**; Garland: *What is a “history of the present”?* On Foucault’s genealogies and their critical preconditions (see n. 2), p. 372.

<sup>51</sup>Charlotte Epstein: *The power of words in international relations: birth of an anti-whaling discourse*, 2008, p. 10.

“problematic or more dangerous than would otherwise appear.”<sup>52</sup> While empirically rigorous, the goal of genealogy is not to make a new claim of objective historical truth, or to create a new mere-history. Rather, in conducting an effective history, genealogy undertakes the explicitly political task of intervening in the present.<sup>53</sup> Genealogy uses knowledge for cutting, and by taking a knife to the roots of the past shows that knowledge, in itself, is perspective.<sup>54</sup>

Foucault’s primary object of study in genealogical analysis was discourse; regimes of knowledge comprised of ideas, concepts, statements and practices that temporarily “fix meaning” about a particular subject and enable actors “to make sense of the world and act within it”.<sup>55</sup> From the post-structuralist perspective, the world can only be understood through language, as language is necessary to make “our thoughts understandable to others.”<sup>56</sup> Discourses are thus the continually changing linguistic systems of shared understandings that “orders statements and concepts” and allows them to be used, perpetuated, and contested by actors in the conduct of acting.<sup>57</sup> As Kevin Dunn and Iver Neumann state,

Because a discourse maintains a degree of regularity in social relations, it produces preconditions for action. It constrains how the stuff that the world consists of is ordered, and so how people categorize and think about the world. It constrains what is thought of at all, what is thought of as possible, and what is thought of as the “natural thing” to do in a given situation. But discourse cannot determine action completely. There will always be more than one possible outcome. ... Thus, we understand a discourse as a system producing a set of statements and practices that, by entering into institutions and appearing like

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<sup>52</sup>Garland: What is a “history of the present”? On Foucault’s genealogies and their critical preconditions (see n. 2), p. 372.

<sup>53</sup>Bonditti et al.: Genealogy (see n. 28), pp. 165, 167.

<sup>54</sup>Nietzsche: On the Uses and Disadvantages of History for Life. *Untimely Meditations* (see n. 27), p. 76; Michel Foucault: *The History of Sexuality, First American Edition (Volume 1: An Introduction)*, New York 1978, p. 90.

<sup>55</sup>Stuart Hall: Foucault: Power, knowledge and discourse, in: *Discourse theory and practice: A reader* 72 (2001), p. 81; Epstein: The power of words in international relations (see n. 51); Dunn/Neumann: *Undertaking discourse analysis for social research* (see n. 49), p. 2.

<sup>56</sup>Baylis/Smith/Owens: *The globalization of world politics: an introduction to international relations* (see n. 40), p. 170.

<sup>57</sup>Idem: *The globalization of world politics: an introduction to international relations* (see n. 40), p. 170; Dunn/Neumann: *Undertaking discourse analysis for social research* (see n. 49), p. 3.



normal, constructs the reality of its subjects and maintains a certain degree of regularity in social situations.<sup>58</sup>

Because discourse produces meaning, it is not necessary to ask what states ‘*really* mean’ when they speak or to look for an extra-discursive realm where meaning lies behind discourse. This is the reason that Foucault claims “nothing exists outside discourse.”<sup>59</sup>

Further, because discourses are necessarily entangled with practices, they are not simply ideational phenomena but have elements of materiality as well.<sup>60</sup> A key component of this work looks at the material aspects that constitute and shape freedom of the seas discourse, such as naval aggrandizement and force structure. However, these material aspects are not the only, or even primary, component of discourse formation and state behavior.

Discourse analysis, and discourse theory, commonly study the relational “micro-physics” of power at play within discourses and how these regimes of knowledge inscribe subject positions upon actors in society.<sup>61</sup> This dissertation, however, utilizes a ‘thin’ conception of discourse. It uses the notion of discourse to describe the evolving bundle of statements and practices that are able to be used to meaningfully discuss a concept. For example, within the contemporary freedom of the seas discourse, freedom of navigation operations can be conceived of as a particular discursive practice. This work sets aside the ‘thick’ conception of discourse that encompasses the notion’s productive power. While employing a ‘thick’ conception of discourse may be a fruitful avenue of future study in relation to freedom of the seas, it falls outside the scope of the project at hand. The author does not believe that

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<sup>58</sup>Idem: Undertaking discourse analysis for social research (see n. 49), p. 4.

<sup>59</sup>Hall: Foucault: Power, knowledge and discourse (see n. 55).

<sup>60</sup>Dunn/Neumann: Undertaking discourse analysis for social research (see n. 49), p. 3.

<sup>61</sup>Mahon: Foucault’s Nietzschean genealogy: Truth, power, and the subject (see n. 30), p. 9; David J Howarth et al.: Discourse theory and political analysis: Identities, hegemonies and social change, 2000, p. 5; Hall: Foucault: Power, knowledge and discourse (see n. 55); Epstein: The power of words in international relations (see n. 51); Crowley: Genealogy, method (see n. 25), pp. 3–10; Hansen: Discourse analysis, post-structuralism, and foreign policy (see n. 50), p. 103; Garland: What is a “history of the present”? On Foucault’s genealogies and their critical preconditions (see n. 2), p. 373; Dunn/Neumann: Undertaking discourse analysis for social research (see n. 49).

Foucault would mind this revision in scope of his genealogical project, as Foucault himself stated that “the only valid tribute to thought... is precisely to use it, to deform it, to make it groan and protest”.<sup>62</sup> The ‘thin’ conception of discursive assemblages adds explanatory value by expanding the scope of relevant empirical material and situating this project’s intellectual history firmly within the confines of genealogy rather than straying into the methodological domains of the Cambridge School’s History of Ideas or Koselleck’s Conceptual History.

Needless to say, in employing a genealogical method that rejects the ‘scientific’ writing of history, this work rejects the positivist deductive-nomological model of study. Instead, it aims to provide a post-positivist narrative that subverts the homogeneous portrayal of “the historic concept of freedom of the seas”<sup>63</sup> in contemporary U.S. foreign policy. By demystifying the discourse in U.S. foreign policy, this dissertation aims to expose the historic conditions upon which current U.S. political-military strategy depends. By doing so this project will examine the contemporary relevance freedom of the seas discourse and highlight potential avenues for creativity and change in U.S. strategic policy towards the South China Sea dispute.

Empirically, this work will draw on primary and secondary sources in the conduct of its genealogical analysis. Primary source archival material will comprise the public and private statements of individuals who ‘speak for the state’ on matters of foreign policy, such as Presidents, Secretaries, Ambassadors, Ministers, ‘executive agents’, etc. To gather such primary source material, the Foreign Relations of the United States archival series, furnished by the U.S. Office of the Historian, provides an invaluable archive of foreign policy statements and correspondence between U.S. officials and with foreign counterparts. The Foreign Relations series covers a time span beginning in 1861 and ending in 1993. Primary sources prior to

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<sup>62</sup>Garland: What is a “history of the present”? On Foucault’s genealogies and their critical preconditions (see n. 2), pp. 365–366.

<sup>63</sup>Leonard Sullivan Jr.: Executive Summary Prepared in the Office of the Assistant Secretary of Defense for Program Analysis and Evaluation (Sullivan), vol. Foreign Relations of the United States, 1969–1976, Volume XXXV, National Security Policy, 1973–1976, Document 47, November, 1974, url: <https://history.state.gov/historicaldocuments/frus1969-76v35/d47>.

1861 were obtained via the Founders Online archive maintained by the National Archives. Founders Online provides records of correspondence from George Washington, Benjamin Franklin, John Adams, Thomas Jefferson, Alexander Hamilton, and James Madison. While there are no archival sources available post-1993, this study will utilize public foreign policy and Navy doctrinal statements from relevant public officials. This study will also utilize diplomatic histories as secondary sources. To trace the influence of naval doctrine and material capabilities on freedom of the seas discourse, this dissertation will depend on prominent naval historical works such as E.B Potter's *Sea power: A naval history*<sup>64</sup>, Kenneth Hagan's *This people's navy: The making of American sea power*<sup>65</sup>, and Harold and Margaret Sprout's *Rise of American Naval Power*.<sup>66</sup> Empirical analysis will start in 1776 with the American Revolution, and then trace the discourse through the diplomatic history of the United States to the present day. Tracing the discourse across the entire span of American history will allow this project to both destabilize representations that portray the discourse as natural and enduring, as well as expose the historical conditions on which the contemporary discourse still depends in the present South China Sea dispute.

Because this dissertation conducts a genealogy of American foreign policy discourse, analysis will be restricted to the American archive. This is not to say that the discursive representations of other states are constant or unimportant. However, analysis of the discursive archives of other states, such as Chinese maritime, legal, and strategic thought, fundamentally falls outside the scope of this work. The aim of this project is to radically historicize, and by doing so undermine, the discourse of freedom of the seas that lies at the heart of U.S. political-military strategy in the South China Sea. In the conduct of this project, non-U.S. representations of freedom of the seas discourse will only be featured to the extent that they

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<sup>64</sup>E.B. Potter: *Sea power: A naval history*, 1981.

<sup>65</sup>Kenneth J Hagan: *This people's navy: The making of American sea power*, 1992.

<sup>66</sup>Harold Hance Sprout/Margaret Sprout: *Rise of American Naval Power*, vol. 2339, 1939.

play a part in the “historical accidents”<sup>67</sup> or the powered contestations of meaning that have shaped how freedom of the seas discourse has been represented in U.S. foreign policy. As Nietzsche said, “knowledge must turn its sting against itself.”<sup>68</sup> Therefore, this dissertation uses an effective historical knowledge of American foreign policy discourse to undermine the contemporary American foreign policy representation of freedom of the seas.

This dissertation only undertakes the project of critiquing the discourse on which U.S. political-military strategy is based in the South China Sea today. This work does not aim to critique American political-military strategy as a whole, or even in the more limited scope of Sino-U.S. relations. Because of this, it falls outside the scope of this study to analyze the strengths and weaknesses of American strategic doctrine overall, such as aspiring to control strategically significant areas of the sea or spending vast amounts of money to prepare for a military conflict with China. Additionally, because the scope of this project only pertains to the discourse of freedom of the seas, analyzing the political-military policies of the United States in other domains, such as Land, Space, and Cyber, has no bearing on the present work. This applies to all foreign policies that are not involved in the historical accidents that have produced the discourse of freedom of the seas in the present.

The primary methodological challenge that this work will face is the classification of primary source material. The scale and scope of classified material that would be relevant to this genealogical study is a known unknown. Archival research suggests that documentation of the Cold War period is still particularly impacted by classification. For example, a notable amount of sequential primary source material either does not include key documents, or includes material that is partially redacted. The classification of primary source material does hinder the empirical analysis of freedom of the seas discourse, particularly within a time period where the discourse underwent a significant change in meaning within U.S.

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<sup>67</sup>Foucault: Nietzsche, genealogy, history (see n. 37), p. 80.

<sup>68</sup>Nietzsche: On the Uses and Disadvantages of History for Life. Untimely Meditations (see n. 27), p. 103.

foreign policy. However, there is still sufficient unclassified, or partially declassified, material available to conclusively document, demonstrate, and understand the substantial change that occurred in the way freedom of the seas discourse was conceptualized. While the gaps in the archive hinders the ability to attribute the discursive shift to any particular actor or group of actors, this does not pose a fatal flaw to the study. Understanding *how* the discourse shifted is much more important for understanding the contemporary international security implications than *why* the discourse shifted. While an analysis of *why* the discourse shifted would serve to further highlight the randomness and contingency of the present, the genealogical analysis preceding the Cold War period provides ample demonstration of this. Showing *how* the discourse shifted speaks to the problem posed in the present by highlighting the historical conditions on which the contemporary discourse emerged and still depends today. While Freedom of Information Act requests could be made to try and obtain additional records, time limitations prevent such a course of action in the current project.

## **Situating the Work**

The present work provides a significant contribution to the conversation surrounding the U.S. political-military strategy in the Sino-American South China Sea dispute. Specifically, this dissertation will contribute to the nascent literature of critical strategic studies, within the wider critical security studies literature. While much scholarship has been conducted on the South China Sea dispute from orthodox structuralist security perspectives, there have been no critical, or epistemologically post-positive studies conducted to critique American political-military strategy in the confrontation. No other study has attempted to speak to American strategy in the South China Sea by calling into question the discourse of freedom of the seas on which contemporary U.S. actions, such as freedom of navigation operations, are predicated. This dissertation fills this gap in the literature.

## International Security

Much research has been done within ‘orthodox’ international security literature on U.S. defense of freedom of the seas in the face of Chinese maritime claims. As opposed to the current project, the international security literature addresses the Sino-U.S. dispute in the South China Sea from a position that takes the U.S. interest of freedom of the seas as self-evident. The literature sets about to determine how to counter the ‘obviously’ problematic Chinese maritime territorial claims without stopping to consider why these claims are problematic for U.S. foreign policy and the implications it may have going forward.

The mainstream international security literature argues that U.S. political-military operations on behalf of freedom of the seas are necessary, even if not sufficient, to safeguard economic trade,<sup>69</sup> regional security,<sup>70</sup> and the liberal “rules-based international order.”<sup>71</sup>

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<sup>69</sup>Jeremy Stocker: Nonintervention: Limited Operations in the Littoral Environment, in: *Naval War College Review* 51.4 (1998), pp. 42–62, here p. 52; Thomas B Fargo: Walking the Talk in the South China Sea, in: *Asia Policy* 21.1 (2016), pp. 59–65, here pp. 60, 63; Peter Dutton: A maritime or continental order for Southeast Asia and the South China Sea?, in: *Naval War College Review* 69.3 (2016), pp. 5–13, here pp. 5–7; Bert Chapman: US Marine Corps Battalion Deployment to Australia: Potential Strategic Implications, in: *Security Challenges* 13.1 (2017), pp. 1–18, here pp. 2–3; Joel Wuthnow: Beyond Imposing Costs: Recalibrating US Strategy in the South China Sea, in: *asia policy* 24.1 (2017), pp. 123–138, here p. 129; Andrew Scobell: The South China Sea and US-China Rivalry, in: *Political Science Quarterly* 133.2 (2018), pp. 199–225, here pp. 202, 216; Steven Stashwick: Getting Serious about Strategy in the South China Sea, in: *Naval War College Review* 71.4 (2018), pp. 131–136, here p. 132; Hal Brands/Zack Cooper: Getting Serious about Strategy in the South China Sea, in: *Naval War College Review* 71.1 (2018), pp. 12–32, here p. 16.

<sup>70</sup>Stocker: Nonintervention: Limited Operations in the Littoral Environment (see n. 69), p. 52; Peter A Dutton: China’s maritime disputes in the East and South China Seas, in: *Naval War College Review* 67.3 (2014), pp. 7–19, here p. 10; Fargo: Walking the Talk in the South China Sea (see n. 69), p. 60; Dutton: A maritime or continental order for Southeast Asia and the South China Sea? (see n. 69), pp. 5–7; Tiffany Ma/Michael Wills: Raising the stakes: the interests of non-claimant states in the South China Sea disputes, in: *asia policy* 2016, pp. 2–5, here p. 2; Erickson: America’s Security Role in the South China Sea (see n. 9), p. 18; James R Holmes/Toshi Yoshihara: Deterring China in the “Gray Zone”: Lessons of the South China Sea for US Alliances, in: *Orbis* 61.3 (2017), pp. 322–339, here p. 324; Scobell: The South China Sea and US-China Rivalry (see n. 69), p. 216; Stashwick: Getting Serious about Strategy in the South China Sea (see n. 69), p. 132; Brands/Cooper: Getting Serious about Strategy in the South China Sea (see n. 69), p. 16.

<sup>71</sup>Dutton: A maritime or continental order for Southeast Asia and the South China Sea? (see n. 69), pp. 5–8; Ma/Wills: Raising the stakes: the interests of non-claimant states in the South China Sea disputes (see n. 70), p. 3; Erickson: America’s Security Role in the South China Sea (see n. 9), p. 18; Holmes/Yoshihara: Deterring China in the “Gray Zone”: Lessons of the South China Sea for US Alliances (see n. 70), p. 324; James Kraska/Raul Pedrozo: The Free Sea: The American Fight for Freedom of Navigation, 2018, pp. 282–283; Stashwick: Getting Serious about Strategy in the South China Sea (see n. 69), p. 131;

Overwhelmingly, the mainstream international security literature portrays the U.S. ‘defense’ of freedom of the seas, defined as global access, as a benevolent burden upheld for the sake of a stable and prosperous international order for all.<sup>72</sup> American actions are not portrayed as serving U.S. national interests, but the interests of international society. Even Andrew Scobell, who emphasizes the U.S. Navy’s orientation towards Mahanian command of the sea and the enduring interest of the United States to protect “the homeland,” argues that “U.S. strategy in the South China Sea” is oriented to defend freedom of the seas as a normative concept.<sup>73</sup> Scobell describes freedom of the seas as “the higher principle to which the United States and other liberal democracies subscribe”.<sup>74</sup> Additionally, while Suk Lee and Young Lee attribute U.S. freedom of navigation operations to national security interests, they argue that FONOPs are conducted to uphold the rules-based international order, and specifically UNCLOS, which has secondary effects that provide conditions for “the maintenance of superior [U.S.] military power,” “reassuring the U.S.-Japanese military alliance,” and “creating strategic ties with ASEAN countries.”<sup>75</sup> This stands in contrast to the explanation this dissertation will offer that, within U.S. foreign policy, freedom of the seas discourse directly works to facilitate a maritime sphere of influence for the benefit of the United States rather than for the global community.

Within the literature, there are a number of recurrent justifications for why the United States’ political-military strategy in the South China Sea rests on freedom of the seas discourse and focuses on FONOPs. Scholars press the argument that the U.S. must “use it

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Brands/Cooper: Getting Serious about Strategy in the South China Sea (see n. 69), pp. 16, 26.

<sup>72</sup>Dutton: China’s maritime disputes in the East and South China Seas (see n. 70), p. 10; Dutton: A maritime or continental order for Southeast Asia and the South China Sea? (see n. 69), pp. 6, 8; Ma/Wills: Raising the stakes: the interests of non-claimant states in the South China Sea disputes (see n. 70), p. 3; Kraska/Pedrozo: The Free Sea: The American Fight for Freedom of Navigation (see n. 71), p. 4.

<sup>73</sup>Scobell: The South China Sea and US-China Rivalry (see n. 69), p. 218.

<sup>74</sup>Ibid., p. 218.

<sup>75</sup>Kyung Suk Lee/Kyu Young Lee: US freedom of navigation operations in South China Sea: An ongoing riddle between the United States and China, in: Korean journal of defense analysis 29.3 (2017), pp. 455–473, here pp. 459–460.

or lose it.”<sup>76</sup> Meaning that if the United States does not push back against encroachments on the legal right of access, the international norm will erode and such access will be denied.<sup>77</sup> The corollary to this argument is that by refusing to acknowledge the extra territorial claims, U.S. FONOPs actively deny legitimacy to such claims.<sup>78</sup> Some scholars in this field also argue that pushing back on the maritime claims will have a disciplining effect on China and cause them to fall in line with a rule-based international order.<sup>79</sup>

Scholars of a more realist orientation do not dispute the validity of the above arguments, rather they emphasize that, in tandem, the United States needs to further its diplomatic and military efforts to counter, or contain, Chinese advances.<sup>80</sup> As Andrew Erickson of the U.S. Naval War College argues, developing military capabilities and international partners to push back against Chinese expansionism is essential to ensure maritime access and is needed for the current era of great power competition defined by “competitive coexistence”.<sup>81</sup>

Robert Gilpin has advanced an argument that this work tangentially speaks to. While not speaking on the Sino-American confrontation in the South China Sea specifically, Gilpin’s 1981 book, *War & Change in World Politics* advances an argument that has the potential to

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<sup>76</sup>Kraska/Pedrozo: *The Free Sea: The American Fight for Freedom of Navigation* (see n. 71), pp. 282–283.

<sup>77</sup>Sam Bateman: *Some Thoughts on Australia and the Freedoms of Navigation*, in: *Security Challenges* 11.2 (2015), pp. 57–67, here p. 63; Kraska/Pedrozo: *The Free Sea: The American Fight for Freedom of Navigation* (see n. 71), p. 282.

<sup>78</sup>Fargo: *Walking the Talk in the South China Sea* (see n. 69), p. 61; Erickson: *America’s Security Role in the South China Sea* (see n. 9), p. 18; Sébastien Colin et al.: *China, the US, and the Law of the Sea*, in: *China Perspectives* 2016, p. 57, here pp. 58, 60; Alexandra Sophie Marksteiner: *It’s Not All FON and Games: US “Freedom of Navigation” Operations and the Legal Debate Surrounding Innocent Passage*. In: *Hemispheres* 40 (2017), p. 23; Kraska/Pedrozo: *The Free Sea: The American Fight for Freedom of Navigation* (see n. 71), pp. 282–283; Brands/Cooper: *Getting Serious about Strategy in the South China Sea* (see n. 69), p. 20; Scobell: *The South China Sea and US-China Rivalry* (see n. 69), p. 219.

<sup>79</sup>Henry J Kenny: *The South China Sea: A Dangerous Ground*, in: *Naval War College Review* 49.3 (1996), pp. 96–108, here p. 103; M Taylor Fravel: *US policy towards the disputes in the South China Sea since 1995 [Policy Report]*, 2014, p. 2.

<sup>80</sup>Fargo: *Walking the Talk in the South China Sea* (see n. 69), p. 59; Dutton: *A maritime or continental order for Southeast Asia and the South China Sea?* (see n. 69), pp. 6, 8; Erickson: *America’s Security Role in the South China Sea* (see n. 9), pp. 12–13; Holmes/Yoshihara: *Deterring China in the “Gray Zone”: Lessons of the South China Sea for US Alliances* (see n. 70), pp. 325–327; Wuthnow: *Beyond Imposing Costs: Recalibrating US Strategy in the South China Sea* (see n. 69), pp. 130–135; Brands/Cooper: *Getting Serious about Strategy in the South China Sea* (see n. 69), p. 27.

<sup>81</sup>Erickson: *America’s Security Role in the South China Sea* (see n. 9), pp. 13, 15.



explain the driving factor of contention in the region.<sup>82</sup> Gilpin asserts that as the interests and balance of capabilities change in the international system, actors who have the capacity to shape the international system in their favor will do so “until an equilibrium is reached between the costs and benefits of further change”.<sup>83</sup> The international system that arises after such change is one which reflects “the new distribution of power and the interests of its new dominant members.”<sup>84</sup> Confrontation arises, however, when the capabilities of one state changes to such a degree that there develops a strong incentive to try to change the international system to reflect their interests.<sup>85</sup>

Unlike Gilpin’s thesis, this dissertation neither sets out to provide an enduring theory of international political change nor explain the relational dynamics driving conflict in the Sino-American South China Sea dispute. While it may be the case that a change in the balance of capabilities is prompting China to take a revisionist stance in the South China Sea, this work specifically aims to analyze American political-military strategy in the region, predicated on freedom of the seas discourse, to show that in an era of maritime great power competition, strategies predicated on a discourse that assumes naval preponderance is “more dangerous than would otherwise appear.”<sup>86</sup> This dissertation complements, rather than refutes, Gilpin’s project by providing a reflexive analysis of the political-military strategy used by the declining hegemon to contest a challenger in a time of hierarchically muddled regional capabilities. Rather than arguing that it is the misinterpretation of the balance of power that is driving conflict, this work asserts that there is a disjuncture between desired the ends of the United States from available means that is adding fuel to the fire in the South China Sea dispute. This disjuncture is manifest in the American political-military strategy

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<sup>82</sup>Robert Gilpin: War and change in world politics, 1981.

<sup>83</sup>Ibid., pp. xi–xii.

<sup>84</sup>Ibid., p. 1.

<sup>85</sup>Ibid., p. 14.

<sup>86</sup>Garland: What is a “history of the present”? On Foucault’s genealogies and their critical preconditions (see n. 2), p. 372.

predicated on freedom of the seas discourse. While a reflexive understanding of American political-military strategy rooted in freedom of the seas discourse may not mitigate underlying tensions between the United States and China as a whole, this post-structural project undertakes the more limited aim of seeking to expose potential avenues for creativity and change in U.S. strategic policy towards the dispute that may better enable the United States to navigate this period of contention.

The only work published to date that looks at the concept of freedom of the seas in U.S. foreign policy from a historical perspective, James Kraska and Raul Pedrozo's, *The Free Sea: The American Fight for Freedom of Navigation*, reinforces the conception of freedom of the seas as an *a priori* good to be defended against Chinese transgressions. The 2018 book by Kraska and Pedrozo was developed in conjunction with the U.S. Naval War College Stockton Center for International Law, where James Kraska serves as Chairman and Howard S. Levie Professor and Raul Pedrozo as visiting fellow.<sup>87</sup> As opposed to showing how the discourse evolved through U.S. foreign policy in order to speak critically to the present international security situation, Kraska and Pedrozo project the contemporary 'objective' idea of 'freedom of the seas as access' onto the past. Serving as an example of the kind of history Nietzsche and Foucault sought to expel, Kraska and Pedrozo's work de-historicizes the concept of freedom of the seas and seeks to uncritically justify American naval aggrandizement and the continuance of freedom of navigation operations against China. *The Free Sea* presents freedom of the seas as a self-evident interest that not only has been consistently and uniformly championed in U.S. foreign policy, but also represents a torch that has been passed down from the great empires of history to the United States today.<sup>88</sup> This empirically has not been the case.

In their empirical analysis, Kraska and Pedrozo gloss over inconvenient periods of history

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<sup>87</sup>Kraska/Pedrozo: *The Free Sea: The American Fight for Freedom of Navigation* (see n. 71).

<sup>88</sup>*Ibid.*, p. 2.

that do not support their normative argument. For example, Kraska and Pedrozo's work excludes discussion of the 100 years between 1814 and 1914. During that important time period, freedom of the seas became institutionalized in international legal conventions and the United States Navy underwent significant doctrinal changes which, along with concomitant technological commitments, had a tremendous impact on freedom of the seas discourse. Further, in the three and a half pages spent covering the entire Second World War, Kraska and Pedrozo fail to recognize the paradigm shift that occurred within freedom of the seas discourse through, and as a result of, the establishment of the American Neutrality Zone.<sup>89</sup> The majority of the book (Chapters 5-10) focuses on isolated Cold War incidents that support the authors' monumentalization of 'freedom of the seas as access' in order to build a false historical foundation under the current U.S. South China Sea policy.<sup>90</sup> Thus, Kraska and Pedrozo's book serves more as a piece of propaganda than a work of scholarship. By employing a genealogical approach, this dissertation aims to substantively contribute to the conversation surrounding the South China Sea dispute by tearing down the presentist representation upheld by Kraska and Pedrozo in order to expose the dangers in taking freedom of the seas as a self evident goal and to illuminate new conceptualizations of American South China Sea strategy.

## Critical Security Studies

The present work fits within the literature of critical security studies to the degree that it opposes mainstream, realist, positivist conceptions of security.<sup>91</sup> It speaks to this literature because critical security studies has positioned itself as a bastion for alternative perspectives

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<sup>89</sup>Ibid., pp. 94–97.

<sup>90</sup>Ibid., pp. 98–246.

<sup>91</sup>Keith Krause/Michael C Williams: *From Strategy to Security: Foundations of Critical Security Studies*, in: idem (eds.): *Critical security studies: Concepts and strategies*, 1997, pp. 36–38; Ken Booth: *Security and Self: Reflections of a Fallen Realist*, in: Keith Krause/Michael C Williams (eds.): *Critical security studies: Concepts and strategies*, 1997, pp. 84, 107; Richard Wyn Jones: *On Emancipation: Necessity, Capacity, and Concrete Utopias*, in: Ken Booth (ed.): *Critical security studies and world politics*, 2005, p. 215.

on security issues and indeed celebrates heterogeneity of scholarship rather than imposing a “straightjacket” of orthodoxy via the establishment of “criteria for inclusion and exclusion”.<sup>92</sup> Critical security studies has been referred to as a “typological device” that describes postpositivist international relations scholarship on security studies.<sup>93</sup> Conventionally, the project of critical security studies seeks to de-center the sovereign state and expand the scope of security studies beyond interstate military issues to topics that have become salient in the ‘post-Cold War period’.<sup>94</sup> The focus of study tends to problematize security itself and examine “what it is that is being secured”.<sup>95</sup> In doing so it opposes the neo-realist assumption that the state is the natural referent object of security.<sup>96</sup> While studies utilizing a state-based ontology to study military conflict are not excluded from the interdisciplinary home of critical security studies, the sub-disciplinary project aims to push beyond this stance.<sup>97</sup>

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<sup>92</sup>Keith Krause/Michael C Williams: *Critical security studies: Concepts and strategies*, 1997, pp. viii–ix; Wyn Jones: *On Emancipation: Necessity, Capacity, and Concrete Utopias* (see n. 91), p. 215; Claudia Aradau: *Security, war, violence—the politics of critique: A reply to Barkawi*, in: *Millennium* 41.1 (2012), pp. 112–123, here pp. 112–113.

<sup>93</sup>Wyn Jones: *On Emancipation: Necessity, Capacity, and Concrete Utopias* (see n. 91), p. 215.

<sup>94</sup>Ken Booth: *Security and emancipation*, in: *Review of International Studies* 17.4 (1991), pp. 313–326, here pp. 318, 320; Barry Buzan et al.: *Security: A new framework for analysis*, 1998, pp. 1, 34–35; Krause/Williams: *Critical security studies: Concepts and strategies* (see n. 92), p. x; Simon Dalby: *Contesting the Essential Concept: Reading the Dilemmas in Contemporary Security Discourse*, in: Keith Krause/Michael C Williams (eds.): *Critical security studies: Concepts and strategies*, 1997, pp. 4, 6; Krause/Williams: *From Strategy to Security: Foundations of Critical Security Studies* (see n. 91), pp. 34, 43–45; R.B.J. Walker: *The Subject of Security*, in: Keith Krause/Michael C Williams (eds.): *Critical security studies: Concepts and strategies*, 1997, pp. 62, 65, 71; Booth: *Security and Self: Reflections of a Fallen Realist* (see n. 91), pp. 85–87; Rita Floyd: *Towards a consequentialist evaluation of security: bringing together the Copenhagen and the Welsh Schools of security studies*, in: *Review of International Studies* 33.2 (2007), pp. 327–350, here pp. 327–328.

<sup>95</sup>Krause/Williams: *Critical security studies: Concepts and strategies* (see n. 92), pp. ix, x, xiv; idem: *From Strategy to Security: Foundations of Critical Security Studies* (see n. 91), pp. 34–35, 39; Aradau: *Security, war, violence—the politics of critique: A reply to Barkawi* (see n. 92), p. 115; Stefano Guzzini: *A dual history of “securitisation”*, 2015, p. 9.

<sup>96</sup>Michael C Williams: *Modernity, identity and security: a comment on the ‘Copenhagen controversy’*, in: *Review of International Studies* 24.3 (1998), pp. 435–439, here p. 435; Krause/Williams: *Critical security studies: Concepts and strategies* (see n. 92), pp. ix, x, xiv; idem: *From Strategy to Security: Foundations of Critical Security Studies* (see n. 91), pp. 34–35, 39; Aradau: *Security, war, violence—the politics of critique: A reply to Barkawi* (see n. 92), p. 115.

<sup>97</sup>Krause/Williams: *Critical security studies: Concepts and strategies* (see n. 92), p. xvi; Booth: *Security and Self: Reflections of a Fallen Realist* (see n. 91), p. 107; Aradau: *Security, war, violence—the politics of critique: A reply to Barkawi* (see n. 92), p. 114.

## Critical Strategic Studies

The work at hand would more comfortably fall into the nascent critical strategic studies literature.<sup>98</sup> Critical strategic studies separates itself as a literature by looking at strategy, rather than security, war,<sup>99</sup> or militarism,<sup>100</sup> as the referent object of critical study. While authors writing in critical strategic studies would chafe at being included in a critical security studies section,<sup>101</sup> it is the opinion of the author that the critical strategic studies literature is not yet established enough to stand on its own. Therefore, for the present purposes it can be thought to exist as a tradition on the conservative fringe of the far ranging critical security studies literature. However, whereas the broader project of critical security studies primarily aims to de-center both the ontological and epistemological foundations of the structuralist perspectives of International Relations, critical strategic studies simply incorporates a post-positivist epistemology into the study of military strategy and leaves state based ontology in place.<sup>102</sup>

By bringing post-positivist epistemology into the study of strategy, critical strategic studies seeks to introduce reflexivity into “strategic thinking in order to unveil all the possibilities of the present.”<sup>103</sup> By placing reflexivity at the heart of critical strategic studies, the tradi-

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<sup>98</sup>Tarak Barkawi/Shane Brighton: Powers of war: fighting, knowledge, and critique, in: *International Political Sociology* 5.2 (2011), pp. 126–143; Philippe Dufort: The Influence of Changing Understanding of Power over Strategy: A Genealogical Essay, in: *Revista Científica General José María Córdova* 15.19 (2017), pp. 29–81.

<sup>99</sup>Barkawi/Brighton: Powers of war: fighting, knowledge, and critique (see n. 98); Tarak Barkawi: From war to security: Security studies, the wider agenda and the fate of the study of war, in: *Millennium* 39.3 (2011), pp. 701–716.

<sup>100</sup>Victoria M Basham/Aaron Belkin/Jess Gifkins: What is critical military studies?, 2015.

<sup>101</sup>Dufort: The Influence of Changing Understanding of Power over Strategy: A Genealogical Essay (see n. 98), pp. 71–74.

<sup>102</sup>Tarak Barkawi: Strategy as a vocation: Weber, Morgenthau and modern strategic studies, in: *Review of International Studies* 24.2 (1998), pp. 159–184, here p. 168; Dufort: The Influence of Changing Understanding of Power over Strategy: A Genealogical Essay (see n. 98), pp. 32, 62.

<sup>103</sup>Barkawi: Strategy as a vocation: Weber, Morgenthau and modern strategic studies (see n. 102), p. 168; Dufort: The Influence of Changing Understanding of Power over Strategy: A Genealogical Essay (see n. 98), p. 32; Philippe Beaulieu-B/Philippe Dufort: Conclusion: Researching the Reflexive Turn in Military Affairs & Strategic Studies, in: *Journal of Military and Strategic Studies* 17.4 (2017), pp. 277, 288.

tion moves away from deterministic structural conceptions of strategic thinking. This work's genealogical project, which calls into question the discourse that lies unquestioningly at the heart of contemporary American political-military strategy in the South China Sea, is particularly suited to contribute to this tradition. By introducing reflexivity into the study of strategy, critical strategic studies meshes well with this dissertation's goal of, borrowing from Nietzsche, trampling on the piety of the so-called 'objective' value of freedom of the seas in order to expose new avenues of action in the present.

Most of the work consciously done under the banner of critical strategic studies, has focused on praxis. Critical strategic scholars engaged with praxis have aimed to displace 'objective rationality' and incorporate reflexive strategic analysis into military education, military design, and operational planning.<sup>104</sup> Theoretical scholarship in this vein, though not necessarily explicitly affiliated with critical strategic studies, has centered on challenging cultural and conceptual biases at the core of political-military strategy.<sup>105</sup> This theoretical branch of work spills over into the wider gamut of post-positivist security studies and co-

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<sup>104</sup>Theo Farrell: Culture and military power, in: *Review of International Studies* 24.3 (1998), pp. 407–416, here p. 407; Christopher R Papparone: Beyond Ends-Based Rationality: A Quad-Conceptual View of Strategic Reasoning for Professional Military Education, in: *Teaching Strategy: Challenge and Response* 2010, p. 313; Vandra Harris/Aaron P Jackson: Learning each other's language: Doctrine and AFP-ADF interoperability, in: *Security Challenges* 7.4 (2011), pp. 103–119; Ben ZweiBelson: Three design concepts introduced for strategic and operational applications, in: *Prism* 4.2 (2013), pp. 87–104; Francis Clermont: The art of being a soldier-diplomat: From an implicit role to an explicit function, in: *Canadian Military Journal* 15.2 (2015), pp. 25–35; Philippe Dufort/Philippe Beaulieu-B (eds.): *Special Issue: Reflexive Military Practitioners: Design Thinking and Beyond*, 2017; Aaron P Jackson: Innovative within the Paradigm: The Evolution of the Australian Defence Force's Joint Operational Art, in: *Security Challenges* 13.1 (2017), pp. 59–80.

<sup>105</sup>Ken Booth: Strategy and ethnocentrism, 1979; Carol Cohn: Sex and death in the rational world of defense intellectuals, in: *Signs: Journal of women in culture and society* 12.4 (1987), pp. 687–718; Theo Farrell: America's misguided mission, in: *International Affairs* 76.3 (2000), pp. 583–592; idem: Transnational norms and military development: Constructing Ireland's professional army, in: *European Journal of International Relations* 7.1 (2001), pp. 63–102; idem: Transnational norms and military development: Constructing Ireland's professional army (see n. 105); Tarak Barkawi/Mark Laffey: The postcolonial moment in security studies, in: *Review of International Studies* 32.2 (2006), pp. 329–352; Patrick Porter: Military orientalism: Eastern war through Western eyes, 2009; Grant Martin: Zero dark squared: Does the US benefit from more Special Operations Forces?, in: *International Journal* 69.3 (2014), pp. 413–421; Daniel G Cox/Alex Ryan: Countering Insurgency and the Myth of "The Cause", in: *Journal of Strategic Security* 8.1-2 (2015), pp. 43–62.

mingles with post-colonialist, feminist, and constructivist literatures. Thus, tying firmly back into the conceptualization of critical security studies as a broad “typological device”.<sup>106</sup>

Empirically, within the critical strategic studies tradition no work has been done to introduce a reflexive postpositivist epistemology into the study of naval policy at all, let alone to critically engage with the discourse of freedom of the seas in the South China Sea dispute. Within the wider critical security studies, John Odom has written on freedom of the seas discourse in the context of foreign policy, however, the article proposes a way that policy makers might “clarify what they mean” when discussing freedom of the seas in order to “reduce the risk of misunderstanding”.<sup>107</sup> The work by Jonathan Odom strives to “capture the concept of freedom effectively” as opposed probing deeper on whether there is maritime ‘freedom’ at all.<sup>108</sup>

This dissertation contributes to the international security conversation surrounding the South China Sea dispute by radically historicizing the principle upon which U.S. foreign policy in the region is based. Doing so will show the recent emergence of a concept portrayed as historic and foundational, as well as expose the historical conditions upon which contemporary freedom of the seas discourse depends today. This dissertation contributes to the critical strategic studies literature, in tandem with the larger critical security studies literature, by showing that contemporary U.S. political-military strategy towards China in the South China Sea region is “more dangerous than would otherwise appear”.<sup>109</sup> No prior work has been done to study the South China Sea dispute from a critical strategic perspective, let alone to destabilize the discourse of freedom of the seas that lies at the heart of contemporary United States political-military operations in the region. The present dissertation fills this

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<sup>106</sup>Wyn Jones: *On Emancipation: Necessity, Capacity, and Concrete Utopias* (see n. 91), p. 215.

<sup>107</sup>Jonathan G Odom: *Navigating Between Treaties and Tweets: How to Ensure Discourse about Maritime Freedom Is Meaningful*, in: *Ocean Development & International Law* 49.1 (2018), pp. 1–51, here p. 1.

<sup>108</sup>*Ibid.*, p. 2.

<sup>109</sup>Garland: *What is a “history of the present”?* *On Foucault’s genealogies and their critical preconditions* (see n. 2), p. 372.

gap in the literature.

## Outline of the Work

The following chapter, Chapter 1, will provide an in depth look at the contemporary international security situation in the South China Sea from the perspective of the United States. Chapter 1 will outline Chinese actions in the region, such as territorial claims, military expansionism, and the application of domestic law on the region's high seas, which the United States argues are in violation of the principle of freedom of the seas. This chapter will discuss the political-military operations that the United States undertakes in order to 'defend' the principle of freedom of the seas in the South China Sea and the military 'incidents' that have resulted from the American operations in the region. Chapter 1 will highlight how freedom of the seas lies at the heart of the Trump administration's strategic vision for the region, a "Free and Open Indo-Pacific."<sup>110</sup> Further, Chapter 1 will problematize the American representation of the 'problem' in the South China Sea.

Chapter 2 discusses the argument that will be made in the conduct of this genealogy. Chapter 2 will argue that rather than championing the altruistic principle of global access on behalf of the liberal-rules based international order, the contemporary discourse of freedom of the seas functions as a mechanism of sea control for the United States. This chapter argues that freedom of the seas discourse takes on the role of preempting *de jure* sovereign claims over the world's high seas so that the U.S. can establish a global maritime sphere of influence and dominate via *imperium*. Because of this, Chapter 2 argues that freedom of the seas discourse is fundamentally unsuited for an era of maritime great power competition. The remainder of the dissertation empirically details the historical accidents that gave rise to this contemporary conceptualization in U.S. foreign policy.

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<sup>110</sup>A Free and Open Indo-Pacific, Advancing a Shared Vision (see n. 7).



The empirical portion of the work is divided into two sections. While this project traces the singular discourse of freedom of the seas, the sections represent the discourse before and after it underwent a radical shift in meaning from a discourse of trade to a discourse of security. The two sections are respectively categorized as *Mare Liberum* and *Mare Imperium* to represent the change in discursive conceptualization. The first section, Chapter 3 through Chapter 6, will chronicle the trade discourse of freedom of the seas in U.S. foreign policy before it shifted to a security discourse. The trade discourse of freedom of the seas followed the Grotian conceptualization that emphasized the ability of all states to engage in unhindered trade with one another. Specifically, this *Mare Liberum* conceptualization of freedom of the seas centered around the right for neutral and impartial states to continue to trade during times of war.

Chapter 3 will begin the genealogy's empirical analysis at the start of United States history, the American Revolution. This chapter will describe freedom of the seas discourse in U.S. foreign policy before a commonly agreed upon basket of practices comprised the discourse in world politics. During this time period, the primary interference with international trade arose during times of war, when belligerent powers sought to wage economic warfare by preventing all material aid from reaching their enemies. The debate surrounding freedom of the seas regarded what rights neutral, and impartial, countries had to continue to trade on the high seas during times of war. Chapter 3 discusses the disagreements between neutral rights, expressed in terms of freedom of the seas discourse, and unilaterally imposed conceptions of belligerent rights. Chapter 3 will show how the United States utilized the concept of freedom of the seas in order to establish bilateral treaties with European states to secure support against the British and to win recognition of sovereign American independence. Chapter 3 shows that the United States was quick to forsake the principle of freedom of the seas in pursuit of other foreign policy goals, such as American independence and non-entanglement in European conflicts. Chapter 3 traces the utilization of freedom of

the seas discourse through the War of 1812.

Chapter 4 discusses the institutionalization of freedom of the seas discourse and the United State's resistance to any international legal covenant enshrining the principle that would hinder American national security. Chapter 4 discusses how the United States refused to adhere to the 1856 Declaration of Paris Respecting Maritime Law because it contained a provision outlawing privateers. During the time period, the United States did not have a large standing Navy and depended on privateers to engage in enemy commerce raiding if the need arose. Rather than join the Declaration of Paris which institutionalized a conceptualization of freedom of the seas based on the neutral rights doctrine of 'free ships, free goods,' the United States advocated a more liberal policy that all private property should be immune from seizure on the high seas. This more liberal principle would have abolished all forms of commerce raiding from privateers and ships of war alike. Chapter 4 traces both the American opposition to the 1856 Declaration of Paris, and the reluctant acceptance of its principles during the American Civil War. Chapter 4 documents a time period ranging from the Crimean War through the end of the American Civil War.

Chapter 5 highlights the radical doctrinal and technological change that occurred within the United States Navy at the turn of the 20th century. During this time period the United States shifted away from a doctrine predicated on coastal defense and commerce raiding, towards a vision of sea power most prominently articulated by Alfred Thayer Mahan. Mahan argued that the United States should develop a large battleship navy with which to control its near seas. This doctrine of sea control was advocated in the U.S. naval establishment by prominent figures such as Secretary of the Navy Benjamin Tracy and later Assistant Secretary of the Navy, and subsequent President of the United States, Theodore Roosevelt. Both of whom knew Mahan personally. Chapter 5 discusses the solidification of the Mahanian doctrine of sea control following its successes in the Spanish-American War. Importantly, Chapter 5 shows that following the Spanish-American War, the United States refused to

deviate from advocating the principle of freedom of the seas defined as the immunity of all private property on the high seas from seizure. This chapter documents how Alfred Thayer Mahan personally, and repeatedly, tried to get the United States to abandon the principle of freedom of the seas. Mahan argued that it was no longer wise to restrict the ability of the U.S. Navy now that it could be counted among the respectable naval fleets of the world. Chapter 5 shows that although Mahan personally urged President Theodore Roosevelt to abandon the immunity principle, President Roosevelt refused. While freedom of the seas discourse played a less prominent role in the affairs of this time period, this chapter shows how the discourse remained constant in the face of enormous material, technological, and doctrinal change. Because of this, Chapter 5 plays an important role in separating this genealogical discourse analysis from purely material, realist, account of U.S. foreign policy. Chapter 5 covers the time period from 1880 through 1912 in the lead up to the First World War.

Chapter 6 discusses the American freedom of the seas discourse in relation to the First World War. This chapter shows that in the face of a major European conflict, the United States abandoned the immunity principle of freedom of the seas and pragmatically sought an agreement from the belligerents in accordance with the 'free ships, free goods' principles of neutral trade originally institutionalized in 1856. Chapter 6 shows how the United States pushed back against expansive British blockades utilizing freedom of the seas discourse, and then later used the same discourse to condemn Germany's unrestricted submarine warfare campaign in the Atlantic. Because of this, Chapter 6 shows, it was the violation of the principle of freedom of the seas defined as the right of neutral states to continue to trade during times of war that brought the United States into the First World War. Chapter 6 then details the negotiations leading up to the Treaty of Paris and President Wilson's attempt to shape the post-war world through the League of Nations. Specifically, Chapter 6 documents how President Wilson abandoned explicit codification of freedom of the seas

into the Charter of the League of Nations, though it was a primary U.S. foreign policy goal, in order to secure British acquiescence to the League.

The second group of chapters, Chapter 7 through Chapter 10, marks the shift away from the *Mare Liberum* conception of freedom of the seas and highlights the consolidation of the conception of freedom of the seas as a security discourse in U.S. foreign policy. Rather than the *Mare Liberum* discourse, which aims to protect American trade on the high seas, the *Mare Imperium* freedom of the seas discourse works to ensure an American high seas sphere of influence for national security purposes.

Chapter 7 marks the transition away from the *Mare Liberum* discourse of freedom of the seas, relating to the rights afforded to neutral trade during times of war, and towards the *Mare Imperium* discourse imbued with Mahanian sea control precepts. Chapter 7 details the shift that occurred in the discourse during and as a result of the Second World War. This chapter discusses the American Neutrality Acts which relinquished the neutral trading rights traditionally afforded to the United States under the principle of freedom of the seas. Chapter 7 then details the formation of the American Neutrality Zone. With the American Neutrality Zone, a territorial defense zone was established in order to prevent the war in Europe from spreading to the Western Hemisphere. The zone was primarily established for security purposes, with neutral trade protections assumed to naturally follow. Because of this, freedom of the seas became ensured within a territorially defined area established and maintained by military force. Chapter 7 also shows how impartiality was evacuated from the discourse of freedom of the seas after the fall of France. Freedom of the seas discourse was utilized to ship weapons and materiel, goods that were previously understood to be contraband, to Great Britain and the Allied powers to resist German advances. This chapter will show that, in U.S. foreign policy, freedom of the seas took on the meaning of preventing hostile states from gaining sea control. Freedom of the seas became synonymous with control of the sea by the ‘free world.’

Chapter 8 traces freedom of the seas discourse through the beginning of the Cold War period from the 1950s through the 1960s. During this time period the United States doubled down on the *Mare Imperium* conception of freedom of the seas discourse. Chapter 8 shows how during the UNCLOS negotiations the United States utilized freedom of the seas discourse to keep states from making expansive sovereign claims over the world's high seas. Freedom of the seas discourse was deployed in the first two law of the seas conventions to ensure the largest area of high seas space so the preponderant United States Navy could operate. By ensuring global access for the United States navy, freedom of the seas discourse facilitated the American forward defense strategy and sought to prevent the Communist states from controlling the seas. By controlling the sea on behalf of the 'free world,' the United States argued that it kept the seas free. Chapter 8 shows that, unlike the commercial motivations of *Mare Liberum* discourse, the primary motivation for Cold War era freedom of the seas discourse was motivated almost exclusively for security concerns.

Chapter 9 covers the latter half of the Cold War from the 1970s through to the end of the Cold War. Chapter 9 shows how the United States constructed an Oceans Policy following the failures at the first two UN Conventions on the Law of the Sea and, at the suggestion of the Soviet Union, participated in the Third and what would be final UN Law of the Sea convention in order to prevent unilateral claims of jurisdiction over the global high sea space. During this time period the Carter Administration began conducting what would become known as Freedom of Navigation Operations to contest what the United States perceived to be illegitimate claims of *de jure* sovereignty over the high seas. This Freedom of Navigation Program was subsequently championed by the Reagan administration.

Chapter 10, the final empirical chapter, documents the contemporary freedom of the seas discourse. Chapter 10 explores how the discourse has been used since the end of the Cold War and details how freedom of the seas discourse remained squarely centered around protecting the navigational abilities of the United States Navy. In U.S. foreign policy, freedom of the

seas remains an essential component of the United States' ability to project power around the world and intervene in crises wherever they may arise. This chapter shows that the United States holds the position that American forward deployment and power projection capabilities were essential to defend the world's commercial linkages. From the Cold War to the present, the practice of Freedom of Navigation Operations continued and became increasingly oriented towards contesting Chinese extraterritorial claims and Anti-Access/Area Denial capabilities. The Trump administration's 'free and open Indo-Pacific' strategy perpetuated the usage of freedom of the seas in order to ensure that the United States maintains the ability to project power in the event of a crisis and to forward deploy maritime forces. The Trump administration's representation of freedom of the seas discourse holds at its core the notion that the sea fundamentally must be controlled by the United States military lest it be supplanted by a new "repressive" order. Therefore, in U.S. foreign policy, freedom of the seas and American global command of the seas are discursively synonymous.

# Chapter 1

## The Contemporary South China Sea Dispute

This chapter will provide a robust overview of the points of contention driving the Sino-American South China Sea dispute from the perspective of the United States. While there are numerous other regional disputes in the South China Sea that involve more actors than China and the United States, such as the many contentious overlapping resource and territorial claims, chronicling them falls outside the scope of this work. This chapter exclusively aims to discuss the problem the United States believes it is facing in the South China Sea. For this genealogical project, it is necessary to understand the present situation before intervening in it.

### 1.1 The Problem in the South China Sea

The United States currently believes that it faces a significant problem in the South China Sea. As the U.S. understands it, this problem stems from China transgressing the principle of freedom of the seas. While not defined under international law, in contemporary U.S. foreign policy freedom of the seas is understood as the “rights, freedoms, and uses of the sea and airspace guaranteed to all nations by international law,” specifically the right to access and transit the high seas unimpeded.<sup>1</sup> The U.S. Department of Defense argues that this

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<sup>1</sup>Department of State: Department of State Maritime Security and Navigation. (see n. 3); Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), pp. 2–3;

principle of freedom of the seas, also referred to as freedom of navigation, applies to both civilian and military vessels in equal measure.<sup>2</sup> In governmental publications, the United States asserts that freedom of the seas is a historic principle that has been consistently and routinely championed by the United States throughout its history, on behalf of the global community of states.<sup>3</sup> For example, in 2020 the Congressional Research Service produced a report for the members and committees of Congress claiming that the same principle of freedom of the seas that the U.S. champions today “dates back about 400 years, to the early 1600s, and has long been a matter of importance to the United States.”<sup>4</sup> Additionally, the Department of Defense’s 2018 Freedom of Navigation Report to Congress stated that,

Throughout its history, the United States has asserted a key national interest in preserving the freedom of the seas, often calling on its military forces to protect that interest. Following independence, one of the U.S. Navy’s first missions was to defend U.S. commercial vessels in the Atlantic Ocean and Mediterranean Sea from pirates and other maritime threats. The United States went to war in 1812, in part, to defend its citizens’ rights to commerce on the seas. In 1918, President Woodrow Wilson named “absolute freedom of navigation upon the seas” as one of the universal principles for which the United States and other nations were fighting World War I. Similarly, before World War II, President Franklin Roosevelt declared that our military forces had a “duty of maintaining the American policy of freedom of the seas.”

The United States’ interest in the freedom of the seas extends beyond safeguarding vessels from the physical threats posed by pirates and submarines. Excessive maritime claims are attempts by coastal States to unlawfully restrict the free-

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U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), pp. 4, 11–12.

<sup>2</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 2; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 4.

<sup>3</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 1; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), p. 2; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2018 (see n. 1), p. 2; The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 4.

<sup>4</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 4.



doms of navigation and overflight and other lawful uses of the sea. Excessive maritime claims are made through laws, regulations, or other pronouncements that are inconsistent with international law as reflected in the Law of the Sea Convention. If left unchallenged, excessive maritime claims could infringe the rights, freedoms, and lawful uses of the sea enjoyed by the United States and other nations.<sup>5</sup>

The United States argues that in the South China Sea, China is making excessive maritime claims that put freedom of navigation in jeopardy. In response, the United States is actively conducting military operations in an attempt to defend and uphold the principle of freedom of the seas.

In the South China Sea region, China claims sovereignty over a large swath of seascape and the resources within it.<sup>6</sup> While the precise coordinates of the extraterritorial claim have not been published by the Chinese government, the contested region encapsulates approximately 2,000,000 square kilometers; nearly the entire South China Sea.<sup>7</sup> The claimed seascape is roughly delineated by what is commonly referred to as the “nine-dash line”. In 2009, China delivered a Note Verbale to the United Nations asserting “indisputable sovereignty” over the islands, waters, and subsoil rights in the South China Sea, delineated by nine dashes drawn on an attached map.<sup>8</sup>

Exclusive access to the vast subsurface and subsoil resources of the region is a primary factor motivating the militarized Chinese territorial claims.<sup>10</sup> Contemporary estimates state

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<sup>5</sup>Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2018 (see n. 1), p. 2.

<sup>6</sup>Kenny: *The South China Sea: A Dangerous Ground* (see n. 79), p. 99.

<sup>7</sup>United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs: *Limits in the Sea* (see n. 5), p. 7; Erickson: *America’s Security Role in the South China Sea* (see n. 9); Annual Report to Congress: *Military and Security Developments Involving the People’s Republic of China 2017* (see n. 11), p. 8.

<sup>8</sup>The Permanent Mission of the People’s Republic of China to the United Nations: *Note Verbale - South China Sea Claims* (see n. 5); United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs: *Limits in the Sea* (see n. 5).

<sup>10</sup>Kenny: *The South China Sea: A Dangerous Ground* (see n. 79), p. 100; Snyder: *The implications of*

that the South China Sea contains approximately 10% of the world's fish stocks, 11 billion barrels of oil and 190 trillion cubic feet of natural gas reserves.<sup>11</sup> In 1994 China became a net importer of oil.<sup>12</sup> While China's energy portfolio is still primarily centered around coal, the country's transportation infrastructure, and therefore economy, depends on steady access to oil supplies.<sup>13</sup> Thus making oil security a primary national security concern for China.<sup>14</sup> By developing the South China Sea oil reserves, China aims to reduce its dependence on foreign imports, and therefore mitigate potential foreign interference with its oil supply.<sup>15</sup> Scholars also point out larger geostrategic ambitions motivating China's desire to establish sovereignty over its near seas.<sup>16</sup> These include defending the traditional maritime approach used by imperial powers to colonize China during its "century of humiliation"<sup>17</sup> as well as utilizing regional supremacy as springboard for global hegemony.<sup>18</sup>

To secure its vast maritime territorial claim, in 2014, China began an immense island building program in the South China Sea.<sup>19</sup> China dredged thousands of tons of seabed material in order to turn small rock features and islets into artificial islands capable of

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hydrocarbon development in the South China Sea (see n. 10), p. 142; Michael Studeman: Calculating China's Advances in the South China Sea: Identifying the Triggers of "Expansionism", in: *Naval War College Review* 51.2 (1998), pp. 68–90, here p. 69; Ian James Storey: Creeping Assertiveness: China, the Philippines and the South China Sea Dispute, in: *Contemporary Southeast Asia* 1999, pp. 95–118; The Asia-Pacific Maritime Security Strategy (see n. 1); M Taylor Fravel: China's strategy in the South China Sea, in: *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 33.3 (2011), pp. 292–319; Peter Dutton: Three disputes and three objectives: China and the South China Sea, in: *Naval War College Review* 64.4 (2011), pp. 42–67.

<sup>11</sup>The Asia-Pacific Maritime Security Strategy (see n. 1).

<sup>12</sup>Kenny: The South China Sea: A Dangerous Ground (see n. 79), p. 100.

<sup>13</sup>Andrew Erickson/Lyle Goldstein: Gunboats for China's new "grand canals"? Probing the Intersection of Beijing's Naval and Oil Security Policies, in: *Naval War College Review* 62.2 (2009), pp. 43–76, here p. 45.

<sup>14</sup>*Ibid.*, p. 48.

<sup>15</sup>*Ibid.*, pp. 53–54.

<sup>16</sup>Kenny: The South China Sea: A Dangerous Ground (see n. 79), p. 100; Erickson/Goldstein: Gunboats for China's new "grand canals"? Probing the Intersection of Beijing's Naval and Oil Security Policies (see n. 13), p. 44; James E Fanell: China's Global Naval Strategy and Expanding Force Structure, in: *Naval War College Review* 72.1 (2019), pp. 10–55, here p. 12.

<sup>17</sup>Kenny: The South China Sea: A Dangerous Ground (see n. 79), p. 100; Erickson/Goldstein: Gunboats for China's new "grand canals"? Probing the Intersection of Beijing's Naval and Oil Security Policies (see n. 13), p. 44.

<sup>18</sup>Fanell: China's Global Naval Strategy and Expanding Force Structure (see n. 16), p. 12.

<sup>19</sup>Erickson: America's Security Role in the South China Sea (see n. 9), p. 9.

supporting military installations.<sup>20</sup> As of 2016, two-thousand acres, or eight-million square meters, of land have been built within the “nine-dash line” region.<sup>21</sup> This “Great Wall of Sand” is built with the intention of “safeguarding” China’s territorial sovereignty and meeting China’s “military defense needs” in the region.<sup>22</sup> On Fiery Cross Reef, Subi Reef, and Mischief Reef in the Spratly island chain, for example, airfields have been constructed capable of supporting large military transport aircraft.<sup>23</sup> On Woody Island, in the Paracel island chain, surface to air missile systems have been deployed and a “regiment” of J-B11 fighter jets have been stationed.<sup>24</sup> The U.S. Department of Defense stated that while these new features do not confer new legitimacy to China’s extraterritorial claims, they do boost China’s military presence in the region and increase its ability to control the maritime space.<sup>25</sup>

According to the United States, China’s claims are made squarely in violation of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>26</sup> Formalized in 1982, the UN Convention on the Law of the Seas remains the primary legal framework that governs the world’s oceans.<sup>27</sup> UNCLOS designates and delineates sovereign maritime territory in the world’s oceans based on physical features of the terrain and continental shelf. To realize its goal of “a just and equitable international economic order, which takes into account the interests and needs of mankind as a whole,” UNCLOS aims to divide up exclusive maritime

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<sup>20</sup>Ibid., p. 9.

<sup>21</sup>Erickson: America’s Security Role in the South China Sea (see n. 9), p. 9; Huy Duong: Massive Island-Building and International Law, url: <https://amti.csis.org/massive-island-building-and-international-law/>.

<sup>22</sup>Erickson: America’s Security Role in the South China Sea (see n. 9), p. 9.

<sup>23</sup>Annual Report to Congress: Military and Security Developments Involving the People’s Republic of China 2017 (see n. 11), p. 10.

<sup>24</sup>Ibid., p. 10.

<sup>25</sup>Brian B Barnes/Chuanmin Hu: Island building in the South China Sea: detection of turbidity plumes and artificial islands using Landsat and MODIS data, in: Scientific reports 6 (2016), p. 33194; Annual Report to Congress: Military and Security Developments Involving the People’s Republic of China 2017 (see n. 11), pp. 9–10.

<sup>26</sup>A Free and Open Indo-Pacific, Advancing a Shared Vision (see n. 7), p. 23.

<sup>27</sup>Bernaerts: Bernaerts’ Guide to the 1982 United Nations Convention on the Law of the Sea: Including the Text of the 1982 Un Convention & Agreement Concerning Part XI of 1994 (see n. 8).

territory so that states can take advantage of available material resources.<sup>28</sup> As it stands, each state possesses a 12 nautical mile zone of territorial waters from its coastline, wherein it exercises sovereignty “subject to the right of innocent passage and other rules of international law”.<sup>29</sup> Past 12 nautical miles, the ocean legally becomes international waters. However, up to 24 nautical miles each state can “exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations”.<sup>30</sup> Additionally, each state possesses an exclusive economic zone (EEZ) that stretches from the nation’s baseline out to 200 nautical miles. While still international waters, within this zone the state has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources” as well as “the establishment and use of artificial islands, installations and structures.”<sup>31</sup> However, because EEZs are legally international waters, according to UNCLOS all nations still have the right to “the freedoms of navigation, overflight, laying and maintenance of submarine cables, and other uses related to these freedoms” within them just as they would on the high seas.<sup>32</sup>

China maintains that the island territories within the nine-dash line region are legitimate historic claims dating back centuries.<sup>33</sup> However, the United States refuses to accept such claims. The U.S. Department of State’s 2017 strategic White Paper titled, *A Free and Open Indo-Pacific: Advancing a Shared Vision* clearly states, “PRC maritime claims in the South China Sea, exemplified by the preposterous nine-dash line, are unfounded, unlawful, and unreasonable.”<sup>34</sup> The report continues stating, “These claims ... are without legal, historic,

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<sup>28</sup>Bernaerts: Bernaerts’ Guide to the 1982 United Nations Convention on the Law of the Sea: Including the Text of the 1982 Un Convention & Agreement Concerning Part XI of 1994 (see n. 8).

<sup>29</sup>Ibid.

<sup>30</sup>Ibid.

<sup>31</sup>Ibid.

<sup>32</sup>Ibid.

<sup>33</sup>Dutton: Three disputes and three objectives: China and the South China Sea (see n. 10), pp. 45–48; Mohan Malik: Historical Fiction: China’s South China Sea Claims, in: *World Affairs* 176.1 (2013), pp. 83–90, here p. 88.

<sup>34</sup>*A Free and Open Indo-Pacific, Advancing a Shared Vision* (see n. 7), p. 23.

or geographic merit”.<sup>35</sup>

From the perspective of the United States, the crux of the issue at the heart of the Sino-American South China Sea dispute is not simply that China is making excessive territorial claims, but also that they are attempting to apply domestic law to the sea space surrounding its territorial claims. This application of domestic law is made with regards to both its continental shores and militarized island positions throughout the region.<sup>36</sup> Specifically, China insists on the right to prevent foreign military vessels from operating within its EEZ, including intelligence and military survey ships.<sup>37</sup> As opposed to “the broader U.S./Western definition of freedom of navigation (aka freedom of the seas),” China perceives freedom of navigation as applying only to commercial shipping vessels transiting international waters.<sup>38</sup> It is this attempt to restrict transit rights of military vessels that, from the perspective of the United States, infringes upon the principle of freedom of the seas and fuels Sino-American contention in the region.<sup>39</sup> According to the Congressional Research Service, the United States takes the position, along with the majority of states (all but 27)<sup>40</sup>, that while UNCLOS permits the control of EEZs for the purpose of resource harvesting, it does not permit states to “regulate foreign military activities in the parts of their EEZs beyond 12-nautical-mile territorial waters.”<sup>41</sup>

The application of domestic law within EEZs is a separate issue from Chinese maritime territorial claims, however, the two are necessarily intertwined.<sup>42</sup> Chinese claims of sovereignty

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<sup>35</sup>Ibid., p. 23.

<sup>36</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 43.

<sup>37</sup>Ibid., pp. 7, 42.

<sup>38</sup>Ibid., pp. 10–11.

<sup>39</sup>Ibid., pp. 7, 43.

<sup>40</sup>Bangladesh, Brazil, Burma, Cambodia, Cape Verde, China, Egypt, Haiti, India, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Portugal, Saudi Arabia, Somalia, Sri Lanka, Sudan, Syria, Thailand, United Arab Emirates, Uruguay, Venezuela, and Vietnam have implemented restrictions that would restrict the navigation of foreign warships beyond their 12 nautical mile territorial seas.

<sup>41</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), pp. 7, 38.

<sup>42</sup>Ibid., p. 7.

over the islands and features of the South China Sea give it cause to declare new EEZs around such features and to use its regional militarization to unilaterally impose its domestic laws in the surrounding sea space.<sup>43</sup> However, even if China retracted all territorial claims in the region and rolled back its military outposts, China would still prohibit foreign military vessels from operating in international waters off the coast of its continental territory.<sup>44</sup> Further, the United States is concerned that China will leverage its military expansion in the South China Sea to extend the application of its domestic law prohibiting foreign warships within the entire South China Sea space as reflected in its sovereign nine-dash line claim.<sup>45</sup> Therefore, the problems of Chinese territorial claims, military expansion, and application of domestic law restricting warship access are inherently entangled.

### 1.1.1 Incidents and Operations

According to the United States, Chinese restrictions of warship access in the South China Sea fundamentally violates the American principle of freedom of the seas and has repeatedly led to military “incidents” between the United States and China.<sup>46</sup> Two noteworthy examples that demonstrate the level of contention between the United States and China are the 2009 *Impeccable* incident and the 2018 *Decatur* incident.

Between March 5 and March 8, 2009, the USNS *Impeccable* was harassed by the Chinese navy and airforce, as well as Chinese coast guard and maritime militia forces, in international waters approximately 75 miles off the coast of Hainan Dao, in the South China Sea.<sup>47</sup> The

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<sup>43</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 7.

<sup>44</sup>Ibid., pp. 7–8.

<sup>45</sup>Kennedy/Erickson: China Maritime Report No. 1: China’s Third Sea Force, The People’s Armed Forces Maritime Militia: Tethered to the PLA (see n. 10), p. 103.

<sup>46</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), pp. 7, 43.

<sup>47</sup>Raul Pedrozo: Close encounters at sea: the USNS *impeccable* incident, in: Naval War College Review 62.3 (2009), pp. 101–112, here p. 101; Jake Douglas et al.: Counter-Coercion Series: Harassment of the USNS *Impeccable*, May 9, 2017, url: <https://amti.csis.org/counter-co-harassment-usns-impeccable/>.

U.S. Naval Ship was unarmed and operating under civilian jurisdiction in order to conduct marine surveillance and gather hydrographic intelligence.<sup>48</sup> The *Impeccable* was operating in China's Exclusive Economic Zone which, according to the UN Convention on the Law of the Sea, is legally international waters and therefore does not prohibit the conduct of surveillance operations.<sup>49</sup> On March 5, a PLA Navy Frigate crossed in front of the *Impeccable*'s bow.<sup>50</sup> Shortly after, a Chinese Y-12 aircraft "made 11 flybys at an altitude of 600 feet and a range of 100 to 300 feet."<sup>51</sup> On March 7, a "PLA Navy auxiliary general intelligence ship" challenged the *Impeccable*'s presence in the area over radio asserting that the U.S. ship would "suffer the consequences" if it did not leave the area.<sup>52</sup> On March 8, five Chinese vessels surrounded the *Impeccable*.<sup>53</sup> The ships included, "one PLA Navy Ship, one fisheries vessel, one China Marine Surveillance patrol ship, and two small Chinese-flagged fishing trawlers."<sup>54</sup> The fishing trawlers operating under the direct military control under China's People's Armed Forces Maritime Militia.<sup>55</sup>

The fishing trawlers stopped in front of the *Impeccable*, forcing the U.S. ship to divert its course in order to prevent a collision.<sup>56</sup> The two trawlers then approached at a range of 50 feet off of the stern side of the *Impeccable* and attempted to damage its towed sonar array.<sup>57</sup> The fishing vessels attempted to damage the instruments by running over the cable with their vessels as well as attempting to grab the array with hooks attached to poles.<sup>58</sup>

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<sup>48</sup>Pedrozo: Close encounters at sea: the USNS *impeccable* incident (see n. 47), p. 101; Douglas et al.: Counter-Coercion Series: Harassment of the USNS *Impeccable* (see n. 47).

<sup>49</sup>Pedrozo: Close encounters at sea: the USNS *impeccable* incident (see n. 47), p. 102.

<sup>50</sup>Douglas et al.: Counter-Coercion Series: Harassment of the USNS *Impeccable* (see n. 47).

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.*

<sup>53</sup>Pedrozo: Close encounters at sea: the USNS *impeccable* incident (see n. 47), p. 101.

<sup>54</sup>Douglas et al.: Counter-Coercion Series: Harassment of the USNS *Impeccable* (see n. 47).

<sup>55</sup>Kennedy/Erickson: China Maritime Report No. 1: China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA (see n. 10), p. 8.

<sup>56</sup>Pedrozo: Close encounters at sea: the USNS *impeccable* incident (see n. 47), p. 101.

<sup>57</sup>Douglas et al.: Counter-Coercion Series: Harassment of the USNS *Impeccable* (see n. 47).

<sup>58</sup>*Ibid.*

In response, the *Impeccable* fired on the fishing vessels with its water cannon.<sup>59</sup> The sailors aboard the fishing vessels waved Chinese flags and “told the U.S. ship to leave the area”.<sup>60</sup> The *Impeccable* offered, over radio, to withdraw from the area, to which the fishing trawlers stopped in front of the U.S. ship and dropped wooden debris in its path.<sup>61</sup> While this was occurring, the PLA Navy ship positioned itself a few hundred feet off of the port side of the *Impeccable*, while “a white-hulled vessel also blocked the U.S. ship’s path and inched progressively closer until it was only a few dozen feet from the *Impeccable*.”<sup>62</sup> Shortly after, the *Impeccable* was allowed to leave the scene.

The *Decatur* incident occurred more recently off the coast of Gaven Reef. Originally a barren rock feature, China reclaimed thirty-four acres of land and converted Gaven Reef into a military outpost in the southern reaches of the South China Sea.<sup>63</sup> On the morning of September 30, 2018, the USS *Decatur* (DDG-73) was intercepted by a Chinese Luyang-class destroyer as it conducted a freedom of navigation operation in the vicinity of Gaven Reef, in the Spratly Island Chain.<sup>64</sup> The Chinese destroyer “overtook” the *Decatur* and crossed into its path on the port side, forcing the *Decatur* to change course to avoid a collision.<sup>65</sup> The Chinese vessel came within 145 feet of the U.S. warship.<sup>66</sup> While the interception was occurring, the Chinese vessel broadcast a radio transmission threatening, “If you don’t change your [sic.] will suffer consequences.”<sup>67</sup> Video footage of the incident, analyzed by Kieth Patton of the U.S. Naval War College, showed the crew of the People’s Liberation Army Navy (PLAN) vessel preparing their ship for an “imminent” collision by deploying buoys to absorb potential

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<sup>59</sup>Douglas et al.: Counter-Coercion Series: Harassment of the USNS *Impeccable* (see n. 47).

<sup>60</sup>Yuli Yang: Pentagon says Chinese vessels harassed U.S. ship, March 9, 2009.

<sup>61</sup>Douglas et al.: Counter-Coercion Series: Harassment of the USNS *Impeccable* (see n. 47).

<sup>62</sup>*Ibid.*

<sup>63</sup>Asia Maritime Transparency Initiative: Gaven Reefs, url: <https://amti.csis.org/gaven-reefs/#DredgingImages-heading>.

<sup>64</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 41.

<sup>65</sup>*Ibid.*, p. 41.

<sup>66</sup>*Ibid.*, p. 41.

<sup>67</sup>*Ibid.*, p. 41.



impact.<sup>68</sup>

These incidents are not isolated cases. According to the U.S. Department of Defense 2015 *Asia-Pacific Maritime Security Strategy* white paper, Chinese territorial expansionism ... has led to an increase in air and maritime incidents in recent years, including an unprecedented rise in unsafe activity by China's maritime agencies in the East and South China Seas. U.S. military aircraft and vessels often have been the targets of this unsafe and unprofessional behavior, which threatens the U.S. objectives of safeguarding the freedom of the seas and promoting adherence to international law and standards. China's expansive interpretation of jurisdictional authority beyond territorial seas and airspace causes friction with U.S. forces and treaty allies operating in international waters and airspace in the region and raises the risk of inadvertent crisis.<sup>69</sup>

So much so, that on May 23, 2017, Director of the Defense Intelligence Agency, Lt. General Vincent R. Stewart, informed the Senate Armed Services Committee that Chinese military expansionism in the South China Sea constituted one of the "top five military threats" facing the United States.<sup>70</sup>

According to the Congressional Research Service, the primary concern for the United States is that "a challenge to freedom of the seas" in the South China Sea would have global ramifications for the international legal order.<sup>71</sup> The congressional report states that a degradation in international law in one area and by one actor could be used as precedent for the further deterioration of UNCLOS, "the international legal regime governing sovereignty over much of the surface of the world."<sup>72</sup> The report presented to the members and committees of

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<sup>68</sup>John Power: Exclusive: US Navy footage of warships' near collision in South China Sea, January 23, 2020, url: <https://www.scmp.com/week-asia/politics/article/3047317/exclusive-us-navy-footage-warships-near-collision-south-china>.

<sup>69</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 14; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 41.

<sup>70</sup>Cheryl Pellerin: DIA Director Testifies on Top Five Global Military Threats, May 23, 2017, url: <https://www.defense.gov/Explore/News/Article/Article/1190834/dia-director-testifies-on-top-five-global-military-threats/>.

<sup>71</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 5.

<sup>72</sup>Ibid., p. 5.

Congress, argued that the United States needs to push back, lest the “roughly 400-year legal tradition” of freedom of the seas be weakened or destroyed.<sup>73</sup> On April 17, 2018, Admiral Philip Davidson, speaking to the Senate Armed Services Committee, stated,

With respect to the Indo-Pacific region, specifically, I am concerned that some nations, including China, assert their interests in ways that threaten the foundational standards for the world’s oceans as reflected in the Law of the Sea Convention. This trend is most evident off the coast of China and in the South China Sea where China’s policies and activities are challenging the free and open international order in the air and maritime domains. China’s attempts to restrict the rights, freedoms, and lawful uses of the sea available to naval and air forces is inconsistent with customary international law and as President Reagan said in the 1983 Statement on United States Oceans Policy, “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.”<sup>74</sup>

To contest Chinese territorial claims and the application of domestic jurisdiction over high seas space, the United States conducts freedom of navigation operations (FONOPs).

Freedom of navigation operations function by transiting U.S. warships through the global commons as defined by international law in order to, according to the the Department of Defense, “challenge excessive maritime claims” and “support the longstanding U.S. national interest of freedom of the seas.”<sup>75</sup> The USS *Decatur* was conducting a freedom of navigation operation off the coast of Gavin Reef when it was intercepted by the Chinese navy in 2018. According to the Department of Defense 2019 Indo-Pacific Strategy Report, “Throughout our history, the United States has asserted a key national interest in preserving the freedom of the seas, and has often relied on the U.S. military forces to protect that interest.”<sup>76</sup> By routinely conducting freedom of navigation operations, the United States claims to demonstrate

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<sup>73</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 5.

<sup>74</sup>Ibid., p. 77.

<sup>75</sup>Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), p. 2.

<sup>76</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43.

that it will continue to “operate wherever international law allows, regardless of the location of excessive maritime claims and regardless of current events.”<sup>77</sup> By refusing to “acquiesce to excessive maritime claims” the U.S. Department of Defense states that it “protects long-standing principles of freedom of navigation for civilian and military vessels”.<sup>78</sup> According to the Department of State, 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 high seas related uses.”<sup>79</sup> This particularly applies to the application of domestic laws over the high seas, such as prohibiting warships from accessing EEZs.<sup>80</sup> If coastal states make maritime claims, both territorial claims and jurisdictional claims, that exceed what is delineated in UNCLOS, the U.S. will demonstrate through diplomacy and “operational activities by U.S. military forces” that the US does not recognize the legitimacy of such claims.<sup>81</sup> By conducting FONOPs and defending freedom of the seas, the United States claims that it defends the ‘rules-based international order’ on behalf of the global community of states.<sup>82</sup>

From the perspective of the United States, freedom of the seas and the rules-based international order are mutually constitutive. Because freedom of the seas is a political-legal concept, defined as “the rights, freedoms, and lawful uses of the sea and airspace guaranteed

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<sup>77</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 12.

<sup>78</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43.

<sup>79</sup>Department of State: Department of State Maritime Security and Navigation. (see n. 3).

<sup>80</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 12.

<sup>81</sup>Department of Defense: U.S. Department of Defense Freedom of Navigation Program Fact Sheet, 2015, url: [https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD20FON20Program20--20Fact20Sheet20\(March202015\).pdf](https://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD20FON20Program20--20Fact20Sheet20(March202015).pdf).

<sup>82</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 2; A Free and Open Indo-Pacific, Advancing a Shared Vision (see n. 7), pp. 5–6, 29–30; The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), pp. 43, 54; Jim Garamone: U.S. Competition With China Ongoing Challenge, October 1, 2019, url: <https://www.defense.gov/Explore/News/Article/Article/1976756/us-competition-with-china-ongoing-challenge/>; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), pp. 3, 6, 75.

to all nations under international law,”<sup>83</sup> defending freedom of the seas defends international law. Because of this, defending freedom of the seas upholds the liberal rules-based international order and such an international order, in turn, provides the conditions for freedom of the seas.

### 1.1.2 A Free and Open Indo-Pacific

On November 10, 2017, President Donald Trump laid out his administration’s “vision for a free and open Indo-Pacific.”<sup>84</sup> According to President Trump, this vision is predicated on “respect for the rule of law, individual rights, and freedom of navigation and overflight, including open shipping lanes.”<sup>85</sup> Speaking on the administration’s vision, Randall Schriver, Assistant Defense Secretary for Indo-Pacific Security, informed the American Enterprise Institute that the United States military will continue to act in the Indo-Pacific region to defend “the international rules-based order” upon which “a free and open Indo-Pacific” is predicated.<sup>86</sup> Schriver elaborated, “By free, we mean nations will be free from coercion and able to protect their sovereignty,” and “Open refers to nations enjoying freedom of the seas and airways.”<sup>87</sup> According to the corresponding 2017 Department of State white paper, *A Free and Open Indo-Pacific: Advancing a Shared Vision*, U.S. presence and engagement in the region is necessary to uphold the liberal rules-based international order and to contest the “repressive vision of the future international order,” it claims is put forth by China.<sup>88</sup>

<sup>83</sup>Department of State: Department of State Maritime Security and Navigation. (see n. 3); Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), pp. 2–3; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), pp. 4, 11–12.

<sup>84</sup>Donald Trump: Remarks by President Trump at APEC CEO Summit, Da Nang, Vietnam, November 10, 2017, url: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-apec-ceo-summit-da-nang-vietnam/>.

<sup>85</sup>Ibid.

<sup>86</sup>Jim Garamone: U.S., Allies Aim to Maintain Free, Open Indo-Pacific Region, August 8, 2018, url: <https://www.defense.gov/Explore/News/Article/Article/1596903/us-allies-aim-to-maintain-free-open-indo-pacific-region/>.

<sup>87</sup>Ibid.

<sup>88</sup>A Free and Open Indo-Pacific, *Advancing a Shared Vision* (see n. 7), p. 5.

According to the white paper, China's alternative vision of international order is one where "Authoritarian revisionist powers seek to advance their parochial interests at others' expense."<sup>89</sup> Assistant Defense Secretary Schriver stated, "unfolding competition in the region between China and nations committed to the current international order"<sup>90</sup> is "the ongoing challenge of this generation".<sup>91</sup> It is a challenge which, Schriver stated, "At the most basic level, what the United States is competing for is to sustain a position within the regional and international system that allows us to promote, support and protect a liberal rules-based order whose institutions, rules and norms have fostered peace for decades".<sup>92</sup>

The motivations given by the United States for championing freedom of the seas, and by proxy the rules-based international order, are predominantly economic, with secondary security benefits that contribute to regional economic stability. The primary concern expressed by the United States is that Chinese extraterritorial claims and subsequent militarization of the South China Sea will disrupt global trade.<sup>93</sup> According to the Department of State's 2017 white paper on the Free and Open Indo-Pacific, the future of the United States and the Indo-Pacific region are "inextricably intertwined" due to the "\$1.9 trillion in two-way trade".<sup>94</sup> The U.S. Department of Defense 2019 Indo-Pacific Strategy Report stresses the fact that the South China Sea is one of the world's primary economic corridors for trade.<sup>95</sup> According to the Indo-Pacific Strategy Report, 60% of all global trade passes through the Asia Pacific with a third of global maritime trade passing through the South China Sea.<sup>96</sup> Additionally, two thirds of the world's oil trade is conducted through the South China Sea

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<sup>89</sup>Ibid., p. 5.

<sup>90</sup>Garamone: U.S., Allies Aim to Maintain Free, Open Indo-Pacific Region (see n. 86).

<sup>91</sup>Idem: U.S. Competition With China Ongoing Challenge (see n. 82).

<sup>92</sup>Ibid.

<sup>93</sup>The Asia-Pacific Maritime Security Strategy (see n. 1); The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1).

<sup>94</sup>A Free and Open Indo-Pacific, Advancing a Shared Vision (see n. 7), p. 4.

<sup>95</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 1.

<sup>96</sup>Ibid., p. 1.

with approximately 15 million barrels of oil transiting the Strait of Malacca every day.<sup>97</sup> As Randall Schriver, Assistant Defense Secretary for Indo-Pacific Security, stated “Sea lanes through the region carry the life’s blood of world prosperity and must remain open.”<sup>98</sup> The U.S. Department of Defense argues that China’s “attempts to exert de facto control” over the South China Sea threatens the “free flow of trade” and the regional stability that enables commerce.<sup>99</sup> Therefore, the presence of the United States Navy in the region, according to the 2019 Indo-Pacific Strategy Report, “secures the vital sea lanes of the Indo-Pacific that underpin global commerce and prosperity.”<sup>100</sup>

Freedom of the seas also, according to the Department of Defense, has implications for security concerns.<sup>101</sup> Being able to navigate unimpeded on the high seas ensures that that U.S. military forces can respond to crises around the world and uphold alliance commitments.<sup>102</sup> The ability to do this, according to the U.S. Department of Defense and the Department of State, fosters regional peace that underwrites economic stability and commercial prosperity.<sup>103</sup> According to the 2015 Asia-Pacific Maritime Security Strategy,

Freedom of the seas is thus also essential to ensure access in the event of a crisis. Conflicts and disasters can threaten U.S. interests and those of our regional allies and partners. The Department of Defense is therefore committed to ensuring free and open maritime access to protect the stable economic order that has served all Asia-Pacific nations so well for so long, and to maintain the ability of U.S. forces to respond as needed... For 70 years, U.S. military presence in the Asia-Pacific region has played a vital role in undergirding regional peace, stability, and security. This presence has enabled tremendous prosperity and economic growth across the region and facilitated the unimpeded flow of resources and

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<sup>97</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 1.

<sup>98</sup>Garamone: U.S., Allies Aim to Maintain Free, Open Indo-Pacific Region (see n. 86).

<sup>99</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 8.

<sup>100</sup>Ibid., p. 2.

<sup>101</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 5; The Asia-Pacific Maritime Security Strategy (see n. 1), p. 2.

<sup>102</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 2.

<sup>103</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 2; A Free and Open Indo-Pacific, Advancing a Shared Vision (see n. 7), pp. 5, 21.

trade across vital Asian waterways. It is in the interests of all nations, not only those in the Asia-Pacific region, that the United States continues to deter and prevent conflict in this critical region.<sup>104</sup>

This position is reiterated in the 2019 Indo-Pacific Security Strategy.<sup>105</sup> The 2019 Security Strategy states that the “excessive maritime claims” made by China threaten the liberal rules-based international order and reiterates that an ardent defense of freedom of the seas is necessary to safeguard the “stable economic order.”<sup>106</sup> Without this ‘historic’ principle of freedom of the seas, the 2020 Congressional Research Report on Sino-American strategic competition argues, the United States may “require changes (possibly very significant ones) in U.S. military strategy, U.S. foreign policy goals, or U.S. grand strategy.”<sup>107</sup>

## 1.2 Problematizing the Problem in the South China Sea

However, there are a number of inconsistencies with how the United States currently represents the problem in the South China Sea. The foremost of which stems from a misrepresentation of the meaning of freedom of the seas and its portrayal as an enduring historic concept. Although American military and foreign policy white papers argue that the principle of freedom of the seas which the United States ‘defends’ today in the South China Sea “dates back about 400 years, to the early 1600s,”<sup>108</sup> the principle that the United States champions is radically different from what Hugo Grotius argued for in 1609.<sup>109</sup> In fact, Hugo

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<sup>104</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 2.

<sup>105</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43.

<sup>106</sup>Ibid., p. 43.

<sup>107</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 5.

<sup>108</sup>Ibid., p. 4.

<sup>109</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 1; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), p. 2; Department of Defense Report

Grotius' original conception of freedom of the seas was not antagonistic to sovereign claims over the ocean or to the prohibition of foreign warships within those maritime territories.<sup>110</sup> Rather, Grotius simply championed the principle that every nation had the right to travel to every other nation to engage in commercial trade.<sup>111</sup>

In 1609, Hugo Grotius, a Dutch lawyer, published a pamphlet titled 'The Free Sea or a Dissertation on the Right Which the Dutch Have to Carry on Indian Trade', which is commonly known by its Latin title *Mare Liberum*.<sup>112</sup> In the century prior to its publication, Pope Alexander VI issued a decree granting Portugal "exclusive and permanent rights to the lands of Africa from Ceuta to Guinea and beyond, towards the southern shore" in order to spread Christianity to unreached corners of the globe.<sup>113</sup> Forty years later, another series of papal decrees were issued to Spain, granting territorial rights to undiscovered lands west of a demarcation line that stretched from the North Pole to the South and lay west of the Azores and Cape Verde Islands.<sup>114</sup> This divided the Atlantic Ocean into two halves, one half belonging to Portugal and the other Spain. King Phillip III of Spain, who was also King of Portugal, prohibited any foreigner from trading "in greater India itself, and in all other regions of the seas".<sup>115</sup> In protest to this territorial claim and the exclusion of Dutch commerce, Grotius wrote *Mare Liberum*. Grotius' intention in writing *Mare Liberum* was "to demonstrate briefly and clearly that the Dutch ... have the right to sail to the Indians as they are now doing and to engage in trade with them."<sup>116</sup> Grotius bases his argument on

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to Congress: Annual Freedom of Navigation Report, Fiscal Year 2018 (see n. 1), p. 2; The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43.

<sup>110</sup>Grotius: Hugo Grotius *Mare Liberum* 1609-2009: Original Latin Text and English Translation (see n. 21).

<sup>111</sup>*Ibid.*, p. 25.

<sup>112</sup>*Ibid.*, p. 25.

<sup>113</sup>Arvid Pardo: The Law of the Sea: Its Past and Its Future, in: Oregon Law Review 1984, pp. 1-13, here p. 6.

<sup>114</sup>*Ibid.*

<sup>115</sup>Grotius: Hugo Grotius *Mare Liberum* 1609-2009: Original Latin Text and English Translation (see n. 21), p. 157.

<sup>116</sup>*Ibid.*, p. 25.



the “primary law of nations,” or “*jus gentium primum*,” that holds the “self-evident and immutable” rule that, “every nation is free to travel to every other nation and to trade with it.”<sup>117</sup>

Grotius justified his free trade position by arguing that the papal territories were invalid and therefore Spain and Portugal had no right to restrict Dutch commerce. According to Grotius, the only areas of the sea that are able to be possessed are those that can be “marked off by [physical] boundaries and placed under guard.”<sup>118</sup> Only physical demarcation could confer legitimate ownership; under no circumstances could territory be cordoned off by “an imaginary line,” regardless of how many dashes it comprised.<sup>119</sup> If this were not the case, Grotius stated, “the geometers must have taken the earth from us long since, just as the astronomers must also have taken the heavens.”<sup>120</sup>

Although Grotius thought it unconscionable to possess large tracts of open-ocean, he conceded, “that if any part of the sea is susceptible of occupancy, then that part becomes the property of the person occupying it, so long as it does not impede common use.”<sup>121</sup> As Grotius stated,

Furthermore, even if a given person did possess sovereignty over the sea, he would still lack authority to diminish its common usefulness, just as the Roman People lacked authority to prevent the commission, on shores belonging to the Roman Empire, of any act whatsoever that was permissible under the law of nations. Yet again, even if it were possible to prohibit some particular act of this kind, such as fishing (for it may be maintained that the supply of fish is, in a sense, exhaustible), it would in any case be impossible to prohibit navigation, through which the sea loses nothing. ... even in the case of land that has been assigned as private property, whether to nations or to single individuals, it is nevertheless unjust to deny the right of passage (that is to say, of course,

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<sup>117</sup>Ibid., p. 25.

<sup>118</sup>Ibid., pp. 33–35.

<sup>119</sup>Ibid., pp. 83–85.

<sup>120</sup>Ibid., pp. 83–85.

<sup>121</sup>Mónica Brito Vieira: Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s debate on dominion over the seas, in: Journal of the History of Ideas 64.3 (2003), pp. 361–377, here p. 372.

*unarmed* and innocent passage) [Emphasis added] to men of any nation, precisely as it is unjust to deny them the right of drinking from a stream.<sup>122</sup>

The imperative stipulation being that, under the original Grotian conception of freedom of the seas, unhindered navigation was only granted to commercial vessels who were engaged in trade, rather than military transit. Trade was argued to be the fundamental right of nations, military transit was not.

In 1652 John Selden, English jurist and scholar of Jewish law, wrote ‘*Mare Clausum: Of the Dominion, or, Ownership of the Sea*’ in opposition to Grotius’ *Mare Liberum*.<sup>123</sup> Selden did not dispute Grotius’ perspective on the freedom of trade, but rather that the sea could only be possessed by physical demarcation.<sup>124</sup> Selden, who wrote in defense of the economic goal of harvesting fisheries resources in the North Sea, argued that areas of the high seas could be placed under the exclusive dominion, or sovereignty, of a single state and such dominion could, in fact, be demarcated by ‘imaginary lines’ rather than physical walls.<sup>125</sup> Referencing the Roman law doctrine of *res nullius*, things belonging to nobody, Selden stated that territorial ownership may be first established by occupation.<sup>126</sup> Selden invokes religious doctrine to argue that, regardless of the mechanism of demarcation, within the bounds of the permissive law of nature, dominion, meaning ownership or the “right of using, enjoying, alienating, and free disposing,” can be established by the continuous use and control of a territory.<sup>127</sup> The permissive law of nature being “set forth by things whose use is neither

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<sup>122</sup>Grotius: Hugo Grotius *Mare Liberum* 1609-2009: Original Latin Text and English Translation (see n. 21), p. 93.

<sup>123</sup>John Selden: *Mare Clausum: The Right and Dominion of the Sea* in Two Books, 1631.

<sup>124</sup>Idem: *Mare Clausum: The Right and Dominion of the Sea* in Two Books (see n. 123); Vieira: *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s debate on dominion over the seas* (see n. 121), p. 371.

<sup>125</sup>Selden: *Mare Clausum: The Right and Dominion of the Sea* in Two Books (see n. 123); Vieira: *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden’s debate on dominion over the seas* (see n. 121), p. 371.

<sup>126</sup>Selden: *Mare Clausum: The Right and Dominion of the Sea* in Two Books (see n. 123), p. 60.

<sup>127</sup>*Ibid.*, p. 55.

commanded nor forbidden.”<sup>128</sup> Selden states, dominion, or *dominium*, comes

... from such a private or peculiar use or enjoiment [sic.] of the Sea, as consists in a setting forth Ships to Sea, either to defend or make good the Dominion, in prescribing Rules of Navigation to such as pass through it; in receiving such Profits and Commodities as are peculiar to every kinde [sic.] of Sea-Dominion whatsoever and, which is the principal, either in admitting or excluding others at pleasure.<sup>129</sup>

Therefore, Selden argued, whatever regions of the sea can be brought under control through naval force can constitute effective ownership if the claim is enforced.

Although the Grotian *Mare Liberum* and Seldenian *Mare Clausum* positions are often portrayed as dichotomous, they are not inherently conflictual. For example, speaking on Selden’s work, Sir Phillip Meadows, English diplomat of the Cromwell government, asserted, that just as market paths through private fields remain public, so too are sea routes over exclusive maritime territories.<sup>130</sup>

The Sea, say we, is the publick Property of the Crown of England; but yet as ‘tis a Way, ‘tis common to the peaceable Traders of all Nations. A Path over a Field is of some damage to the Soil, though compensated with a greater utility, but a way over the Sea is of no damage to the Water; and the Sea being a fluid Body is all Path, where a Ship can Sail, and a common Highway from one Nation to another.<sup>131</sup>

Seventeenth century international law ubiquitously reflected the Grotian conception of freedom of the seas, ensuring the right that “every nation is free to travel to every other nation and to trade with it”<sup>132</sup>, regardless of whether exclusive sovereignty was claimed over an area.

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<sup>128</sup>Ibid., p. 51.

<sup>129</sup>Ibid., p. 225.

<sup>130</sup>Philip Meadows: Observations concerning the dominion and sovereignty of the seas. 1689, url: <http://login.ezproxy.lib.vt.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=edsgec&AN=edsgec.BL3025081295&site=eds-live&scope=site>.

<sup>131</sup>Ibid.

<sup>132</sup>Grotius: Hugo Grotius *Mare Liberum* 1609-2009: Original Latin Text and English Translation (see n. 21), p. 25.

Therefore, China's nine-dashed line claim over the South China Sea and its resources is not antagonistic to the "historic" understanding of freedom of the seas. Neither is militarizing the territorial claim to "make good the dominion"<sup>133</sup>, or preventing foreign warships from operating within the claimed high seas area.<sup>134</sup> In fact, the "narrow" Chinese definition of freedom of navigation, or freedom of the seas, which only acknowledges the rights of universal navigation for commercial shipping vessels is more in line with the 400 year old Grotian principle of freedom of the seas than the United States' insistence on the right of access for warships.<sup>135</sup>

Further, the U.S. insistence that American military presence in the region is necessary to safeguard regional trade fails to take into consideration China's vested interest in the same goal. According to the Center for Strategic and International Studies, in 2016, more than 64% of China's total maritime trade was conducted through the South China Sea. In 2016, China exported \$874 billion and imported \$598 billion worth of goods through the region, amounting to \$1.47 trillion dollars worth of regional trade.<sup>136</sup> China also conducts more trade through the region than any other country.<sup>137</sup> In 2016, Chinese trade comprised 39.5% of total trade through the South China Sea.<sup>138</sup> By comparison, in the same year the United States only traded \$208 billion worth of goods, representing a mere 5.72% of total South China Sea freight.<sup>139</sup> Therefore, China would have much more to lose if regional trade was disrupted.

While China does harass the fishing and oil exploration vessels of neighboring states found

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<sup>133</sup>Selden: *Mare Clausum: The Right and Dominion of the Sea in Two Books* (see n. 123), p. 225.

<sup>134</sup>Grotius: *Hugo Grotius Mare Liberum 1609-2009: Original Latin Text and English Translation* (see n. 21), p. 93.

<sup>135</sup>U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), pp. 10–11.

<sup>136</sup>CSIS: *How much trade transits the South China Sea?*, August 2, 2017, url: <https://chinapower.csis.org/much-trade-transits-south-china-sea/>.

<sup>137</sup>Ibid.

<sup>138</sup>Ibid.

<sup>139</sup>Ibid.

operating in the nine-dash-line territory, and foreign military vessels that encroach on its perceived sovereign sea-space, regional trade has not been a target of disruption. In fact, there has been no instance whatsoever of interference with trade navigation in the region.<sup>140</sup> Because of this the argument that a sustained U.S. naval presence in the region is necessary in order to keep “the vital sea lanes of the Indo-Pacific” open to ensure “global commerce and prosperity” is unfounded.<sup>141</sup>

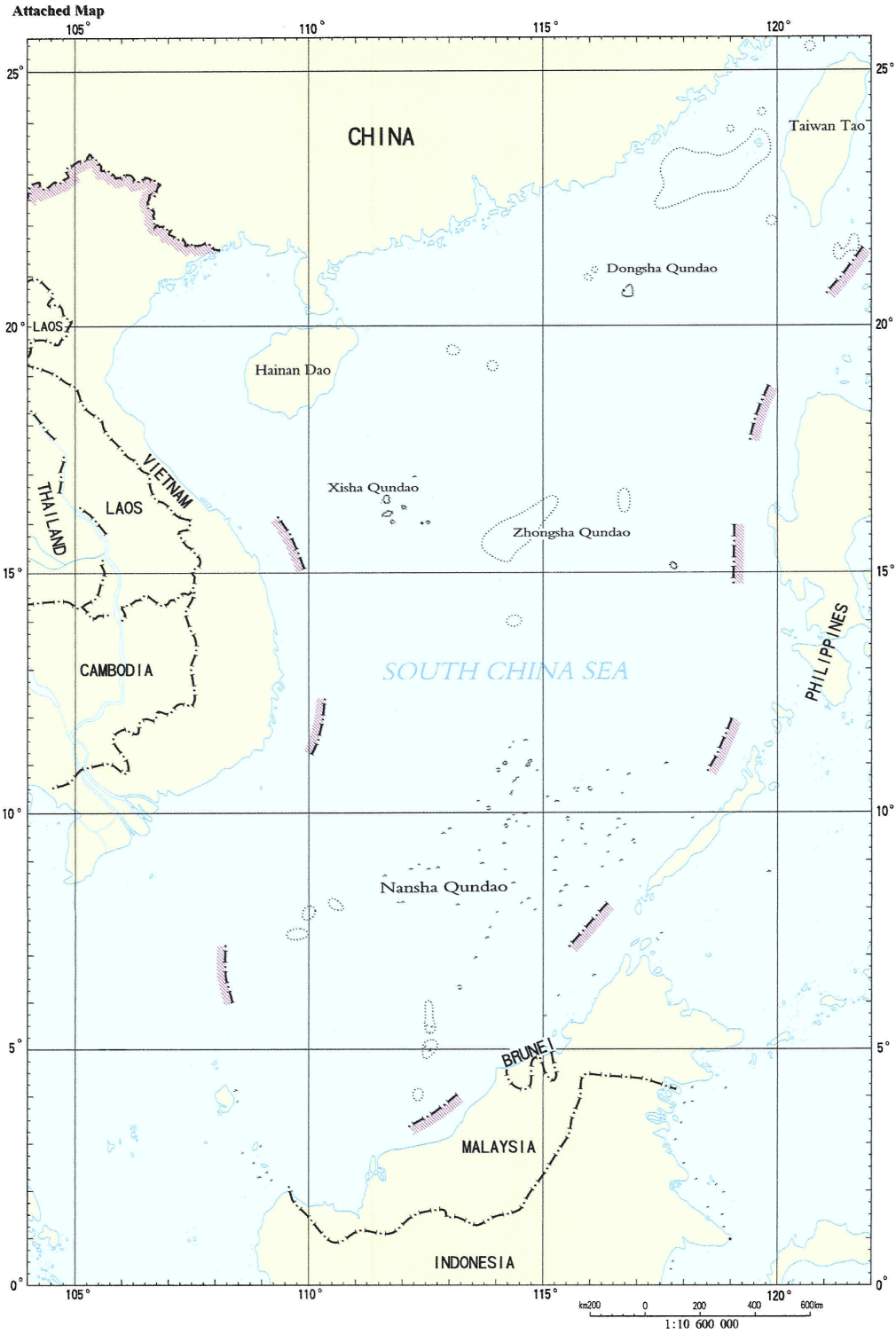
To understand the inconsistencies portrayed in the American representation of the ‘problem’ in the South China Sea, this work will write a history of the present of the discourse of freedom of the seas upon which American political-military strategy is based. This work’s genealogical project will show that the discourse of freedom of the seas evolved over the course of U.S. foreign policy away from a discourse of trade, in line with Grotius’ *Mare Liberum* conceptualization, and towards a security discourse which facilitates American sea control. This dissertation will demonstrate that in contemporary U.S. foreign policy, freedom of the seas is not the altruistic principle of freedom upheld for the common good, but is rather a mechanism of control used by the United States to establish a global American maritime sphere of influence. The form of control levied through this contemporary security discourse is not that of Seldenian dominion, or *dominium*, but rather that of *imperium*.

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<sup>140</sup>Zha: Security in the South China Sea (see n. 23), pp. 36–37.

<sup>141</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 2.

Figure 1.1: China's Nine-Dash Line<sup>9</sup>



## Chapter 2

### Presenting *Mare Imperium*

This chapter will outline the argument made by this dissertation that contemporary freedom of the seas discourse functions as a mechanism of sea control in U.S. foreign policy. This argument is made in order to support the second goal of this work, to show that freedom of the seas discourse is “more dangerous than would otherwise appear.”<sup>1</sup> Because of this, this dissertation argues that freedom of the seas should not underpin American political-military strategy in the Sino-U.S. South China Sea dispute. By making this argument, this work engages in the genealogical project to utilize history to intervene in the present.

This work will show that rather than championing the altruistic principle of global maritime access, in contemporary U.S. foreign policy freedom of the seas functions as a mechanism of sea control. In U.S. foreign policy, the meaning of freedom of the seas shifted from a discourse of trade to a discourse of security following the ascendance of the United States to global naval preponderance in the aftermath of World War II. Prior to that time, freedom of the seas meant the right of neutral states to trade on the high seas during times of war. This dissertation categorizes the early freedom of the seas discourse of trade as the *Mare Liberum* conception of freedom of the seas since it follows in the same strain of thought as Grotius’ doctrine on free trade. As international law reflected, regardless of who claimed sovereignty over an area of sea-space, every nation maintained the right “to travel to every other nation and to trade with it.”<sup>2</sup> During times of peace, unimpeded trade was ubiquitous.

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<sup>1</sup>Garland: What is a “history of the present”? On Foucault’s genealogies and their critical preconditions (see n. 2), p. 372.

<sup>2</sup>Grotius: Hugo Grotius *Mare Liberum* 1609-2009: Original Latin Text and English Translation (see

The only peacetime interruption came from pirates, who were quickly declared enemies of humanity and driven from the sea. Thus, the only threat to free trade came during times of war when belligerent powers sought to prevent material aid from reaching their enemies. Prior to World War II, the discourse surrounding freedom of the seas centered on the rights of neutral and impartial states to continue to trade globally, with neutral states and belligerent powers alike, under the condition that neutral countries did not supply the belligerents with materials of war. As late as 1919, for example, President Woodrow Wilson asserted, “freedom of the seas means the definition of the right of neutrals to use the seas when other nations are at war.”<sup>3</sup> While the discursive assemblage fluctuated in the conduct of pre-World War II U.S. foreign policy, it did not break from the *Mare Liberum* typology of trade.

In early U.S. history, freedom of the seas discourse was used to justify maintaining a small standing navy and concomitant naval doctrines of coastal defense and commerce raiding. It was feared that keeping a strong standing navy would cause the new country to become entangled in European conflicts and would impose an unrealistic tax burden on the American people.<sup>4</sup> Coastal defense was a particularly popular naval doctrine during the Jefferson administration.<sup>5</sup> As it sounds, coastal defense strategies prioritize a naval force structure that is designed to protect the coast from invasion.<sup>6</sup> Coastal defense prioritized developing coastal fortifications and small shallow-draft vessels that could operate near-shore.<sup>7</sup> The primary goal of these small vessels was to harass blockading vessels and to repel enemy landing parties. Commerce raiding, or *guerre de course*, depended on ocean going cruisers to harass

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n. 21), p. 25.

<sup>3</sup>Woodrow Wilson: An After-Dinner Speech in San Diego, vol. The Papers of Woodrow Wilson Digital Edition. Originally published in The Papers of Woodrow Wilson 1966–1994, Princeton University Press, September 19, 1919, url: <https://rotunda.upress.virginia.edu/founders/WILS-01-63-02-0144>.

<sup>4</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), pp. 76–77.

<sup>5</sup>Idem: This people’s navy: The making of American sea power (see n. 65), pp. 68–69; Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 80.

<sup>6</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), pp. 68–69.

<sup>7</sup>Idem: This people’s navy: The making of American sea power (see n. 65), pp. 68–69; Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 79.



enemy commerce and disrupt their maritime logistics chains.<sup>8</sup> This style of ‘guerilla warfare at sea’ was an asymmetric way that small naval and trading powers could strike out against larger maritime states.<sup>9</sup> Commerce raiding sought to disrupt a larger enemy’s more prevalent trade routes and, by doing so, force the stronger state to divert resources from the primary attack in order to protect its own commerce.<sup>10</sup> Because the United States did not want to maintain a large fleet of cruisers necessary for such a strategy, the United States depended on Letters of Marque to commission privateers. In the final years of the nineteenth century, however, a new naval doctrinal concept was popularized by Alfred Thayer Mahan. Mahan elaborated a large-navy vision of sea power which centered around command of the sea, or the control of strategically significant tracts of sea-space.

## 2.1 Mahanian Command of the Sea

Command of the sea describes a condition where an actor has established, through the preponderance of material force, the ability to deny enemy access to a maritime space.<sup>11</sup> It is, as Mahan states, “that overbearing power on the sea which drives the enemy’s flag from it, or allows it to appear only as a fugitive; and which, by controlling the great common, closes the highways by which commerce moves to and from the enemy’s shores.”<sup>12</sup> Mahan argued that the Navy’s principle mission in times of war is “to control the areas of sea communication in order to secure their use to one’s own cargo vessels and transports while denying their use to the enemy.”<sup>13</sup> Areas of sea communication, commonly called sea lines of communication,

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<sup>8</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), pp. 68–69; Sprout/Sprout: *Rise of American Naval Power* (see n. 66), pp. 80, 92–93.

<sup>9</sup>CAPT Wayne P Hughes Jr et al.: *Fleet tactics and naval operations*, 2018.

<sup>10</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), pp. 92–93.

<sup>11</sup>Barry R Posen: *Command of the commons: the military foundation of US hegemony*, in: *International security* 28.1 (2003), pp. 5–46, here pp. 11–12, 21.

<sup>12</sup>Alfred Thayer Mahan: *The influence of sea power upon history, 1660-1783*, 2011; Robert C Rubel: *Command of the sea: an old concept resurfaces in a new form*, in: *Naval War College Review* 65.4 (2012), pp. 20–33, here p. 22.

<sup>13</sup>Potter: *Sea power: A naval history* (see n. 64), p. 162.

are the commonly traveled sea routes of shipping and commerce, that are generally dictated by maritime geography rendering certain routes ‘the path of least resistance’ between two points.<sup>14</sup> Having the preponderant capability to keep these lines open to national commerce and military transport, while denying the enemy the same access is what, Mahan argued, conferred the success of a great power.<sup>15</sup> Mahan stated, “Let us start from the fundamental truth, warranted by history, that the control of the seas, and especially along the great lines drawn by national interest or national commerce [Sea Lines of Communication], is the chief among the merely material elements in the power and prosperity of nations.”<sup>16</sup>

Control of sea lines of communication was essential to national prosperity, Mahan argued, because it guaranteed the link between domestic production and foreign markets, as the ocean is the “great medium of circulation”.<sup>17</sup> The imperialist and mercantilist doctrine of Mahan argued that national prosperity, and therefore power, lay in seizing foreign markets for domestic production and expanding the nation’s carrying trade.<sup>18</sup> To compete commercially with the European nations, the United States needed to develop a strong merchant marine, secure safe harbors at the shipping destinations, and be able to ensure the safety of goods in transit.<sup>19</sup> For this, Mahan argued, it was essential to secure overseas colonies and maintain a robust naval capability, both to defend the colonies and to protect the sea routes of trade.<sup>20</sup> A positive feedback loop of naval development and imperialism ran rampant, however, because a naval fleet of the day required coaling stations along its routes, or sea lines of communication, as warships could not carry enough fuel to transit an ocean and arrive in fighting shape.<sup>21</sup> Mahan argued that because such stations should be self sufficient, coaling

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<sup>14</sup>Alfred Thayer Mahan: *The interest of America in sea power, present and future*, 1918, pp. 41–42.

<sup>15</sup>*Ibid.*, p. 52.

<sup>16</sup>*Ibid.*, p. 52.

<sup>17</sup>*Ibid.*, pp. 6, 52.

<sup>18</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 236.

<sup>19</sup>*Ibid.*, pp. 236–237.

<sup>20</sup>Potter: *Sea power: A naval history* (see n. 64), p. 162; Sprout/Sprout: *Rise of American Naval Power* (see n. 66), pp. 236–237.

<sup>21</sup>Potter: *Sea power: A naval history* (see n. 64), p. 162.

stations should be located in a nation's colonies. "Colonies in turn," Mahan states, "make trade more profitable and thus nourish the merchant marine, which is the *raison d'être* of sea power in the first place."<sup>22</sup> In other words, a nation needs a large navy to protect shipping to its colonies, and it needs colonies to provide for the naval capability to do so. It was the possession of these factors that gave the British Empire the undisputed command of the sea, which in turn led it to become the world's preeminent power.<sup>23</sup> Mahan argued that the United States, as a virtual island itself, was in a similar position as Great Britain to command the sea.<sup>24</sup>

However, having no overseas colonies or a large merchant marine, the issue facing the United States was not how to command the seas globally, but how to do so within a regional sphere of influence.<sup>25</sup> Localized control would guarantee that, if the United States became embroiled in war, "foreign neutral shipping" would still maintain free access to the U.S. coast.<sup>26</sup> Thus, preventing an "effective blockade" against the key ports of the United States.<sup>27</sup> The only way to prevent such a blockade in times of war, would be by maintaining a fighting force strong enough to command the sea in a "wide zone contiguous to our continental coastline," and increasingly in the Caribbean, in order to imperil any blockading fleet.<sup>28</sup> This could only be done, Mahan argued, with a powerful fleet of "capital ships," or battleships, that had the capability to destroy the fleet of the enemy.<sup>29</sup> To this end, Mahan provided an intellectual justification for an American fleet of battleships that could break distant blockades and rival the predominant navies of the day.<sup>30</sup>

A navy that consists primarily of cruisers, whose main purpose is to harass enemy trade,

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<sup>22</sup>Ibid., p. 162.

<sup>23</sup>Ibid., p. 162.

<sup>24</sup>Ibid., p. 162.

<sup>25</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 237.

<sup>26</sup>Ibid., p. 237.

<sup>27</sup>Ibid., p. 237.

<sup>28</sup>Ibid., pp. 237–238.

<sup>29</sup>Potter: Sea power: A naval history (see n. 64), p. 162.

<sup>30</sup>Ibid., p. 162.

Mahan argued, is insufficient as it offers no protection to domestic shipping. While cruisers may serve a complementary purpose, the first goal of a Navy at war, Mahan argued, should be to destroy the enemy's fighting capability.<sup>31</sup> By destroying the fighting capability of the enemy and obtaining command of the sea, a state is able to not only impose blockades and choke enemy commerce at will, but also conduct commerce on the "open commons".<sup>32</sup> The United States Navy adopted this doctrinal development just prior to the Spanish American War of 1898. Concomitantly, the Navy abandoned its coastal defense and commerce raiding force structures and undertook a series of ambitious ship-building programs to develop a 'battleship navy' that could secure for the United States a sphere of influence in the Caribbean.

## 2.2 Contemporary Command and Control of the Sea

The United States Navy abides by similar Mahanian doctrinal precepts today. While the terms are sometimes conflated, contemporary American doctrine differentiates between the concepts of command of the sea and sea control. According to a January 4, 2017, statement by Vice Admiral Thomas A. Rowden, Commander of the U.S. Pacific Fleet Naval Surface Force,

Naval thinkers often write of 'command of the sea,' which I assert is the general condition of superiority of one naval force over all contenders. Command of the sea can be regional or global, depending on the era under consideration and the nation exercising it, and it exists in peacetime as well as during conflict. ...

'Sea control,' on the other hand, denotes a condition that is both temporally and geographically constrained. When a navy has established sea control, it can exercise the full range of operations of which it is capable within and from that

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<sup>31</sup>Potter: *Sea power: A naval history* (see n. 64), p. 162.

<sup>32</sup>George W Baer: *US Naval Strategy 1890-1945*, in: *Naval War College Review* 44.1 (1991), pp. 6–33, here p. 9.

area.<sup>33</sup>

In other words, command of the sea describes a strategic aim and condition, while sea control refers to an operational or tactical situation and goal.<sup>34</sup>

Following in line with the Mahanian conceptualization of “that overbearing power on the sea,”<sup>35</sup> command of the sea describes a condition of material preponderance where one naval power exercises such a superiority of force that a global or regional sea space is brought into its sphere of influence.<sup>36</sup> Within this sphere of influence the preponderant power is able to “exploit more fully other sources of power, including its own economic and military might as well as the economic and military might of its allies” while preventing adversaries from enjoying the same benefits.<sup>37</sup> Command of the sea does not prevent other actors from using the high sea during times of peace, or even prevent other militaries from using the commons in a manner acceptable to the preponderant naval power.<sup>38</sup> However, command of the sea does mean that the preponderant power can “credibly threaten to deny” the commanded territory’s use to others, and that the preponderant power has the capability to prevent a foreign naval power from denying it access to the commanded space.<sup>39</sup> Because of this, command of the sea is seen as a precondition for exercising a hegemonic foreign policy.<sup>40</sup>

While command of the seas represents a strategic condition of superiority and latent ability to exercise power, sea control represents the actualization of such capability in a given maritime space.<sup>41</sup> While strategic theories, and strategic theorists, typically assume an ‘ideal type’ of sea control where authority is definitively established and absolute, in reality

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<sup>33</sup>Thomas A Rowden: Sea Control First, in: Proceedings, United States Naval Institute January 4, 2017.

<sup>34</sup>Rubel: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 22.

<sup>35</sup>Mahan: The influence of sea power upon history, 1660-1783 (see n. 12).

<sup>36</sup>Rubel: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 22.

<sup>37</sup>Posen: Command of the commons: the military foundation of US hegemony (see n. 11), pp. 8–9; Rubel: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 22.

<sup>38</sup>Posen: Command of the commons: the military foundation of US hegemony (see n. 11), p. 8.

<sup>39</sup>Ibid., p. 8.

<sup>40</sup>Posen: Command of the commons: the military foundation of US hegemony (see n. 11), pp. 8, 21; Rubel: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 24.

<sup>41</sup>Idem: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 22.

sea control is more akin to “a working control.”<sup>42</sup> While this working control may resemble the ideal type and apply to the ocean in general, sea control more realistically applies regionally or locally, and for a finite period of time.<sup>43</sup> According to Stansfield Turner of the Naval War College, because of modern technology, “It is no longer conceivable, except in the most limited sense, to totally control the seas for one’s own use or to totally deny them to the enemy.”<sup>44</sup> Because of this, contemporary sea control can be said to be obtained when a state has the “ability to use or deny the sea lines of communication” to a degree necessary to achieve its operational objectives.<sup>45</sup> According to Vice Admiral Thomas A. Rowden, Commander of the U.S. Pacific Fleet Naval Surface Force, “sea control is a condition that exists when a naval force is capable of mounting the full range of combat operations within acceptable levels of risk given the threat and the desired combat objectives.”<sup>46</sup> Conversely, sea control is absent when an enemy degrades the ability to use or deny areas of sea space to such a degree that operational objectives cannot be accomplished.<sup>47</sup>

The contemporary operational objectives for which the United States depends on sea control include protecting domestic “industrial supplies,” securing the ability to “reinforce and resupply military forces overseas,” achieving the ability to provide wartime military and economic supplies to allies, and ensuring safety for naval forces engaged in projecting power ashore.<sup>48</sup> The global alliance commitments, and therefore security architecture, of the United States is dependent on ensuring that no hostile sea power is able to prevent the United

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<sup>42</sup>Colin S Gray: *Sea Power: The Great Enabler*, in: *Naval War College Review* 47.1 (1994), pp. 18–27, here p. 18.

<sup>43</sup>James A Field: *The Influence of Sea Power on Modern Strategy*, in: *Naval War College Review* 10.1 (1957), pp. 31–53, here p. 20; Stansfield Turner: *Missions of the US Navy*, in: *Naval War College Review* 1974, pp. 2–17, here p. 7; Rubel: *Command of the sea: an old concept resurfaces in a new form* (see n. 12), p. 22.

<sup>44</sup>Turner: *Missions of the US Navy* (see n. 43), p. 7.

<sup>45</sup>Field: *The Influence of Sea Power on Modern Strategy* (see n. 43), p. 21.

<sup>46</sup>Rowden: *Sea Control First* (see n. 33).

<sup>47</sup>Field: *The Influence of Sea Power on Modern Strategy* (see n. 43), p. 21.

<sup>48</sup>Turner: *Missions of the US Navy* (see n. 43), p. 8.

States from achieving sea control whenever and wherever it deems necessary.<sup>49</sup> It is for this reason that the June 8, 2018, Department of Defense Joint Maritime Operations publication (JP 3-32) stated, “Sea control is the essence of seapower and is a necessary ingredient in the successful accomplishment of all naval missions.”<sup>50</sup> It is worth quoting the 2018 Joint Maritime Operations Publication at length as it clearly articulates the concept of sea control and highlights its fundamental importance in contemporary U.S. Naval strategy. The Joint Maritime Operations Publication states,

Sea control operations are those operations designed to secure use of the maritime domain by one’s own forces and to prevent its use by the enemy. Sea control is the essence of seapower and is a necessary ingredient in the successful accomplishment of all naval missions. Sea control and power projection complement one another. Sea control allows naval forces to close within striking distance to remove landward threats that threaten access, which in turn enhances freedom of action at sea. Freedom of action at sea enables the projection of forces ashore. Sea control operations are the employment of naval forces, supported by land, air, space, cyberspace, or special operations forces, to achieve military objectives in vital sea areas. Establishing sea control may require projecting power ashore to neutralize threats or control terrain in the landward portion of the littorals. Sea control operations include the destruction of enemy naval forces, suppression of enemy sea commerce, protection of vital sea lanes, and establishment of local air and maritime superiority in areas of naval operations. The vastness of the world’s oceans makes it impossible for even a preeminent naval power to achieve global maritime superiority. Thus, achieving local or regional maritime superiority or maritime supremacy may be desired by the JFC [Joint Force Commanders] for a limited duration to accomplish specific objectives.<sup>51</sup>

This dissertation argues that when the United States emerged from the Second World War as the strongest naval power in the history of the world, and thus had complete command of the sea, the meaning of freedom of the seas distinctly changed in U.S. foreign policy

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<sup>49</sup>Field: *The Influence of Sea Power on Modern Strategy* (see n. 43), p. 28.

<sup>50</sup>Joint Maritime Operations (see n. 24), pp. x, I-3.

<sup>51</sup>*Ibid.*, pp. I-3.

in order to directly facilitate American sea control operations and the establishment of a global maritime sphere of influence. No longer did freedom of the seas carry the meaning of ensuring the rights of neutral and impartial states to continue to trade on the high seas during times of war. After World War II, freedom of the seas came to mean ensuring the largest possible area of global high seas space where the United States Navy could operate and exercise its command via sea control operations. Because, as the 2018 Joint Maritime Operations Publication states, not even the United States' naval preponderance can be exerted to subjugate every part of the ocean at all times, freedom of the seas discourse takes on the role of preempting *de jure* sovereign claims over the world's high seas so that the U.S. can project power and intervene globally as it sees fit. By preempting claims of dominion over the world's ocean space, the discourse secures the ability to dominate via *imperium*.

### 2.3 The Exercise of *Imperium*

*Imperium* stands apart from the Seldinian 'closed seas' concept of dominion, or *dominium*, because unlike the latter, it does not connote sovereignty or ownership.<sup>52</sup> *Imperium*, rather, is the right to command.<sup>53</sup> *Imperium* connotes stewardship rather than ownership.<sup>54</sup> Within the steward's sphere of influence, they have the ability to exert control over the "space being stewarded and over others who might wish to use the stewarded region in a contrary manner."<sup>55</sup> According to Philip Steinberg, as steward, the actor exercising *imperium* may "temporarily appropriate, manage, and even transform the stewarded space in order to ensure that it continues to serve specified social ends."<sup>56</sup>

For the present work, the type of control exerted over the ocean is discussed only for the

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<sup>52</sup>Philip E Steinberg: Lines of division, lines of connection: Stewardship in the world ocean, in: Geographical Review 89.2 (1999), pp. 254–264, here p. 258.

<sup>53</sup>Idem: The social construction of the ocean, 2001, pp. 64–65.

<sup>54</sup>Idem: Lines of division, lines of connection: Stewardship in the world ocean (see n. 52), p. 259.

<sup>55</sup>Ibid., p. 257.

<sup>56</sup>Ibid., p. 258.



purpose of showing how the contemporary practices of freedom of the seas discourse function to exert control over the global ocean. Thus, discussion of types of control exercised serves to further the argument that in contemporary U.S. foreign policy, freedom of the seas is not the altruistic principle of freedom upheld for the common good, but is rather a mechanism of control used by the United States to establish a global American maritime sphere of influence. While this section utilizes the work of Philip Steinberg it is important to state that my project does not aim to speak to the critical geopolitics literature. Steinberg has written extensively on types control exerted on and across the high seas while discussing the impact of socially constructed representations of the material ocean-space on actors' behavior. This project does not aim to discuss how oceanic representations impact the form of control able to be exerted at sea, rather this project aims to show that contemporary freedom of the seas discourse facilitates sea control.

Philip Steinberg discusses the concept of *imperium* as the form of control exerted by the Roman Empire over the Mediterranean.<sup>57</sup> As the region's hegemon, and due to the fact that the territory of Rome encompassed the whole of the Mediterranean, the Roman Empire claimed the sea as part of its sphere of influence.<sup>58</sup> However, according to Steinberg and his critical geopolitics perspective, because the sea was perceived to be the common property of humanity, no claims of dominion were made over the ocean. Instead, Rome acted as the steward of the "unclaimable space that lay in the middle of its realm."<sup>59</sup> Although public law ensured that everyone had access to the sea, as the dominant naval power Rome was able to act "as they alone saw fit."<sup>60</sup> Therefore, Steinberg states, in accordance with *imperium* the ocean was constructed as a "surface that belonged to no one but upon which powerful states could intervene," through material power, "for the national interest."<sup>61</sup>

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<sup>57</sup>Steinberg: The social construction of the ocean (see n. 53), pp. 64–67.

<sup>58</sup>Ibid., p. 66.

<sup>59</sup>Ibid., p. 65.

<sup>60</sup>Ibid., p. 66.

<sup>61</sup>Ibid., pp. 66–67.

Steinberg also provides an example of Great Britain, at its zenith of sea power, exercising control via *imperium* over the world's seas.<sup>62</sup> Steinberg states,

Although Britain was the overwhelming sea power for much of the eighteenth and nineteenth centuries, it never sought to claim the world ocean as part of imperial territory. Rather, like Rome before it, Britain claimed the authority to exercise its power as ocean steward ... Britain may have “ruled the waves”—an act of *imperium*—but maps portraying the empire upon which “the sun never set” indicated only land space as the territory over which British *dominium* prevailed.<sup>63</sup>

In both these examples, Roman and British command of the seas, as it is defined today, provided the maritime powers a high seas sphere of influence over which it was the exclusive steward.

As such, in his discussion of the impact of political-economic systems on oceanic constructs, Steinberg attributes this form of ocean space control to the mercantilist era. During the mercantilist era, the Mahanian doctrine of command of the sea and the resultant the competition between naval powers for control of strategic sea lines of communication embodied the pursuit and exercise of *imperium*.<sup>64</sup> While subsequent political-economic systems, industrial and post-modern capitalism, changed the representation of the ocean in society, British and American naval institutions clung to the Mercantilist-Mahanian ideology.<sup>65</sup> The internalization of Mahanian doctrinal precepts stemmed from the privileged identity it conferred on the navy as a great war fighter of sea battles, as opposed to an escort service for merchant ships.<sup>66</sup> Because of this, the exertion of *imperium* is inherently manifest in the contemporary Mahanian naval doctrine of sea control to which the United States ascribes today.

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<sup>62</sup>Steinberg: Lines of division, lines of connection: Stewardship in the world ocean (see n. 52), p. 260.

<sup>63</sup>Ibid., p. 260.

<sup>64</sup>Steinberg: The social construction of the ocean (see n. 53), pp. 150–154.

<sup>65</sup>Ibid., p. 156.

<sup>66</sup>Ibid., p. 154.

Therefore, command of the seas represents the strategic condition whereby a maritime sphere of influence is established globally, or regionally. Within this high seas sphere of influence, latent *imperium* is held. The preponderant power is the *de facto* steward of its commanded high seas sphere of influence. Sea control represents the actualization, or manifestation, of control via *imperium*. Sea control operations are employed to intervene within the sphere of influence on behalf of a particular national interest.

It is important to state that while China's naval doctrine also explicitly follows Mahanian sea control precepts,<sup>67</sup> since China has claimed "indisputable sovereignty" over the islands and waters of the South China Sea,<sup>68</sup> their aspiration of control extends beyond *imperium* to a Seldenian claim of *dominium* over the South China Sea.

## 2.4 The *Mare Imperium* Discourse of Freedom of the Seas

This dissertation will show that when freedom of the seas discourse shifted in U.S. foreign policy from a *Mare Liberum* discourse of trade to a discourse of security, the meaning of freedom of the seas changed to facilitate the naval doctrine of sea control, and therefore the attainment of *imperium*. This *Mare Imperium* freedom of the seas discourse is predicated on command of the seas and its requisite material naval preponderance. The *Mare Imperium* discourse works to establish the global high seas as an arena free from claims of sovereignty so that the United States, as the unrivaled naval power, can intervene globally on behalf of its national interests as it sees fit. In other words, freedom of the seas discourse secures a global

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<sup>67</sup>Erickson/Goldstein: Gunboats for China's new "grand canals"? Probing the Intersection of Beijing's Naval and Oil Security Policies (see n. 13), pp. 49–50; Scobell: The South China Sea and US-China Rivalry (see n. 69), p. 209.

<sup>68</sup>The Permanent Mission of the People's Republic of China to the United Nations: Note Verbale - South China Sea Claims (see n. ??); United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs: Limits in the Sea (see n. 5).

high seas sphere of influence upon which, Posen argues, the “military foundation of U.S. political pre-eminence” and “hegemonic foreign policy” depend.<sup>69</sup> This work does not take a normative position on whether or not it is appropriate for the United States to still formulate political-military strategy through the doctrine of sea control. Rather, this project argues that basing strategy on a discourse that is predicated on command of the sea, without having the preponderant naval capability that affords such command, is fundamentally dangerous in an era of maritime great power competition. While a full empirical genealogy will be conducted in the body of this work, it is worth mentioning a few examples that highlight the *Mare Imperium* discourse and substantiate the argument being made.

The *Mare Imperium* project of ensuring a global high seas sphere of influence can be seen in the law of the sea discussions following the Second World War. For example, in 1952, Secretary of the Navy, Dan Kimball wrote to Secretary of State Dean Acheson expressing his concern with a Congressional Resolution that had been put forward in the House that aimed to extend U.S. territorial waters.<sup>70</sup> Secretary Kimball feared that extending the *de jure* territorial limits of the United States would legitimize the legal maritime territorial claims by other states and thus prove detrimental to American security interests by reducing the area over which the U.S. maintained *de facto* control.<sup>71</sup> Secretary Kimball wrote,

Any action by other nations which would restrict the range of warships and commercial vessels and military and commercial aircraft would be clearly disadvantageous to a great maritime power such as the United States. Any action which tends to restrict free navigation of the high seas by recognizing sovereignty over territorial waters in excess of 3 miles is contrary to United States security interest.<sup>72</sup>

Therefore, Secretary Kimball argued that limiting the areas of the high seas on which the

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<sup>69</sup>Posen: Command of the commons: the military foundation of US hegemony (see n. 11), p. 21.

<sup>70</sup>Dan A. Kimball: Submerged Lands: The honorable the Secretary of State, vol. Hearings, Reports and Prints of the Senate Committee on Interior and Insular Affairs, Page 556, June 20, 1952.

<sup>71</sup>Ibid.

<sup>72</sup>Ibid.

United States Navy can operate threatens freedom of navigation and poses a security challenge to the United States. Preventing *de jure* sovereign territorial claims over the high seas in the interest of national security was also the United States' primary goal during the UN Convention on the Law of the Sea negotiations.

In a 1954 memorandum discussing the UNCLOS negotiations, Herman Phleger, legal advisor to the Secretary of State, wrote "It is unnecessary to discuss the whole complex of naval and economic warfare to show that the value to the United States of the world's greatest navy is lessened if large areas of high seas are removed from the region of war."<sup>73</sup> Two years later, in 1958, as the United States was failing to make headway protecting the traditional three nautical mile territorial limit, President Eisenhower wrote to the British Prime Minister Harold Macmillan.<sup>74</sup> President Eisenhower wrote,

The U.S. military authorities feel strongly that they cannot accept any extension of the territorial sea beyond three miles in view of their heavy, world-wide responsibilities for the defense of the free world. ... It is the view of the U.S. Delegation to the Conference, shared in Washington, that any retreat from the three-mile limit, such as is involved in the British alternate proposal, will result in Conference approval of a twelve-mile territorial sea with serious damage to our security position vis-à-vis the Sino-Soviet bloc. The stakes are so great that, I suggest, neither of us should permit commercial considerations to control.<sup>75</sup>

Thus, it was a central goal of the United States to retain the greatest area of high seas space on which to levy command of the seas. Command over the largest possible extent of high seas was necessary, according to the United States, to control the sea on behalf of the security

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<sup>73</sup>Herman Phleger: Memorandum by the Legal Adviser (Phleger) to the Secretary of State, vol. Foreign Relations of the United States, 1952–1954, General: Economic and Political Matters, Volume I, Part 2, Document 293, November 26, 1954, url: <https://history.state.gov/historicaldocuments/frus1952-54v01p2/d293>.

<sup>74</sup>Dwight D. Eisenhower: Message From President Eisenhower to Prime Minister Macmillan, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 336, March 4, 1958, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d336>.

<sup>75</sup>Ibid.

free world. This was because, as a 1959 State Department memorandum on the American position on the law of the sea stated, “The non-Communist world is an oceanic grouping of states; it depends for its life on control of the seas.”<sup>76</sup> It continued, “The navies of the Free World keep the seas free. To do so they require maximum areas for maneuvers and for dispersion.”<sup>77</sup> While, the memorandum stated that it was the navies of the Free World that kept the sea ‘free’ through control, because at this time the United States possessed a naval monopoly, in practice it was the United States that sought to keep the seas free for use by its global alliance architecture. For the United States, this security goal took precedence over any consideration of trade.

Within this high seas sphere of influence, the United States was able to act as maritime steward and exert *imperium* to intervene globally on behalf of its national interests as it saw fit. A 1974 memorandum sent from the Assistant Secretary for Defense and Program Analysis, Leonard Sullivan Jr., to Secretary of Defense James Schlesinger (and later forwarded by Schlesinger to Secretary of State Henry Kissinger) aptly summarizes the United States’ position following the Second World War.<sup>78</sup> Sullivan wrote,

The United States emerged from World War II with the largest and most capable naval force the world has ever known, and with undisputed supremacy across the oceans and seas of the world. The British maintained the only other major ocean-going Navy, and even this was of only moderate size compared with U.S. forces. The U.S. naval monopoly, together with the historic concept of ‘freedom of the seas,’ enabled the U.S. to adopt a ‘forward defense’ strategy and to develop economic bonds and other forms of interdependence which are fundamentally predicated on free use of the high seas.<sup>79</sup>

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<sup>76</sup>Arthur L. Richards: Background Memorandum on the Law of the Sea, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 375, January 27, 1959, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d375>.

<sup>77</sup>Ibid.

<sup>78</sup>Sullivan Jr.: Executive Summary Prepared in the Office of the Assistant Secretary of Defense for Program Analysis and Evaluation (Sullivan) (see n. 63).

<sup>79</sup>Ibid.

American command of the sea over the global high seas sphere of influence safeguarded by freedom of the seas discourse, gave the United States the ability to engage in sea control and power projection operations necessary to safeguard the global linkages between the oceanic grouping of non-Communist states.<sup>80</sup> From the perspective of the United States, control over the global sea lines of communication was necessary to develop global systems of interdependence.

The discursive entanglement between freedom of the seas and Mahanian doctrinal precepts can further be seen in a 1976 memorandum written by the Director of the Bureau of Political Military Affairs, George S. Vest to the National Security Council.<sup>81</sup> The memorandum was written to brief the National Security Council on future naval force requirements for the United States. Vest wrote,

The basic strategic issue is how can the US structure its Navy during the balance of the 20th Century in order to maintain the “freedom of the seas”, the term now favored by the Secretary of Defense [Donald Rumsfeld] as a short-hand description of our maritime interests. This translates into a naval force capable of establishing control of crucial sea lanes of communication, as well as maintaining a measure of additional flexibility for the projection of power in crises. From the point of view of the Department of State the latter point is especially important.<sup>82</sup>

Thus, *Mare Imperium* freedom of the seas discourse embodies contemporary Mahanian naval doctrine. *Mare Imperium* functions by preventing *de jure* claims of sovereignty over the global ocean space to safeguard the *de facto* control afforded by command of the sea. By doing so, freedom of the seas discourse facilitates the preponderant power’s ability to control sea lines of communication and to project power on and across the global high seas sphere of

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<sup>80</sup>Richards: Background Memorandum on the Law of the Sea (see n. 76).

<sup>81</sup>George S. Vest: Briefing Memorandum From the Director of the Bureau of Politico-Military Affairs (Vest) to the Acting Secretary of State (Robinson), vol. Foreign Relations of the United States, 1969–1976, Volume XXXV, National Security Policy, 1973–1976, Document 84, 1976, url: <https://history.state.gov/historicaldocuments/frus1969-76v35/d84>.

<sup>82</sup>Ibid.

influence. These factors persist within the discourse of freedom of the seas today and render the South China Sea dispute “more dangerous than would otherwise appear.”<sup>83</sup>

Freedom of the seas discourse is not employed to uphold international order. Freedom of the seas discourse is employed to uphold a global maritime sphere of influence for the United States. Within that sphere of influence, the United States has the ability to act on behalf of national or international interests as it alone sees fit. The United States may “unilaterally exercise its local preponderance” to uphold facets of international order, particularly regarding matters such as the “avoidance and control of crises” and the “limitation of war”.<sup>84</sup> However, because the *Mare Imperium* discourse aims to establish a global maritime sphere of influence in which a preponderant United States acts as the exclusive steward, it fundamentally is not intended as a mechanism to preserve a balance of power or to cede *imperium* to additional great power spheres of influence.<sup>85</sup>

## 2.5 Why this matters

The reason why Chinese territorial ambitions in the South China Sea are so antagonistic to the U.S. conception of freedom of the seas is because Chinese regional sea control strategies directly undermine the United States’ perceived stewardship over the global high seas. Freedom of Navigation Operations are intended to re-assert the United States’ sphere of influence. However, since such a sphere is dependent on material preponderance, the symbolic appeals of FONOPs fall short as China gains in military capability. This poses an irreconcilable challenge in the contemporary era of maritime great power competition.

For the first time since World War II the United States is being confronted by a maritime power with sea control ambitions. Even at the height of the Cold War, the Soviet Union did

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<sup>83</sup>Garland: What is a “history of the present”? On Foucault’s genealogies and their critical preconditions (see n. 2), p. 372.

<sup>84</sup>Hedley Bull: *The anarchical society: a study of order in world politics*, 2012, pp. 202–212.

<sup>85</sup>*Ibid.*, pp. 201, 212.



not aspire to control the sea but rather created a naval force structure based around *guerre de course*, or commerce interdiction, and ensuring a nuclear second strike capability.<sup>86</sup> The ability of the Soviet force structure to exert sea control was limited to its near seas.<sup>87</sup> Therefore the *Mare Imperium* freedom of the seas discourse has never been militarily challenged before now.

China has developed its maritime force structure, its so called anti-naval land based forces, and its militarized outpost system of artificial islands throughout the South China Sea explicitly in accordance with Mahanian doctrinal precepts to bring its near seas under Chinese dominion.<sup>88</sup> Due to Chinese military development, during the 2018 Senate Armed Forces Committee confirmation hearing for the position of Commander of U.S. Pacific Command, Admiral Philip Davidson stated, “In short, China is now capable of controlling the South China Sea in all scenarios short of war with the United States.”<sup>89</sup> The inability to establish sea control in the South China Sea indicates that the United States has conclusively lost whatever global command of the sea it may once have had. The United States lacks the preponderance of force in the South China Sea region needed to credibly threaten to deny China use of the space. China’s capacity to exercise sea control only grows as it’s naval capabilities outpace those of the United States. By the year 2030, China is expected to have a naval force substantially larger, and at technological parity with the United States Navy.<sup>90</sup> The Chinese Navy is anticipated to consist of 550 vessels, including “450 surface ships and ninety-nine submarines,” while the United States is forecasted to only have 355 total ships

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<sup>86</sup>Field: *The Influence of Sea Power on Modern Strategy* (see n. 43), p. 32; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 346.

<sup>87</sup>Field: *The Influence of Sea Power on Modern Strategy* (see n. 43), p. 32.

<sup>88</sup>Erickson/Goldstein: *Gunboats for China’s new “grand canals”?* *Probing the Intersection of Beijing’s Naval and Oil Security Policies* (see n. 13), pp. 49–50; Scobell: *The South China Sea and US-China Rivalry* (see n. 69), p. 209.

<sup>89</sup>Advance Policy Questions for Admiral Philip Davidson, USN Expected Nominee for Commander, U.S. Pacific Command, April 17, 2018, p. 18.

<sup>90</sup>Fanell: *China’s Global Naval Strategy and Expanding Force Structure* (see n. 16), p. 13.

in service.<sup>91</sup> At its base level Mahanian sea control depends on a preponderance of material force. Therefore, as the U.S. wanes in relative material capability it becomes less able to support political-military strategies predicated on the assumption of global naval dominance.

The crux of the issue in the South China Sea is not a contest between free seas and closed seas, but rather competition between overlapping forms of sea control. Because both Chinese maritime territorial claims in the South China Sea and the United States' Post-World War II role as global maritime steward are dependent on overlapping spheres of influence upheld by Mahanian sea control, there is an inherent risk of military confrontation. Since American sea control ambitions are universalized through freedom of the seas discourse there is no elasticity with which to peacefully accommodate a new naval great power. Within *Mare Imperium*, threats to the American ability to control the sea are now discursively synonymous with threats to the freedom of the sea itself. At best, policy makers are aware of the deception involved in portraying control as freedom. At worst, however, decision makers have bought into the naturalized conception of freedom of the seas as the altruistic defense of global access and are therefore careening towards confrontation without understanding why.

The remainder of the project will trace the discourse of freedom of the seas in U.S. foreign policy through the empirical primary source archive. The succeeding chapters will show how the discourse of freedom of the seas shifted from a *Mare Liberum* discourse of trade to a *Mare Imperium* discourse of security in U.S. foreign policy. In doing so this dissertation will conclusively demonstrate that, first, freedom of the seas is not a historic constant championed over the course of U.S. history, but rather is a recent phenomenon. And second, rather than defending the altruistic principle of freedom, the recent assemblage of freedom of the seas has emerged in U.S. policy to facilitate sea control and establish a global maritime sphere of influence for the United States. Because of these factors, this work concludes that American

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<sup>91</sup>Fanell: China's Global Naval Strategy and Expanding Force Structure (see n. 16), p. 13.

political-military strategy in the South China Sea can and should change to reflect the actual conditions of the dispute.

# Part I

## *Mare Liberum*

# Chapter 3

## A Pre-Institutionalized Discourse: The Rights of Neutrals

In the latter half of the 18th century, in the years leading up to the American Revolution, no unified conception of freedom of the seas practices existed. As was the case in the 17th century debates between Grotius and Selden, freedom of the seas, meaning the right to navigate the high seas for the purpose of trade, was ubiquitous in times of peace. The only peacetime interruption of trade navigation arose from piracy, which was quickly declared a crime against humanity and driven from the sea. Thus, the sole point of contention surrounding the freedom of the seas arose during times of war when belligerent states sought to wage economic warfare on their enemies at sea. In the conduct of such economic warfare, belligerent powers sought both to cripple the “import and export trade” of their enemy and to prevent them from acquiring the supplies needed to continue waging war.<sup>1</sup> To accomplish both ends, belligerent powers targeted enemy property on the high seas.<sup>2</sup> Because war was viewed as an existential struggle between nations, and because economic strength was the lifeblood of fighting capability, warring states held that the interdiction of enemy property at sea was their right as belligerents.<sup>3</sup> However, these belligerent rights of hampering enemy

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<sup>1</sup>Philip C Jessup/Francis Déak: The Early Development of the Law of Neutral Rights, in: *Political Science Quarterly* 46.4 (1931), pp. 481–508, here p. 482.

<sup>2</sup>Graham Bower: Private Property on the High Seas, in: *American Journal of International Law* 13.1 (1919), pp. 60–78, here p. 63; Jessup/Déak: The Early Development of the Law of Neutral Rights (see n. 1), p. 482.

<sup>3</sup>Bower: Private Property on the High Seas (see n. 2), p. 63.

commerce fundamentally conflicted with the rights of neutral states to maintain free trade.<sup>4</sup> During this time period, the rights of neutrals were negotiated and maintained solely on a bilateral basis.<sup>5</sup> The freedom of the seas, or the ability to trade unhindered, was therefore unique to each state depending on their diplomatic and trade relationships, as well as the bundle of states embroiled in conflict at any given time. As England, France, and the United Provinces were the largest maritime powers of the time,<sup>6</sup> how they conceived their rights as belligerents immensely shaped the international environment and the discourse surrounding freedom of the seas.

England and France rose to naval predominance through a series of events following the Peace of Nijmegen in 1679. The treaties signed in Nijmegen ended a series of wars fought on the European continent between France and Sweden on one side and the United Provinces, Spain, Denmark, and the Holy Roman Empire on the other.<sup>7</sup> Even after the Peace, French territorial aggrandizement continued unabated from 1679 until 1682.<sup>8</sup> During this time period, King Louis the XIV tasked Jean-Baptiste Colbert with dramatically expanding France's naval capability.<sup>9</sup> At the time of Colbert's death in 1683, France had constructed the most powerful navy in the world.<sup>10</sup> At the same time that France was developing a robust fighting fleet, the naval capabilities of England and Holland were declining.<sup>11</sup> By 1684, the English fleet was so thoroughly degraded that King Charles II personally took it upon himself to organize the redevelopment of English naval capability in order to compete with France. Before substantial work could be done, however, Charles II died in 1685.<sup>12</sup> Charles II was

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<sup>4</sup>Bower: *Private Property on the High Seas* (see n. 2), p. 63; Jessup/Déak: *The Early Development of the Law of Neutral Rights* (see n. 1), p. 482.

<sup>5</sup>Samuel Flagg Bemis: *The diplomacy of the American Revolution*, 2013, p. 2525.

<sup>6</sup>Jonathan R Dull: *The Age of the Ship of the Line: The British and French Navies, 1650-1815*, 2009, p. vii.

<sup>7</sup>Alfred Thayer Mahan: *The influence of sea power upon history, 1660-1783*, 2020, p. 173.

<sup>8</sup>*Ibid.*, p. 173.

<sup>9</sup>*Ibid.*, p. 174.

<sup>10</sup>Potter: *Sea power: A naval history* (see n. 64), p. 19.

<sup>11</sup>Mahan: *The influence of sea power upon history, 1660-1783* (see n. 7), p. 174.

<sup>12</sup>*Ibid.*, p. 175.

succeeded by his Catholic brother, King James II which dramatically changed the international landscape.<sup>13</sup> King James II found an ally as opposed to adversary in Catholic France. The subsequent efforts by James II to Catholicize England provoked so much ire that in 1689, the English Parliament invited the Dutch Protestant Prince William of Orange and his wife Mary, the daughter of King James II, to rule England as co-regents.<sup>14</sup> While Prince William wanted to take the English throne, he needed ships, money, and men from the United Provinces to do so. The United Provinces did not want to be drawn into another war with France which would almost certainly occur if William usurped France's ally James.<sup>15</sup> However, the United Provinces changed their mind when France violated a Franco-Dutch treaty of trade signed in Nijmegen in 1679.<sup>16</sup> A French historian cited by Alfred Thayer Mahan stated, "This violation of the conventions of Nimeguen, by giving a severe blow to Dutch commerce, reducing her European trade more than one fourth, removed the obstacle... and put all Holland at the disposition of William, none having reason longer to conciliate France."<sup>17</sup> When the Dutch forces came to England, James II fled. In April, 1689, William and Mary were crowned co-regents of England. Because the newly crowned King William III of England remained the Stadtholder of Holland, Zeeland, Utrecht, Guelders and Overijssel, the naval capabilities of England and the Dutch provinces were united under a single crown during what would become known as the Nine Years' War.<sup>18</sup>

During the Nine Years' War, neutral trade was targeted by the belligerent powers to a degree not yet seen in naval warfare.<sup>19</sup> The combined naval capability allowed the Anglo-

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<sup>13</sup>Potter: *Sea power: A naval history* (see n. 64), p. 19.

<sup>14</sup>*Ibid.*, p. 19.

<sup>15</sup>Mahan: *The influence of sea power upon history, 1660-1783* (see n. 7), pp. 176–177.

<sup>16</sup>*Ibid.*, pp. 176–177.

<sup>17</sup>*Ibid.*, pp. 176–177.

<sup>18</sup>Potter: *Sea power: A naval history* (see n. 64), p. 19; Mahan: *The influence of sea power upon history, 1660-1783* (see n. 7), p. 178.

<sup>19</sup>Eric Schnakenbourg: *From "hostile infection" to "free ship, free goods": Changes in French neutral trade legislation (1689–1778)*, in: 2011, p. 99.

Dutch alliance to interdict French trade and prevent supplies from reaching their enemy.<sup>20</sup> In interdicting trade, England conceptualized its belligerent rights in the context of the 14th century doctrine of *Consolato del Mare*.<sup>21</sup> *Consolato del Mare* originated among the maritime states of the Mediterranean and codified a common collection of naval practices.<sup>22</sup> This legal code stated that “Enemy goods on the ship of a friend are good prize,” and that “the property of a friend on an enemy vessel is free.”<sup>23</sup> Therefore, under *Consolato del Mare* the goods being transported were independent of the belligerent status of the carrying vessel.<sup>24</sup> Because of this, belligerent states had the right to stop and search neutral shipping vessels. If enemy goods were found aboard the neutral vessel, the belligerent state had the right to seize the enemy goods while allowing the neutral goods and vessel to go free.<sup>25</sup> However, all enemy merchant ships, along with the enemy goods on board were subject to seizure.<sup>26</sup> While neutral goods aboard enemy ships were not liable for seizure under *Consolato del Mare*, they were still routed to Prize Courts of the belligerent for adjudication as opposed to them being able to continue on their way.<sup>27</sup> Because of its status as the long standing and commonly accepted historical practice, *Consolato del Mare* was regarded as the law of nations. Abiding by this conceptualization of belligerent rights suited the British as it enabled England to seek out and cripple enemy commerce wherever it may be.<sup>28</sup>

The Dutch followed a more liberal conception of belligerent rights in its treaties with

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<sup>20</sup>Schnakenbourg: From “hostile infection” to “free ship, free goods”: Changes in French neutral trade legislation (1689–1778) (see n. 19), p. 97.

<sup>21</sup>Edward Elliott: Freedom of Neutral Commerce, in: Calif. L. Rev. 3 (1914), p. 292; Bemis: The diplomacy of the American Revolution (see n. 5), p. 2505.

<sup>22</sup>Elliott: Freedom of Neutral Commerce (see n. 21), p. 292; Bower: Private Property on the High Seas (see n. 2), p. 63.

<sup>23</sup>Idem: Private Property on the High Seas (see n. 2), pp. 63–64.

<sup>24</sup>Elliott: Freedom of Neutral Commerce (see n. 21); Bower: Private Property on the High Seas (see n. 2), p. 64; Jessup/Déak: The Early Development of the Law of Neutral Rights (see n. 1), pp. 485–486.

<sup>25</sup>Idem: The Early Development of the Law of Neutral Rights (see n. 1), pp. 485–486.

<sup>26</sup>Ibid., pp. 485–486.

<sup>27</sup>Ibid., pp. 485–486.

<sup>28</sup>Charles H Stockton: The Declaration of Paris, in: American Journal of International Law 14.3 (1920), pp. 356–368, here p. 358.



neighboring states.<sup>29</sup> The Netherlands endeavored to let maritime trade continue as if there was no war occurring.<sup>30</sup> It aimed to secure the greatest possible leniency for its merchants through a policy that came to be known as ‘free ships, free goods, and enemy ships, enemy goods.’ Rather than stopping and searching out enemy goods wherever they may be found, the Dutch proposed a less invasive policy whereby the flag that the shipping vessel was flying under ‘covered’ all the goods aboard.<sup>31</sup> In this way even enemy goods traveling on neutral ships would be immune from seizure by belligerent states. As a concession to large naval states who benefited from the destruction of enemy commerce, the Dutch doctrine also proposed a corollary that all goods transported under an enemy flag would be subject to confiscation.<sup>32</sup> This was not a painful concession for the Netherlands as the size of their national shipping industry meant that few, if any, Dutch goods were being transported on non-Dutch ships.<sup>33</sup> As interstate trade expanded during this period, more and more bilateral treaties began to move away from the ridged dictums of *Consolato del Mare*.<sup>34</sup> With common addendums that prohibited trade with blockaded enemy ports, and that forbade neutral ships from carrying items declared contraband to non-blockaded enemy ports, the ‘free ships, free goods, enemy ships, enemy goods’ doctrine of neutral rights became accepted among the majority of European maritime states by 1668.<sup>35</sup> However, unlike *Consolato del Mare*, this liberal conception of neutral rights was not accepted as international law.<sup>36</sup>

During this time period and in the context of the Nine Years’ war, France observed

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<sup>29</sup>Dull: *The Age of the Ship of the Line: The British and French Navies, 1650-1815* (see n. 6), p. vii; Jessup/Déak: *The Early Development of the Law of Neutral Rights* (see n. 1), p. 493.

<sup>30</sup>George N Clark: *War trade and trade war, 1701-1713*, in: *The Economic History Review* 1.2 (1928), pp. 262–280, here p. 269.

<sup>31</sup>Bemis: *The diplomacy of the American Revolution* (see n. 5), p. 2525.

<sup>32</sup>*Ibid.*, p. 2525.

<sup>33</sup>Jessup/Déak: *The Early Development of the Law of Neutral Rights* (see n. 1), p. 499.

<sup>34</sup>Bower: *Private Property on the High Seas* (see n. 2), p. 65.

<sup>35</sup>Jessup/Déak: *The Early Development of the Law of Neutral Rights* (see n. 1), p. 499; Bower: *Private Property on the High Seas* (see n. 2), p. 64.

<sup>36</sup>*Idem*: *Private Property on the High Seas* (see n. 2), p. 66; Jessup/Déak: *The Early Development of the Law of Neutral Rights* (see n. 1), p. 488.

the most stringent bundle of economic warfare policies.<sup>37</sup> France instructed its privateers to follow a French ordinance originally put forward in 1543, commonly referred to as the doctrine of hostile infection. According to the doctrine of hostile infection, or contagion, all goods aboard enemy ships were liable for seizure, enemy and neutral alike, along with the vessel itself.<sup>38</sup> Further, and of greater concern to the trading states of northern Europe, if any enemy goods were found aboard a neutral shipping vessel, the neutral cargo, along with the ship itself, would be considered ‘contaminated’ by the enemy cargo and subjected to seizure as well.<sup>39</sup> Thus, under the French belligerent policies only neutral ships carrying exclusively neutral cargoes were safe from predation at sea.<sup>40</sup> Sweden and other neutral trading states regularly denounced the severity of the French conception of belligerent rights.<sup>41</sup>

While France’s naval capability equaled the combined forces of England and the United Provinces at the outset of the war, Louis XIV focused the majority of its resources on the land campaign in continental Europe rather than the navy and so the French fleet deteriorated.<sup>42</sup> When the war concluded in 1697, France was impelled to sign away nearly all territorial possessions it had seized since the Peace of Nijmegen in 1679.<sup>43</sup>

During the War of Spanish Succession (1701-1713), England solidified its position as the predominant naval power of the time.<sup>44</sup> The war was fought to determine who should rule the Spanish Empire and whether or not its global imperial holdings should be divided up to

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<sup>37</sup>Schnakenbourg: From “hostile infection” to “free ship, free goods”: Changes in French neutral trade legislation (1689–1778) (see n. 19), p. 98.

<sup>38</sup>Elliott: Freedom of Neutral Commerce (see n. 21), p. 292; Bower: Private Property on the High Seas (see n. 2), p. 64; Bemis: The diplomacy of the American Revolution (see n. 5), p. 2519.

<sup>39</sup>Elliott: Freedom of Neutral Commerce (see n. 21), p. 292; Bower: Private Property on the High Seas (see n. 2), p. 64; Bemis: The diplomacy of the American Revolution (see n. 5), p. 2519.

<sup>40</sup>Jessup/Déak: The Early Development of the Law of Neutral Rights (see n. 1), pp. 486–487.

<sup>41</sup>Schnakenbourg: From “hostile infection” to “free ship, free goods”: Changes in French neutral trade legislation (1689–1778) (see n. 19), p. 98.

<sup>42</sup>Potter: Sea power: A naval history (see n. 64), p. 19; Mahan: The influence of sea power upon history, 1660-1783 (see n. 7), pp. 178–179, 191.

<sup>43</sup>Idem: The influence of sea power upon history, 1660-1783 (see n. 7), p. 197.

<sup>44</sup>Ibid., p. 225.

maintain a European balance of power.<sup>45</sup> During the conflict England, allied with the Dutch, sought to prevent France from putting a Bourbon on the Spanish throne and thus expanding its protective trade policies over the Spanish colonies in the Western Hemisphere.<sup>46</sup> The War of Spanish Succession continued the belligerent practice of interdicting neutral trade in order to prevent material goods from reaching the enemy.<sup>47</sup> However, during this conflict the three dominant maritime powers primarily relied on privateers to attack enemy commerce rather than conventional naval forces.<sup>48</sup> France, for example, whose conventional navy had deteriorated in strength in the wake of the Nine Year's War sanctioned more privateers during the War of Spanish Succession than ever before or would ever again.<sup>49</sup> According to British Parliamentary records, over 1,100 merchant ships were lost during the conflict between 1701 and 1708.<sup>50</sup> However, by 1708, the British Admiralty succeeded in stemming the vast majority of depredations by French privateers. England seized the strategic holding of Gibraltar and Port Mahon, but by 1710, domestic support for the war in England started to wane.<sup>51</sup> The Dutch, impelled by geography to fight a land war against France, had gradually lost the ability to maintain its naval forces. This forced England to shoulder a disproportionate cost of the conflict.<sup>52</sup> England cashed in its dominant position in the conflict and on April 11, 1713, brokered a treaty of peace in the city of Utrecht between its coalition and France.<sup>53</sup>

As a consequence of the war, both France and the United Provinces, exhausted by land campaigns, ceased to be regarded as naval powers of a first rate.<sup>54</sup> Following the War of Spanish Succession, the United Provinces disengaged from European diplomacy and war,

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<sup>45</sup>Ibid., p. 201.

<sup>46</sup>Mahan: *The influence of sea power upon history, 1660-1783* (see n. 7), p. 202; Clark: *War trade and trade war, 1701-1713* (see n. 30), p. 262.

<sup>47</sup>Idem: *War trade and trade war, 1701-1713* (see n. 30), p. 263.

<sup>48</sup>Ibid., p. 263.

<sup>49</sup>Ibid., p. 263.

<sup>50</sup>Ibid., p. 264.

<sup>51</sup>Mahan: *The influence of sea power upon history, 1660-1783* (see n. 7), pp. 216, 219–220.

<sup>52</sup>Ibid., p. 216.

<sup>53</sup>Ibid., p. 218.

<sup>54</sup>Ibid., p. 220.

and began to decline commercially.<sup>55</sup> England's naval position, on the other hand, was vastly improved through the strategic bases and colonial trade it secured through the conflict.<sup>56</sup> After the Treaty of Utrecht, England assumed the role of the dominant sea power of the century.<sup>57</sup> In the Treaty of Utrecht, England sought to neuter France's ability to strike out against British commerce through the use of privateers. England imposed the doctrine of 'free ships, free goods' upon France in a bilateral treaty between the two states.<sup>58</sup>

Because 'free ships, free goods' was viewed as a conditional exception to the established international law of *Consolato del Mare* designed to further particular interests, it was routinely transgressed or "arbitrarily interpreted" by strong maritime powers when a stricter policy of belligerent rights was in their favor.<sup>59</sup> For example, England announced on January 18, 1754, at the outbreak of the French and Indian War, that it would resume seizing all enemy property on the high seas in line with the doctrine of *Consolato del Mare* and it would also seize contraband of war regardless of the property's origin.<sup>60</sup>

As the eighteenth century progressed, small maritime states remained the primary champions of the 'free ships, free goods' conception of freedom of the seas. While the primary beneficiary of this policy was the neutral trading state, 'free ships, free goods' was also distinctly advantageous to states at war with a stronger naval power.<sup>61</sup> Unlike strong naval belligerents, small naval-states did not possess the capability to both protect their commerce and destroy the commerce of their enemy. Therefore, having access to neutral shipping al-

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<sup>55</sup>Mahan: The influence of sea power upon history, 1660-1783 (see n. 7), p. 222.

<sup>56</sup>Ibid., pp. 219-220.

<sup>57</sup>Ibid., p. 225.

<sup>58</sup>Bemis: The diplomacy of the American Revolution (see n. 5), p. 2537; Bower: Private Property on the High Seas (see n. 2), p. 65; Dull: The Age of the Ship of the Line: The British and French Navies, 1650-1815 (see n. 6), p. 34.

<sup>59</sup>Bower: Private Property on the High Seas (see n. 2), p. 66; Jessup/Déak: The Early Development of the Law of Neutral Rights (see n. 1), p. 488; Bemis: The diplomacy of the American Revolution (see n. 5), p. 2537.

<sup>60</sup>Bower: Private Property on the High Seas (see n. 2), pp. 66-67.

<sup>61</sup>Elliott: Freedom of Neutral Commerce (see n. 21); Bemis: The diplomacy of the American Revolution (see n. 5).

lowed small naval-states to continue to receive supplies even without possessing the sea power necessary to protect their own commerce.<sup>62</sup>

## 3.1 The American Revolution

Shortly after the United States declared independence from Britain, the Continental Congress set about to establish treaties of commerce with the states of Europe. The purpose for this was twofold. Treaties of commerce would enable the fledgling country to receive much needed supplies during the American War of Independence, but more importantly, establishing bilateral treaties with the states of Europe would provide international recognition of American independence. In order to appeal to the continental states of Europe who had structured their commercial relations in opposition to the antagonistic maritime policies of Great Britain, the United States pursued commercial agreements founded on the liberal ‘free ships, free goods, enemy ships, enemy goods’ conception of freedom of the seas.<sup>63</sup> A committee comprising John Adams, Benjamin Franklin, John Dickenson, Benjamin Harrison, and Robert Morris, presented to Congress a model treaty, on which all bilateral treaties would be based, that reflected the interests of the fledgling United States with regards to establishing “commerce and amity” with foreign powers.<sup>64</sup> Congress approved the Model Treaty on September 17, 1776.<sup>65</sup> According to Samuel F. Bemis, the Model Treaty can “be regarded as a charter document of early American maritime practice” which encapsulated the “small-navy liberal principles of free ships free goods” that comprised “the American doctrine of freedom of the seas.”<sup>66</sup>

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<sup>62</sup>Idem: The diplomacy of the American Revolution (see n. 5); J S Reeves: Two Conceptions of the Freedom of the Seas, in: The American Historical Review 22.3 (Apr. 1917), pp. 535–543, here p. 540.

<sup>63</sup>Idem: Two Conceptions of the Freedom of the Seas (see n. 62), p. 540; idem: Two Conceptions of the Freedom of the Seas (see n. 62), p. 540; Bemis: The diplomacy of the American Revolution (see n. 5), p. 901.

<sup>64</sup>Idem: The diplomacy of the American Revolution (see n. 5), p. 901.

<sup>65</sup>Plan of the Treaties with France of 1778, Journals of Congress. Tuesday, September 17, 1776. url: [https://avalon.law.yale.edu/18th\\_century/fr1778p.asp](https://avalon.law.yale.edu/18th_century/fr1778p.asp).

<sup>66</sup>Bemis: The diplomacy of the American Revolution (see n. 5), pp. 923, 3208.

Specifically, the model treaty includes provisions for the allowance of enemy goods, save specifically designated contraband, to be transported on neutral ships, and permits neutral countries to do trade with the unblockaded ports of enemy countries.<sup>67</sup> All goods traveling on enemy ships, however, inline with the doctrine of the day, were deemed fair prize. In regulating the belligerent right of search and seizure, the model treaty states that the merchant ships of either signatory nation, bound for enemy ports, may be stopped if there is “just grounds of suspicion” and be required to show their passports and certificates to show that they are not transporting contraband of war.<sup>68</sup> Article XVI of the Model Treaty states,

if not the whole Cargo, but only Part thereof shall consist of prohibited or contraband Goods, and the Commander of the Ship shall be ready and willing to deliver them to the Captor who has discovered them, in such Case the Captor having received those Goods, shall forthwith discharge the Ship, and not hinder her by any Means freely to prosecute the Voyage on which she was bound.<sup>69</sup>

This article further emphasizes that, in the process of confiscating contraband from neutral vessels, it is explicitly illegal to damage the carrying vessel, open any compartments that are not holding contraband, or to remove any non-contraband property.<sup>70</sup> In outlining the limitations of belligerent search and seizure, the treaty directly positions itself against the traditional French doctrine of hostile infection. Article XVI of the Model Treaty states, “the Ship itself, as any other Goods found therein, which by this Treaty, are to be esteemed free; neither may they be detained on Pretence of their being as it were infected by the prohibited Goods, much less shall they be confiscated as lawfull Prize”.<sup>71</sup> Further, the treaty explicitly stipulates what items the United States considers contraband of war, and what items it perceives as being free. From the perspective of the United States, the only goods

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<sup>67</sup>Bemis: *The diplomacy of the American Revolution* (see n. 5), p. 901.

<sup>68</sup>Plan of the Treaties with France of 1778, *Journals of Congress*. Tuesday, September 17, 1776. (see n. 65), Article XV.

<sup>69</sup>*Ibid.*, Article XVI.

<sup>70</sup>*Ibid.*, Article XVI.

<sup>71</sup>*Ibid.*, Article XVI.

that could be considered contraband included instruments of war such as “Gunpowder, Match, Cannon Ball, Pikes, Swords, Lances, Spears, Halberds, Mortars, Petards, Granadoes, Saltpetre, Musketts, Muskett Balls, Helmets, Head Pieces, Breast Plates, Coats of Mail, and the like Kind of Arms proper for arming Soldiers, Muskett rests, Belts, Horses with their Furniture, and all other war like Instruments whatsoever.”<sup>72</sup> All other goods, however,<sup>73</sup>, particularly cloths, metals, foodstuffs, and ship building products were designated as “free goods”.<sup>74</sup> These goods are allowed to be “carried in the freest Manner by the Subjects of both Confederates, even to Places belonging to an Enemy, such Towns and Places being only excepted as are at that time besieged, blocked up, or invested.”<sup>75</sup> Reiterating the ‘enemy ships make enemy goods’ provision, the treaty stated, that if any good from a neutral nation is found being transported on-board an enemy’s ship, regardless of contraband status, it “may be confiscated in the same Manner as if it belonged to the Enemy himself.”<sup>76</sup>

On February 6 1778, after years of covert assistance to the American cause of Independence, the Franco-American Treaty of Amity and Commerce was signed along with a Treaty of Alliance.<sup>77</sup> The Treaty of Amity and Commerce that was signed was almost identical to

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<sup>72</sup>Ibid., p. XXVII.

<sup>73</sup>“These Merchandizes which follow, shall not be reckoned among Contraband or prohibited Goods; that is to Say, all Sorts of Cloths, and all other Manufactures woven of any Wool, Flax, Silk, Cotton, or any other Material whatever; all Kinds of Wearing apparel!, together with the Species whereof they are used to be made; Gold and Silver, as well coined as uncoined, Tin, Iron, Lead, Copper, Brass, Coals; as also Wheat and Barley, and any other Kind of Corn and Pulse; Tobacco, and likewise all manner of Spices; Salted and Smoked Flesh, Salted Fish, Cheese and Butter, Beer, Oils, Wines, Sugars, and all Sorts of Salt; and in general, all Provisions which Serve for the Nourishment of Mankind, and the Sustenance of Life: Furthermore, all Hinds of Cotton, Hemp, Flax, Tar, Pitch, Ropes, Cables, Sails, Sail Cloth, Anchors, and any Parts of Anchors; also Ships’ Masts, Planks, Boards, and Beams, of what Tree Soever; and all other Things proper either for building or repairing Ships, and all other Goods whatsoever which have not been worked into the Form of any Instrument or Thing prepared for War, by Band or by Sea, shall not be reputed Contraband much less such as have been already wrought and made up for any other use; all which shall wholly be reckoned among free Goods...”ibid., p. XXVII

<sup>74</sup>Ibid., p. XXVII.

<sup>75</sup>Ibid., p. XXVII.

<sup>76</sup>Ibid., p. XVII.

<sup>77</sup>A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875; French-American Treaty of Amity and Commerce, url: <https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=008/llsl008.db&recNum=19>; Bemis: The diplomacy of the American Revolution (see n. 5).

the Model treaty approved by the American Congress in 1776. In fact, the articles pertaining to the doctrine of ‘free ships, free goods’, Articles XV, XVI, XVII, and XXVII were adopted verbatim in Articles XII, XIII, XVI, and XXVI of the Franco-American treaty of Commerce.<sup>78</sup> The shift away from France’s all encompassing restrictions on neutral trade towards the liberal small-navy policy of ‘free ships free goods’ was the product of strategic self-interest. By 1788, England outmatched the French navy 122 fighting ships to 63.<sup>79</sup> In order to ensure this preponderant capability, England declared ship building material, predominantly sourced from the Scandinavian countries, contraband.<sup>80</sup> Due to England’s superior capability and geographic location, it was able to jeopardize any major French shipping operations through the English Channel to acquire naval stores.<sup>81</sup> In response, France shifted to a maritime posture of championing the liberal rights of neutral powers in order that they may deliver ship building material, foodstuffs, and other “non-contraband colonial products” to French harbors.<sup>82</sup> Thus, it was a serendipitous coincidence that, during this time, the Anglo-French conflict impelled France to promote the “liberal conception of neutral rights” to further its own interests.<sup>83</sup> For this reason France was willing to accede to the American terms of the Treaty of Amity and Commerce.

The primary aim of the United States in utilizing freedom of the seas discourse, conceptualized in terms of ‘free ships free goods’ policies, was for the purpose of winning European recognition of American independence. In 1780, John Adams wrote the pamphlet “Letters from a Distinguished American” in order to make the case that it was in the best interest

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<sup>78</sup>The Model Treaty, 1776, url: <https://history.state.gov/milestones/1776-1783/model-treaty>; A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875; French-American Treaty of Amity and Commerce (see n. 77), pp. 20, 26.

<sup>79</sup>Bemis: The diplomacy of the American Revolution (see n. 5), pp. 2553–2570; Dull: The Age of the Ship of the Line: The British and French Navies, 1650-1815 (see n. 6), pp. 39, 68, 85.

<sup>80</sup>Bemis: The diplomacy of the American Revolution (see n. 5), pp. 2553–2570.

<sup>81</sup>Ibid., pp. 2553–2570.

<sup>82</sup>Ibid., pp. 2553–2570.

<sup>83</sup>Ibid., pp. 2553–2570.



of European states to support the United States' revolution against the British.<sup>84</sup> It stated,

... if the true American system of policy should be peace and neutrality, as no doubt it will, they will derive such commerce and naval supplies from America for ever, hereafter, as will secure them the *freedom of the seas* [emphasis added]. This is also a powerful motive for all the maritime nations of Europe to favour and support American Independence. It is the true interest of all the maritime nations, that America should have a free trade with all of them, and that she should be neutral in all their wars.

Every body now throughout the world sees, that a renewal of the English monopoly of the American trade, would establish an absolute tyranny upon the ocean, and that every other ship that sails would hold its liberty at the mercy of these Lordly Islanders. ... It is obviously then the interest and duty of all the maritime powers to keep the American trade open and free to all, and to be sure to prevent its being monopolized by any one nation whatever.<sup>85</sup>

Therefore, Adams wrote that supporting American independence would not only prevent one maritime power from dominating the entirety of North American trade, but also that, by controlling its own trade, the United States would be able to provide goods and naval stores to European states under the neutral rights doctrine of freedom of the seas.

On February 28, 1780 Catherine II announced that that Russia would begin building its naval armaments in order to defend neutral Russian trade from all belligerent powers.<sup>86</sup> After signing the Treaty of Amity and Commerce with the United States, France was pulled into the War of American Independence against Great Britain.<sup>87</sup> Spain, an ally of France, was drawn into the war as well.<sup>88</sup> Russia invited the neutral European maritime nations of the day, "Portugal, the Netherlands, Sweden, Denmark-Norway, Prussia, and Austria" to form a

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<sup>84</sup>John Adams: Letters from a Distinguished American," No. 1, 14 July 1780; 17 January 1782, July 14, 1780 and/or January 1782, url: <https://founders.archives.gov/?q=22freedom20of20the20seas22&s=1111311111&sa=&r=3&sr=#PJA09d358n2>.

<sup>85</sup>Ibid.

<sup>86</sup>Bemis: The diplomacy of the American Revolution (see n. 5), p. 2915.

<sup>87</sup>Elliott: Freedom of Neutral Commerce (see n. 21), p. 293.

<sup>88</sup>Ibid., p. 293.

league of armed neutrality in order to protect their neutral commerce and neutral maritime rights enshrined in the doctrine of ‘free ships, free goods.’<sup>89</sup> Specifically, that;

1. That neutral vessels may navigate freely from port to port and along the coasts of the nations at war.
2. That the effects belonging to subjects of the said Powers at war shall be free on board neutral vessels, with the exception of contraband merchandise.
3. That, as to the specification of the above-mentioned merchandise, the Empress holds to what is enumerated in the 10th and 11th articles of her treaty with Great Britain, extending her obligations to all the Powers at war.
4. That to determine what constitutes a blockaded port, this designation shall apply only to a port where the attacking Power has stationed its vessels sufficiently near and in such a way as to render access thereto clearly dangerous.
5. That these principles shall serve as a rule for proceedings and judgments as to the legality of prizes.<sup>90</sup>

The fourth point was an addition to the ‘free ships, free goods’ doctrine that sought to abolish the practice of establishing paper blockades. Paper blockades were established in name only. A belligerent power would declare a number of enemy ports to be under a state of blockade, without devoting any naval or military resources to actualize the claim. Thus it was inevitable that belligerents would declare more ports off limits to neutral trading than they were able to actually close with material resources. Therefore, the practice of paper blockades were thought to be unduly restrictive of neutral trade.

On December 19, 1780, Frances Dana was elected by the Continental Congress to represent the United States as minister to Russia.<sup>91</sup> Publicly, Minister Dana was sent to Russia in order

<sup>89</sup>Bemis: *The diplomacy of the American Revolution* (see n. 5), p. 2915; Elliott: *Freedom of Neutral Commerce* (see n. 21), p. 293; William S Carpenter: *The United States and the League of Neutrals of 1780*, in: *American Journal of International Law* 15.4 (1921), pp. 511–522, here p. 516.

<sup>90</sup>Bemis: *The diplomacy of the American Revolution* (see n. 5), p. 2918.

<sup>91</sup>Henry Ward: *Commission to the Honourable Francis Dana*, vol. *Journals of the Continental Congress, Volume 18 (A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875)*, December 19, 1780.

to accede to principles espoused by the League of Armed Neutrality. Empress Catherine II had invited the belligerent powers to observe the neutral rights demanded by the League.<sup>92</sup> In the letter of credence sent to accompany Minister Dana, the United States Congress stated that the purpose of the American representative was “to testify our approbation of the regulations proposed by your imperial majesty for protecting the freedom of commerce and the rights of nations.”<sup>93</sup> Privately, however, Congress told Francis Dana that “The great object of your negotiation is to engage her imperial majesty to favour and support the sovereignty and independence of these United States.”<sup>94</sup> However, Minister Dana was never invited to the Russian Court. Catherine II refused to recognize the Americans as anything other than “rebels” and therefore did not aim to legitimize the Minister by giving him an audience.<sup>95</sup> Further, as the United States was a belligerent in the American War of Independence, they were by definition not able to become a formal party to the League.<sup>96</sup>

Prior to that time, in the intervening years between Francis Dana’s rejection and the settlement of the American War of Independence, John Adams was able to negotiate a treaty of amity and commerce with the Dutch. The 1782 Dutch-American Treaty of Amity and Commerce, like the prior treaty with France and the model treaty before that, bore the principles of ‘Free Ships, Free Goods’ encapsulated in “the American Doctrine of Freedom of the Seas.”<sup>97</sup> Article 10 of the treaty grants both countries the right to sail from both enemy and neutral ports to the ports of an enemy, so long as the ships are not transporting contraband of war.<sup>98</sup> Further, Article 11 provides, with regard to vessels that are found to be carrying contraband, protections for neutral goods and the ship itself.<sup>99</sup> As stated in Article

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<sup>92</sup>Ibid., p. 1169.

<sup>93</sup>Ibid., p. 1173.

<sup>94</sup>Ibid., pp. 1168–1169.

<sup>95</sup>Carpenter: *The United States and the League of Neutrals of 1780* (see n. 89), p. 520.

<sup>96</sup>Ibid., pp. 520–521.

<sup>97</sup>Bemis: *The diplomacy of the American Revolution* (see n. 5), p. 3208.

<sup>98</sup>VIII. Final Text of the Dutch-American Treaty of Amity and Commerce: A Translation, 6 September 1782, url: <https://founders.archives.gov/documents/Adams/06-13-02-0162-0011-0002>.

<sup>99</sup>Ibid.

XVII of the Model Treaty<sup>100</sup> and Article XIV of the Franco-American Treaty of Amity of Commerce<sup>101</sup> that any neutral goods found carried on an enemy ship “may be confiscated, in the same manner, as if it belonged to the Ennemy [sic].”<sup>102</sup>

Once the preliminary articles for peace were signed between Great Britain and the United States, Congress debated the continuation of Dana’s mission.<sup>103</sup> As the original intention of joining the league was to “acquire new supporters” for American independence, once independence was secured membership in the League was viewed as an unnecessary entanglement in Europe.<sup>104</sup> On June 12, 1783, the United States Congress resolved to stop its attempt of joining the League of Armed Neutrality and recalled Dana back to the United States.<sup>105</sup> On October 1783, Charles Thompson, Secretary of the Continental Congress, wrote to the American ministers in Europe,

The acquisition of Support to the independence of the United States having been the primary object of the instructions to our Ministers respecting the Convention of the neutral maritime powers for maintaining the freedom of Commerce, you will observe that the necessity of such Support is superceded by the Treaties lately entered into for restoring peace. And although Congress approve of the principles of that Convention [‘free ships, free goods’] ... they are unwilling at this juncture to become a party to a Confederacy which may hereafter too far complicate the interests of the United States with the politics of Europe, and therefore ... it is the desire of Congress and their instruction to each of the Ministers of the United States at the respective Courts in Europe, that no further measures be taken at present towards the admission of the United States into that Confederacy.<sup>106</sup>

<sup>100</sup>Plan of the Treaties with France of 1778, Journals of Congress. Tuesday, September 17, 1776. (see n. 65).

<sup>101</sup>A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875; French-American Treaty of Amity and Commerce (see n. 77).

<sup>102</sup>VIII. Final Text of the Dutch-American Treaty of Amity and Commerce: A Translation, 6 September 1782 (see n. 98).

<sup>103</sup>Bemis: The diplomacy of the American Revolution (see n. 5), p. 3159.

<sup>104</sup>Ibid., pp. 3159, 3176.

<sup>105</sup>Ibid., p. 3176.

<sup>106</sup>Charles Thompson: Instructions to the American Peace Commissioners, 29 October 1783, October 29,

John Adams later wrote on the matter that the primary interest of the United States was “that they should be as little as possible entangled in the politics and controversies of European nations” and because of this it was not wise to continue Dana’s mission to Russia.<sup>107</sup> However, regarding the doctrine of ‘free ships, free goods,’ Adams stated, “inasmuch as the liberal principles, on which the said confederacy [the League of Armed Neutrality] was established, are conceived to be in general favourable to the interests of nations, and particularly to those of the United States, and ought in that view to be promoted by the latter as far as will consist with their fundamental policy.”<sup>108</sup> Therefore, while the American doctrine of freedom of the seas was adopted as a matter of expediency to gain support for American independence in Europe, it did reflect the actual, if secondary, interests of the fledgling country.

Towards the attainment of ‘free ships, free goods’ policy, the Continental Congress resolved to pursue bilaterally, “in every treaty they proposed to others,” agreements respecting the rights of neutral American shipping in times of war, as had been done with France and Holland and was outlined in the Model Treaty.<sup>109</sup> In 1784 Charles Thompson, Secretary of the Continental Congress, wrote to the foreign ministers of the United States that all treaties should include provisions whereby non-contraband goods of the enemy of one treaty partner be “entirely free” when carried by the neutral treaty partner.<sup>110</sup> And, that such goods may be shipped to any port that is not physically blockaded.<sup>111</sup> However, according to Adams, such agreements to abide by the ‘free ships, free goods’ conception of ‘freedom of the seas’

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1783, url: <https://founders.archives.gov/documents/Adams/06-15-02-0163>.

<sup>107</sup>John Adams: From John Adams to Boston Patriot, 9 February 1812, February 9, 1812, url: <https://founders.archives.gov/documents/Adams/99-02-02-5751..>

<sup>108</sup>Ibid.

<sup>109</sup>Alexander Hamilton: Remarks on the Treaty of Amity Commerce and Navigation lately made between the United States and Great Britain, [9–11 July 1795], July 9-11, 1795, url: <https://founders.archives.gov/?q=22free20ships2C20free20goods22&s=1111311111&sa=&r=12&sr=>

<sup>110</sup>Charles Thompson: Enclosure III: Instructions to the Commissioners for Negotiating Treaties of Amity and Commerce, 7 May 1784, May 7, 1784, url: <https://founders.archives.gov/documents/Jefferson/01-07-02-0216>.

<sup>111</sup>Ibid.

were not to be accompanied with provisions defending the right of neutrals militarily, so as not to drag the United States into a foreign war.<sup>112</sup>

## 3.2 Jay's Treaty and the Quasi War

The prioritization of independence, peace, and neutrality over the liberal conception of freedom of the seas was again seen later in the 1794 Treaty of Amity, Commerce, and Navigation between the United States and Great Britain. Also known as Jay's Treaty, the agreement served to maintain the fragile peace between the United States and Great Britain. Following the 1783 Treaty of Paris, ending the American War of Independence, the British had failed to vacate their Northwest posts as had been agreed upon in the peace settlement.<sup>113</sup> The British were imposing tariffs and trade restrictions on American goods, thus inhibiting United States exports, all while flooding the American market with British made goods.<sup>114</sup> Further, British policies of seizing American ship building material transported on neutral ships and the impressment of American citizens into British service, pushed the two nations to the brink of war again by 1793.<sup>115</sup> The United States hoped to settle its dispute with Great Britain in order to remain outside of the conflict that was engulfing Europe in the wake of the French Revolution.<sup>116</sup> On February 1, 1793, France declared war on Britain and the Netherlands.<sup>117</sup> Britain immediately set about establishing restrictions on French trade with its treaty partners particularly with regards to ship building material.<sup>118</sup>

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<sup>112</sup>Adams: From John Adams to Boston Patriot, 9 February 1812 (see n. 107).

<sup>113</sup>Milestones in the History of U.S. Foreign Relations: John Jay's Treaty, 1794–95, url: <https://history.state.gov/milestones/1784-1800/jay-treaty>.

<sup>114</sup>Ibid.

<sup>115</sup>Milestones in the History of U.S. Foreign Relations: John Jay's Treaty, 1794–95 (see n. 113); Josiah T Newcomb: New Light on Jay's Treaty, in: American Journal of International Law 28.4 (1934), pp. 685–692, here pp. 685–686.

<sup>116</sup>Milestones in the History of U.S. Foreign Relations: John Jay's Treaty, 1794–95 (see n. 113).

<sup>117</sup>Bower: Private Property on the High Seas (see n. 2), p. 67; Dull: The Age of the Ship of the Line: The British and French Navies, 1650-1815 (see n. 6), p. 127.

<sup>118</sup>Bower: Private Property on the High Seas (see n. 2), p. 67.

On May 12, 1794, President George Washington sent Chief Justice John Jay to negotiate the treaty of amity between the two countries. The only bargaining chip that Jay had was the threat to ally with Denmark and Sweden to militarily defend the 'free ships, free goods' conception of freedom of the seas against the British<sup>119</sup> However, after Alexander Hamilton informed the British that the United States had no intention of joining such an armed neutrality league, Jay was left with little bargaining leverage.<sup>120</sup> Because of this, the final text of the Anglo-American Treaty of Amity, Commerce, and Navigation forsook the principle of 'free ships, free goods' and explicitly codified a relationship based on *Consolato del Mare*.<sup>121</sup> This included a "very broad and illiberal definition of contraband" that barred naval stores and foodstuffs from being traded to enemy ports.<sup>122</sup> The treaty further banned the United States from trading with the colonies of an enemy, so American merchants were barred from doing business in the French West Indies.<sup>123</sup>

The treaty's concessions stirred widespread public backlash, particularly with regards to the lack of 'free ships, free goods' provisions.<sup>124</sup> Jay stated that "he could have found his way across the country by the light of his burning effigies in which he was represented selling his country for British gold."<sup>125</sup> In 1795, Hamilton wrote an editorial justifying the concessions and outlining the need to ratify the arrangement. Regarding the Article XVII, which codified *Consolato del Mare* into operating procedure, Hamilton wrote that the agreement reflected the status quo of "the laws of Nations" and that the principle of 'free ships, free goods' was

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<sup>119</sup>Milestones in the History of U.S. Foreign Relations: John Jay's Treaty, 1794–95 (see n. 113).

<sup>120</sup>Ibid.

<sup>121</sup>Stockton: The Declaration of Paris (see n. 28); Mlada Bukovansky: American identity and neutral rights from independence to the War of 1812, in: International Organization 51.2 (1997), pp. 209–243; Milestones in the History of U.S. Foreign Relations: John Jay's Treaty, 1794–95 (see n. 113).

<sup>122</sup>Bukovansky: American identity and neutral rights from independence to the War of 1812 (see n. 121), p. 228.

<sup>123</sup>Idem: American identity and neutral rights from independence to the War of 1812 (see n. 121), p. 228; Milestones in the History of U.S. Foreign Relations: John Jay's Treaty, 1794–95 (see n. 113); Newcomb: New Light on Jay's Treaty (see n. 115), p. 685.

<sup>124</sup>Bukovansky: American identity and neutral rights from independence to the War of 1812 (see n. 121), p. 229.

<sup>125</sup>Cited in *ibid.*, p. 229.

an aberration.<sup>126</sup> He argued that the phenomenon of ‘free ships, free goods’ did not have the “sanction of time” to render it international law.<sup>127</sup> Hamilton argued that international law could only come about by the consent of all, or by a “long and general usage,” neither of which were present in the case of ‘free ships, free goods’ and some of the parties which pioneered the concept too now practice *Consolato del Mare*.<sup>128</sup> Hamilton argued that the notion of ‘free ships, free goods’ was unlikely to ever gain the status of international law because it ran counter to the logic of naval warfare.<sup>129</sup> However, he continued, if ‘free seas, free goods’ should exist, it can only be so on a bilateral basis and should not be expected in every case.<sup>130</sup> Hamilton argued that it would be foolish for a fledgling country like the United States “to take a ground which cannot clearly be maintained on precedent and principle.”<sup>131</sup> While it may be beneficial to institute ‘free ships, free goods’, since *Consolato del Mare* is already the established law of nations agreeing to a treaty on that principle would not be a concession but rather the status quo.<sup>132</sup> Further, insistence on ‘free ships, free goods’ without the capability to maintain it, he said, would have been “madness”.<sup>133</sup>

In his editorial, Hamilton cited a 1793 exchange between Edmond Charles Genet, the French Minister to the United States, and Thomas Jefferson, the U.S. Secretary of State, as foreign policy precedent for such an agreement. After the war between England and France broke out in 1793, Genet wrote to Jefferson protesting that French citizens, and their goods, had been taken off of American ships by British forces.<sup>134</sup> In his July 24, 1793, reply, Secretary of State Thomas Jefferson had denied that ‘free ships, free goods’ was a general

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<sup>126</sup>Hamilton: Remarks on the Anglo-American Treaty of Amity Commerce and Navigation (see n. 109).

<sup>127</sup>Ibid.

<sup>128</sup>Ibid.

<sup>129</sup>Ibid.

<sup>130</sup>Ibid.

<sup>131</sup>Ibid.

<sup>132</sup>Ibid.

<sup>133</sup>Ibid.

<sup>134</sup>Ibid.



rule.<sup>135</sup> Jefferson had argued that “while the United States had a treaty with France based on this principle, it had no such treaty with England,” and therefore had no grounds “to oppose to their acting according to the general law of nations”.<sup>136</sup> In his letter to Genet, Jefferson complained that having treaties based on ‘free ships, free goods’ with some nations and *Consolato del Mare* with others distinctly disadvantaged the United States.<sup>137</sup> He stated,

Indeed we are losers in every direction of that principle [‘free ships, free goods’], for when it works in our favor, it is to save the goods of our friends, when it works against us, it is to lose our own, and we shall continue to lose while the rule is only partially established. When we shall have established it with all Nations we shall be in a condition neither to gain nor lose, but shall be less exposed to vexatious searches at sea.<sup>138</sup>

Whatever the shortcomings, the treaty was understood to be “the price of peace with Great Britain.”<sup>139</sup> Following its ratification by Congress on June 24, 1796, President Washington implemented the treaty to provide the young republic with time to “consolidate and rearm in the event of future conflict.”<sup>140</sup>

The establishment of the 1796 Anglo-American Treaty of Amity and Commerce, predicated on *Consolato del Mare*, infuriated France who viewed it as a violation of the 1778 Franco-American treaties of alliance and commerce.<sup>141</sup> Particularly, the agreement that food-stuffs be labeled as seizeable contraband provoked the French who depended on American grain shipments.<sup>142</sup> In retaliation, France issued a decree sanctioning its privateers to prey on American commerce. This decree reinstated the historic French policy of hostile infection,

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<sup>135</sup>Thomas Jefferson: From Thomas Jefferson to Edmond Charles Genet, 24 July 1793, July 24, 1793, url: <https://founders.archives.gov/documents/Jefferson/01-26-02-0495>.

<sup>136</sup>Ibid.

<sup>137</sup>Ibid.

<sup>138</sup>Ibid.

<sup>139</sup>Milestones in the History of U.S. Foreign Relations: John Jay's Treaty, 1794–95 (see n. 113).

<sup>140</sup>Ibid.

<sup>141</sup>Milestones in the History of U.S. Foreign Relations: The XYZ Affair and the Quasi-War with France, 1798–1800, url: <https://history.state.gov/milestones/1784-1800/xyz>; Potter: Sea power: A naval history (see n. 64), p. 86; Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 58–59.

<sup>142</sup>Potter: Sea power: A naval history (see n. 64), p. 86.

to such a degree that a French politician, quoted by E.B. Potter, stated “If a handkerchief of English origin is found on board a neutral vessel, both the rest of the cargo and the ship itself are subject to condemnation.”<sup>143</sup> When American envoys, sent to France to resolve the matter, were spurned by the French Foreign Minister Talleyrand and subjected to demands of bribery, in what would later become known as the XYZ affair, President Adams began to prepare for war to protect American commerce.<sup>144</sup> On April 30, 1798, Congress established the U.S. Department of the Navy.<sup>145</sup> While no official declaration of war was levied against France, the United States authorized the new U.S. Navy and American privateers to “subdue, seize and take any armed French vessel,” or any vessel under the “pretence of authority from the Republic of France,” “anywhere on the high seas.”<sup>146</sup> Following America’s response against French shipping, French Foreign Minister Talleyrand invited American representatives to negotiate a peace settlement rather than escalate militarily in an effort to avoid a new major war.<sup>147</sup>

The Convention of 1800, or the Treaty of Môtfontaine, concluded the Quasi-War between the United States and France. The treaty was signed on September 30, 1800, however, was not ratified by the United States until February 18, 1801.<sup>148</sup> While the Convention nullified the 1778 Franco-American Treaty of Alliance as well as the Treaty of Amity and Commerce, it reaffirmed and codified the principles of ‘free ships, free goods’ between the U.S. and France.<sup>149</sup> In fact, Article XVI states that “It is hereby stipulated that free ships shall

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<sup>143</sup>Potter: *Sea power: A naval history* (see n. 64), p. 87.

<sup>144</sup>Milestones in the History of U.S. Foreign Relations: *The XYZ Affair and the Quasi-War with France, 1798–1800* (see n. 141).

<sup>145</sup>Potter: *Sea power: A naval history* (see n. 64), p. 87.

<sup>146</sup>*Ibid.*, p. 87.

<sup>147</sup>Milestones in the History of U.S. Foreign Relations: *The XYZ Affair and the Quasi-War with France, 1798–1800* (see n. 141).

<sup>148</sup>Milestones in the History of U.S. Foreign Relations: *The XYZ Affair and the Quasi-War with France, 1798–1800* (see n. 141); *Convention between the French Republic, and the United States of America: Text of the Treaty*, url: [https://avalon.law.yale.edu/19th\\_century/fr1800.asp](https://avalon.law.yale.edu/19th_century/fr1800.asp).

<sup>149</sup>*Convention between the French Republic, and the United States of America: Text of the Treaty* (see n. 148), Articles XII, XIII, XIV, XV.

give a freedom to goods, and that every thing shall be deemed to be free, and exempt which shall be found on board the ships belonging to the citizens of either of the contracting parties.”<sup>150</sup> During the celebrations in Môtrefontaine, on October 3, 1800, marking the signing of the convention, the third consul of France Charles François Lebrun toasted the American delegation, saluting “the union of America with the northern powers to give respect to the freedom of the seas.”<sup>151</sup>

At that time the northern European naval powers, Denmark-Norway, Sweden, Prussia, and Russia, had formed the Second League of Armed Neutrality, in accordance with ‘free ships, free goods’ principles to protect their neutral shipping from British interference during the French Revolutionary Wars.<sup>152</sup> On October 3, 1800, while the celebrations of the signing of the Convention of 1800 were still underway, President Adams wrote to Secretary of State John Marshall stating,

The question whether neutral ships shall protect ennemies [sic.] property is indeed important. It is of so much importance that if the principle of free ships free goods were once really established honestly observed, it would put an end forever to all maratime [sic.] war and render all military navies useless. However desirable this may be to humanity, how much soever philosophy may approve it and christianity [sic.] desire it, I am clearly convinced it will never take place. The dominant power on the ocean will forever trample on it. The French would despise it more than any nation in the world, if they had the maratime [sic.] superiority of power and the Prussians next to them. We must treat the subject with great attention and if all other nations will agree to it we will. But while one holds out, we shall be the dupes if we agree to it. Sweden & Denmark—Russia & Prussia might form a rope of sand, but no dependance [sic.] can be placed on such a maratime [sic.] coalition. We must however treat the subject with great respect.<sup>153</sup>

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<sup>150</sup>Ibid.

<sup>151</sup>Thomas Paine: To Thomas Jefferson from Thomas Paine, 6 October 1800, October 6, 1800, url: <https://founders.archives.gov/documents/Jefferson/01-32-02-0119>.

<sup>152</sup>Elliott: Freedom of Neutral Commerce (see n. 21), pp. 292–293.

<sup>153</sup>John Adams: From John Adams to John Marshall, 3 October 1800, October 3, 1800, url: <https://founders.archives.gov/documents/Adams/01-32-02-0119>.

Thus, in early U.S. foreign policy the United States remained wary about the concept of freedom of the seas and pessimistic about its long term feasibility. This stands far afield from the contemporary portrayal of the United States as the steadfast defender of the liberal principle of free seas.

### 3.3 The Napoleonic Wars

In 1802, Britain and France signed a peace treaty in Amiens ending the campaigns of conflict between the two nations associated with the French Revolutionary Wars.<sup>154</sup> However, the peace was short lived as Napoleon Bonaparte used the hiatus in violence to expand France's armed forces and engage in military action in Switzerland and Piedmont.<sup>155</sup> Outraged at the violation of the peace agreement, Great Britain declared war on France on May 18, 1803, marking the beginning of what would later be known as the Napoleonic Wars.<sup>156</sup>

While the United States strove to remain neutral in the European conflict, American merchant vessels trading between the two countries became subjected to increasing interference. In a new depredation of neutral rights, American citizens were being taken from their vessels and forced into service in the British navy. Because of the extended wars in Europe, the British navy routinely operated with undermanned vessels.<sup>157</sup> When exercising their belligerent right of search and seizure, British naval ships would take American citizens for service in the British navy.<sup>158</sup> American sailors, on American vessels, sailing from American ports were presumed to be British deserters unless they could prove themselves as not.<sup>159</sup>

On January 5, 1804, James Madison, then Secretary of State, wrote to James Monroe, the

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[//founders.archives.gov/documents/Adams/99-02-02-4635](https://founders.archives.gov/documents/Adams/99-02-02-4635).

<sup>154</sup>Potter: Sea power: A naval history (see n. 64), p. 74.

<sup>155</sup>Ibid., p. 74.

<sup>156</sup>Ibid., p. 74.

<sup>157</sup>Ibid., p. 95.

<sup>158</sup>Ibid., p. 95.

<sup>159</sup>James Madison: From James Madison to James Monroe, 5 January 1804, January 5, 1804, url: <https://founders.archives.gov/documents/Madison/02-06-02-0264>.

Minister to Great Britain, instructing him to discuss with Britain the treatment of neutral American vessels, specifically the new policies of impressment.<sup>160</sup> Secretary Madison wrote,

...we consider a neutral flag on the high seas as a safeguard to those sailing under it. Great Britain on the contrary asserts a right to search for and seize her own subjects; and under that cover, as cannot but happen, are often seized and taken off, citizens of the United States and citizens or subjects of other neutral countries, navigating the high seas, under the protection of the American flag. ...

Altho' Great Britain has not yet adopted in the same latitude with most other nations, the immunities of a neutral flag, she will not deny the general freedom of the high seas, and of neutral vessels navigating them, with such exceptions only as are annexed to it by the law of nations. She must produce then such an exception in the law of nations in favor of the right she contends for. But in what written and received authority will she find it? In what usage except her own, will it be found? She will find in both, that a neutral vessel does not protect certain objects denominated contraband of war, including enemies, serving in the war nor articles going into a blockaded port, nor as she has maintained, and as we have not contested, enemy's property of any kind. But no where will she find an exception to this freedom of the seas, and of neutral flags, which justifies the taking away of any person not an enemy in military service, found on board a neutral vessel. ... It is not then from the law or the usage of nations, nor from the tenor of treaties, that any sanction can be derived for the practice in question. And surely it will not be pretended that the Sovereignty of any nation extends, in any case whatever, beyond its own dominions, and its own vessels on the high seas. Such a doctrine would give just alarm to all nations, and more than any thing, would countenance the imputation of aspiring to an universal empire of the seas.<sup>161</sup>

In other words, Secretary Madison acknowledges that while 'free ship, free goods' is becoming common practice, the United States does not contest the British policy of *Consolato del Mare* as consistent with international law. The United States does contest, however, that

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<sup>160</sup>Ibid.

<sup>161</sup>Ibid.

the impressment of neutral non-combatant American sailors falls within the bounds of the general international legal principle of ‘freedom of the seas’.

By the end of 1805, Great Britain had gained unrivaled naval preponderance. On October 21, 1805, Napoleon and his fleet attempted to invade the British Isles. However, Admiral Horatio Nelson routed the French fleet which “forever denied Napoleon the use of the sea.”<sup>162</sup> Following Trafalgar, the two belligerents increased their commercial warfare against each other. Thus subjecting the United States, who by this point remained “the only major neutral trader on the high seas,” to increasing harrasment and interfearence by both sides.<sup>163</sup> The impressment of American sailors continued and the confiscation of neutral American goods and ships increased as punishment for trading with the enemy.

James Madison spent several months<sup>164</sup> in 1805 compiling a report titled, ‘An Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace’, was delivered to Congress on January 16, 1806. The report argued that the British ‘rule of 1756’, which permitted attacks on neutrals engaged in commerce that would have been prohibited during peacetime, was illegal according to international law.<sup>165</sup> American merchants had been eager to step in and fill the demand for shipping and freight left open by the hostilities between England and France, particularly between France and the French West Indies. In peacetime such commercial rights were restricted to the metropole, however, as the France’s shipping was subjected to predation on the high seas, American merchants happily stepped in to fill the commercial void. For a time, the United States circumvented British restrictions on conducting carrying trade between France and France’s Caribbean colonies by making port calls in the United States before proceeding to their final destinations.<sup>166</sup> By

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<sup>162</sup>Potter: *Sea power: A naval history* (see n. 64), p. 80.

<sup>163</sup>*Ibid.*, p. 95.

<sup>164</sup>July - December, 1805

<sup>165</sup>James Madison: *An Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace*, [ante-8 January 1806], July-December 1805, url: <https://founders.archives.gov/documents/Madison/02-11-02-0031>.

<sup>166</sup>Donald R Hickey: *The Monroe-Pinkney Treaty of 1806: A Reappraisal*, in: *The William and Mary*

doing so the United States profited immensely and was able to capitalize on the majority of trade between Europe and the Caribbean.<sup>167</sup> By 1805, the American re-export market was valued at \$53,000,000, a considerable increase from its 1790 value of \$500,000.<sup>168</sup> However, by 1805 the British had grown tired of the booming American trade.<sup>169</sup> Citing the Rule of 1756, Great Britain began to target and seize American merchant ships doing business with the French colonies.<sup>170</sup> Between 1805 and 1806, approximately three-hundred to four-hundred American merchant ships were seized by the British.<sup>171</sup>

In his report, Madison reiterated the American understanding of freedom of the seas whereby in times of peace there can be no limitations on the “commercial intercourse” of nations, save for individual bilateral agreements between countries.<sup>172</sup> During times of war, Madison argued, the principle of freedom of the seas holds that trade between two neutral nations, not engaged in hostilities, should not “be affected at all by a war between others.”<sup>173</sup> Trade between a neutral and a belligerent should carry on as it had in the absence of conflict, save for the transportation of “instruments of war” and transportation to blockaded ports.<sup>174</sup> The prohibition of trade with enemy colonies, Madison argued, had no basis in international legal scholarship or codified treaty agreements between any nation. It was simply a unilateral declaration imposed by virtue of preponderant sea power; an extension of domestic policies over the global ocean space.<sup>175</sup> Secretary Madison stated,

And thus we are arrived at the true foundation of the principle which has so often varied its attitudes of defence, and when driven from one stand, has been so ready to occupy another. Finding no asylum elsewhere, it at length boldly

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Quarterly: A Magazine of Early American History and Culture 1987, pp. 65–88, here pp. 70–71.

<sup>167</sup>Ibid., p. 71.

<sup>168</sup>Ibid., p. 71.

<sup>169</sup>Ibid., p. 71.

<sup>170</sup>Madison: An Examination of the British Doctrine (see n. 165).

<sup>171</sup>Hickey: The Monroe-Pinkney Treaty of 1806: A Reappraisal (see n. 166), p. 72.

<sup>172</sup>Madison: An Examination of the British Doctrine (see n. 165).

<sup>173</sup>Ibid.

<sup>174</sup>Ibid.

<sup>175</sup>Ibid.

asserts, as its true foundation, a mere superiority of force. It is right in Great-Britain to capture and condemn a neutral trade with her enemies, disallowed by her enemies in time of peace, for the sole reason that her force is predominant at sea. And it is wrong in her enemies to capture and condemn a neutral trade with British colonies, because their maritime force is inferior to hers. The question no longer is, whether the trade be right or wrong in itself, but on which side the superiority of force lies? The law of nations, the rights of neutrals, the freedom of the seas, the commerce of the world, are to depend, not on any fixt principle of justice, but on the comparative state of naval armaments...<sup>176</sup>

The depredations of American commerce by the British, and the impressment of American citizens into British service was solely the product of the British capability to impose its will. Madison lamented that for any nation to champion the Thucydidean position the ‘the strong do what they will and the weak do what they must,’ “must feel great confidence in the permanence, as well as the predominance of its own power.”<sup>177</sup> Because the threat to the freedom of the seas and to American commerce that was posed by the imbalance of naval force and relative weakness of the United States, disarmament was proposed as the proper mechanism to protect American neutral rights.

On January 30, 1806, Thomas Paine wrote to President Thomas Jefferson regarding the crisis in Europe.<sup>178</sup> In his letter Paine argued that the current conflict provided an opportunity to secure “the freedom and safety of the seas” in international law.<sup>179</sup> Paine advocated to the President that the best way to ensure the freedom of the seas was to set a mutual limitation on naval capabilities.<sup>180</sup> Paine stated, the “inability to do mischief is the best security against Mischief.”<sup>181</sup> Whereby prior treaties between England and France had limited naval armaments, Paine proposed that “there should be no ships of the line in

<sup>176</sup>Madison: An Examination of the British Doctrine (see n. 165).

<sup>177</sup>Ibid.

<sup>178</sup>Thomas Paine: To Thomas Jefferson from Thomas Paine, 30 January 1806, January 30, 1806, url: <https://founders.archives.gov/documents/Jefferson/99-01-02-3149>.

<sup>179</sup>Ibid.

<sup>180</sup>Ibid.

<sup>181</sup>Ibid.



existence” and the number of frigates that each state possesses should be severely limited.<sup>182</sup> Paine believed that ‘freedom of the seas’ should be guaranteed to all nations, and the best way to accomplish this was to prevent any one nation from possessing the capability to deprive another of such freedom. While the thread of disarmament was not picked up in U.S. foreign policy, soon after, the United States pushed again to enter into a multi-lateral agreement to agree to a standard of neutral rights at sea.

On March 14, 1806, Secretary of State James Madison wrote to the U.S. Minister to France, John Armstrong.<sup>183</sup> President Jefferson, according to Madison, thought it prudent to discuss the importance of ‘freedom of the seas’ with France and Russia in order to promote the incorporation of neutral rights into a future peace treaty.<sup>184</sup> To this end Madison instructed Armstrong to discuss with the French Government this issue. In his letter, Secretary of Madison reaffirmed the United State’s enduring interest in ‘free ships, free goods’ as specifically delineated in the 1780 and 1800 leagues of armed neutrality, plus a liberal understanding of contraband of war that excludes shipbuilding supplies and naval stores.<sup>185</sup> Madison stated that the United States would be pleased to see such a conception of freedom of the seas “effectually and permanently recognized as principles of the established law of nations.”<sup>186</sup> While Madison admitted that the United States was not able to argue that ‘free ships, free goods’ is already part of international law, since they had on a number occasions allowed and argued in favor of *Consolato del Mare*, he stated that the U.S. had “invariably maintained the utility of the principle and whilst as a pacific and commercial nation they have as great an interest in the due establishment of it, as any nation whatever.”<sup>187</sup> However, like Charles Thompson instructed the American ministers in Europe in 1783, Madison di-

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<sup>182</sup>Ibid.

<sup>183</sup>James Madison: From James Madison to John Armstrong, 14 March 1806, March 14, 1806, url: <https://founders.archives.gov/documents/Madison/02-11-02-0294>.

<sup>184</sup>Ibid.

<sup>185</sup>Ibid.

<sup>186</sup>Ibid.

<sup>187</sup>Ibid.

rected Armstrong to avoid European entanglements.<sup>188</sup> Madison emphasized that, however important the issue, the United States would not become an official party to any negotiation or agreement, particularly of a military nature.<sup>189</sup> While not willing to participate in the actualization of a ‘free seas’ regime, Madison stated that the United States “could not see with indifference a violation of a system of rights so precious to them” and would work towards building a consensus of “commercial and manufacturing nations” to respect a freedom of the seas.<sup>190</sup>

In late 1806, James Monroe and William Pinkney were sent to London to negotiate with the British an end to the violations of American neutral rights at sea.<sup>191</sup> The Jay Treaty, which codified a maritime relationship based on *Consolato del Mare*, had expired in 1803.<sup>192</sup> Even though the Jefferson administration was conducting back channel discussions with the trading states of Europe to collectively agree on a free seas conception of free ships, free goods, the Monroe-Pinkney Treaty, like the Jay treaty before it, forfeited the principle of free ships, free goods and instead codified a relationship based on *Consolato del Mare*.<sup>193</sup> Secretary of State Madison informed Monroe and Pinkney that they were allowed to forsake ‘free ships, free goods’ in order secure an understanding that would protect America’s re-export industry between Europe and the Caribbean colonies.<sup>194</sup> By this time, the U.S. merchant industries had built up enough capital where it was common place to purchase the goods to be shipped directly, thereby making all property on board an American vessel American property.<sup>195</sup> Buying the goods outright allowed merchants to circumvent the belligerent right to seize

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<sup>188</sup>Thompson: Instructions to the American Peace Commissioners, 29 October 1783 (see n. 106); Madison: From James Madison to John Armstrong, 14 March 1806 (see n. 183).

<sup>189</sup>Idem: From James Madison to John Armstrong, 14 March 1806 (see n. 183).

<sup>190</sup>Ibid.

<sup>191</sup>Hickey: The Monroe-Pinkney Treaty of 1806: A Reappraisal (see n. 166), pp. 73–74.

<sup>192</sup>Ibid., p. 66.

<sup>193</sup>Ibid., p. 82.

<sup>194</sup>James Madison: From James Madison to James Monroe and William Pinkney, 17 May 1806, May 17, 1806, url: <https://founders.archives.gov/documents/Madison/02-11-02-0545>.

<sup>195</sup>Hickey: The Monroe-Pinkney Treaty of 1806: A Reappraisal (see n. 166), p. 82.

enemy property under the code of *Consolato del Mare*.<sup>196</sup> In his letter of commission to Monroe and Pinkney, Madison wrote,

...the principle that a neutral flag covers the property of an enemy, [may be] relinquished, ... the relinquishment however being connected with and conditioned on, the provision required in favor of the neutral right to the Colonial Trade. The importance of that principle to the security of neutral Commerce, and to the freedom of the Seas, has at all times been felt by the United States; and although they have not asserted it as the established law of Nations, they have ever been anxious to see it made a part of that law. It was with reluctance of course that a contrary stipulation was authorized, and merely as a mean of obtaining from Great Britain the recognition of a principle now become of more importance to neutral nations possessing mercantile Capital, than the principle of “free Ships free goods.”<sup>197</sup>

Therefore, at the same time the United States was attempting to forge an agreement with Russia and France to incorporate ‘free ships, free goods’ into international law, the United States was forsaking the principle with Britain in order to protect a ‘more important’ principle of freedom of the seas, the ability to conduct colonial trade.<sup>198</sup> When President Jefferson saw the agreed upon treaty draft he dismissed it out of hand. While the treaty secured the United States’ colonial trade, as well as a liberal definition of contraband and an agreement on blockade status, the treaty made no mention of the British policy of impressment.<sup>199</sup> President Jefferson refused to pass the bill along to Congress. Instead, it was sent back to London for revisions which never came.<sup>200</sup>

Just before Monroe and Pinkney began their negotiations in London, on May 16, 1806, Britain issued an Order in Council establishing a paper blockade covering all the coastal territory controlled by France.<sup>201</sup> This Order in Council of 1806 blockaded almost the en-

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<sup>196</sup>Ibid., p. 82.

<sup>197</sup>Madison: From James Madison to James Monroe and William Pinkney, 17 May 1806 (see n. 194).

<sup>198</sup>Hickey: The Monroe-Pinkney Treaty of 1806: A Reappraisal (see n. 166), p. 66.

<sup>199</sup>Ibid., p. 66.

<sup>200</sup>Ibid., pp. 66–67.

<sup>201</sup>Gordon E Sherman: Orders in Council and the Law of the Sea, in: American Journal of International

tirety of western Europe.<sup>202</sup> France retaliated with a decree, made in the recently captured city of Berlin, establishing a paper blockade encompassing the British Isles.<sup>203</sup> This Berlin Decree not only banned trade with the ports of Britain, but also prevented any ship that had previously been to Britain from landing in French ports.<sup>204</sup> Therefore France, who lacked a naval force after the Battle of Trafalgar, attempted to deny England the markets of Continental Europe by preventing British ships from entering to European ports rather than preventing European ships from entering British ports.<sup>205</sup> This self-imposed blockade was to stop enemy goods at neutral ports rather than neutral goods at enemy ports. This was to become known as the Continental System.<sup>206</sup> The Berlin decree additionally declared all “British-made products,” regardless of ownership, able to be seized as prize. Because of this, the loophole that had been capitalized upon by U.S. merchants, buying and ‘Americanizing’ foreign products, was closed.<sup>207</sup>

On January 7, 1807, while President Jefferson was still reviewing the Monroe-Pinkney Treaty, Britain retaliated against France with an additional Order in Council reiterating the Rule of 1756.<sup>208</sup> The Order in Council of 1807 stated that “no vessel shall be permitted to trade from one port to another, both of which ports shall belong to, or be in the possession of France or her allies, or shall be so far under their control as that British vessels may not

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Law 16.4 (1922), pp. 561–584, here p. 561.

<sup>202</sup>Sherman: Orders in Council and the Law of the Sea (see n. 201), p. 561.

<sup>203</sup>Gary Clyde Hufbauer/Jeffrey J Schott/Kimberly Ann Elliott: Economic sanctions reconsidered: History and current policy, vol. 1, 1990, p. 21; Sherman: Orders in Council and the Law of the Sea (see n. 201), p. 562; Berlin decree. In: Berlin Decree 2017, p. 1, url: <http://login.ezproxy.lib.vt.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=f5h&AN=21212368&site=eds-live&scope=site>.

<sup>204</sup>Hickey: The Monroe-Pinkney Treaty of 1806: A Reappraisal (see n. 166), p. 84; Sherman: Orders in Council and the Law of the Sea (see n. 201), p. 562.

<sup>205</sup>Hufbauer/Schott/Elliott: Economic sanctions reconsidered: History and current policy (see n. 203), p. 21.

<sup>206</sup>Ibid., p. 21.

<sup>207</sup>Hickey: The Monroe-Pinkney Treaty of 1806: A Reappraisal (see n. 166), p. 84; Sherman: Orders in Council and the Law of the Sea (see n. 201), p. 562.

<sup>208</sup>Idem: Orders in Council and the Law of the Sea (see n. 201), p. 567; Hickey: The Monroe-Pinkney Treaty of 1806: A Reappraisal (see n. 166), p. 66.

freely trade thereat.”<sup>209</sup> The Order stated that any ship caught defying the edict, or the edict of 1806, will be considered “lawful prize” along with the entirety of its cargo.<sup>210</sup> France countered with what became known as the Milan Decree, which stated that any ship that was found to have traded with Britain, or had the intention of trading with Britain, or that permitted itself to be stopped and searched by a British vessel, would be deemed fair prize and subject to seizure by French privateers.<sup>211</sup>

In this context of increasingly radical curtailments of the neutral right to trade on the high seas during times of war, and under the cloud of continued impressment, President Jefferson issued the Embargo Act of 1807. The Embargo Act aimed to punish English and French behavior by cutting them off from American products. Because the United States lacked the naval capability to challenge Britain on the high seas, the embargo was styled after the French Continental System’s self-blockade.<sup>212</sup> As opposed to the French Continental System, however, the Embargo Act recalled all American merchant ships abroad and prohibited any exports or imports.<sup>213</sup> In fact, ships bound from one American port to another had to post a bond double the amount of the vessel and its cargo in order to prevent smuggling.<sup>214</sup>

Concomitantly, the Jefferson administration shifted U.S. naval doctrine away from maintaining a small number of cruisers with which to harass enemy commerce, towards a coastal defense policy predicated on the use of gunboats.<sup>215</sup> Gunboats were designed as small near-

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<sup>209</sup>Sherman: Orders in Council and the Law of the Sea (see n. 201), p. 568.

<sup>210</sup>Ibid., p. 568.

<sup>211</sup>Napoleon Bonaparte: Milan decree. In: Milan Decree 2017, p. 1, url: <http://login.ezproxy.lib.vt.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=21212809&site=eds-live&scope=site>; Sherman: Orders in Council and the Law of the Sea (see n. 201), pp. 569–570.

<sup>212</sup>François Crouzet: Wars, blockade, and economic change in Europe, 1792–1815, in: *The Journal of Economic History* 24.4 (1964), pp. 567–588; Hufbauer/Schott/Elliott: Economic sanctions reconsidered: History and current policy (see n. 203), p. 21.

<sup>213</sup>J.C.A. Stagg: James Madison: Foreign Affairs, url: <https://millercenter.org/president/madison/foreign-affairs>; Hagan: This people’s navy: The making of American sea power (see n. 65), p. 68.

<sup>214</sup>An Act laying an Embargo on all ships and vessels in the ports and harbors of the United States, vol. Acts of the Tenth Congress of the United States (Session 1, Ch. 5), December 22, 1807.

<sup>215</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), pp. 68–69; Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 80.

shore craft, measuring only fifty feet in length and carrying a crew of twenty, that utilized oars, along with sails, as the primary mechanism of propulsion.<sup>216</sup> While gunboats carried a medium-sized cannon, the primary purpose was to “swarm” enemy ships and “pepper them with small arms fire.”<sup>217</sup> Because of this, gunboats stood no chance of countering larger enemy ships, such as frigates or ships-of-the-line, but they were able to prevent enemy landing parties from reaching the shore and they “could annoy and demoralize the crews, especially on hot, humid days.”<sup>218</sup> The vessels were fundamentally unsuited to any task other than near-shore coastal defense. They had no capacity to be at sea for extended periods of time and before leaving the near shore areas, Jefferson’s gunboats had to store their cannons below deck.<sup>219</sup> Instead, gunboats were designed to work in tandem with “stationary fortifications at strategic points on the coast,” and movable batteries of artillery, both on land and afloat, in order to prevent enemy vessels from attacking coastal cities.<sup>220</sup> Jefferson requested a gunboat navy of over 200 ships to be built.<sup>221</sup> These ships, according to an address to Congress, would be “stationed at the major seaports between New Orleans and Boston, most of them in preservative storage... to be activated by the seamen and militia of the port in times of severe crisis or actual war.”<sup>222</sup>

While there was opposition to this doctrine, primarily among the Federalist party which represented merchant and shipping interests, Congress opposed the construction of any additional large naval vessels.<sup>223</sup> The Federalists demanded a naval fleet of cruisers structured around the *guerre de course*, or commerce raiding, style of warfare which aimed to attack

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<sup>216</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), pp. 68–69; Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 79.

<sup>217</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), pp. 68–69.

<sup>218</sup>Ibid., pp. 68–69.

<sup>219</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 81.

<sup>220</sup>Ibid., p. 80.

<sup>221</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), p. 69.

<sup>222</sup>Ibid., p. 69.

<sup>223</sup>Ibid., pp. 76–77.

and cripple enemy commerce.<sup>224</sup> Or, if not cripple, then divert enough enemy resources away from the primary front of attack so that the less materially capable United States might retain a competitive advantage.<sup>225</sup> Congress, however, both feared that developing a standing navy would increase the debt of the United States, and therefore taxes on its citizens, as well as increase the possibility of being dragged into war by a naval power fearful of American naval aggrandizement.<sup>226</sup> Further, the absolute preponderance of the British navy following the Battle of Trafalgar far outpaced any navy that the United States could build with its limited resources and manufacturing capabilities.<sup>227</sup> The British navy consisted of 800 ships in 1809 and, with the capture of French and Spanish vessels during the Napoleonic Wars, expanded their naval force to 1,024 ships by 1812.<sup>228</sup> The United States constructed the “scattered and inconsequential fleet” of gunboats and remained materially committed to the coastal defense doctrine all the way up to the eve of the war of 1812.<sup>229</sup>

When James Madison took office in 1809, the Jefferson’s Embargo Act had failed to gain any concessions from Britain or France respecting the rights of neutral American shipping.<sup>230</sup> Further, the Embargo had devastated the American shipping industry. Just before Madison assumed office, Congress replaced the damaging Embargo Act with the more lenient Non-Intercourse Act, which allowed Americans to resume international trade with all countries except England and France.<sup>231</sup> While the strength of the American shipping industry quickly returned, so too did the harassment of U.S. vessels by Britain and France.<sup>232</sup>

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<sup>224</sup> Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 92–93.

<sup>225</sup> Ibid., pp. 92–93.

<sup>226</sup> Hagan: This people’s navy: The making of American sea power (see n. 65), pp. 76–77.

<sup>227</sup> Ibid., p. 70.

<sup>228</sup> Ibid., pp. 71, 77–78.

<sup>229</sup> Ibid., pp. 77–78.

<sup>230</sup> Jeffrey A Frankel: The 1807–1809 Embargo Against Great Britain, in: The Journal of Economic History 42.2 (1982), pp. 291–308.

<sup>231</sup> Stagg: James Madison: Foreign Affairs (see n. 213).

<sup>232</sup> Potter: Sea power: A naval history (see n. 64), p. 95.

### 3.4 The War of 1812

When the United States declared war on Britain in 1812, it was the violent release of pressure accumulated over the years, rather than the result of a single incident.<sup>233</sup> On June 1st 1812, President Madison addressed the United States Congress requesting a declaration of war on Britain to defend American neutral shipping rights and therefore America's freedom on the seas.<sup>234</sup> Although French harassment of neutral American shipping was also a recurring issue, since the French had "been virtually driven from the seas" following the battle of Trafalgar, the United States focused on England as their antagonist.<sup>235</sup> In his speech to Congress asking for a declaration of war on Great Britain, President Madison detailed British transgressions against U.S. neutral shipping since over the course of the Napoleonic Wars.<sup>236</sup> Madison stated,

We behold our seafaring citizens still the daily victims of lawless violence, committed on the great common and highway of nations, even within sight of the country which owes them protection. We behold our vessels, freighted with the products of our soil and industry, or returning with the honest proceeds of them, wrested from their lawful destinations, confiscated by prize courts no longer the organs of public law but the instruments of arbitrary edicts, and their unfortunate crews dispersed and lost, or forced or inveigled in British ports into British fleets, whilst arguments are employed in support of these aggressions which have no foundation but in a principle equally supporting a claim to regulate our external commerce in all cases whatsoever."<sup>237</sup>

Madison stated that the practice of "violating the American flag on the great highway of

<sup>233</sup>Potter: *Sea power: A naval history* (see n. 64), p. 95.

<sup>234</sup>James Madison: June 1, 1812: Special Message to Congress on the Foreign Policy Crisis – War Message, June 01, 1812, url: <https://millercenter.org/the-presidency/presidential-speeches/june-1-1812-special-message-congress-foreign-policy-crisis-war>; Bukovansky: *American identity and neutral rights from independence to the War of 1812* (see n. 121), pp. 234–235.

<sup>235</sup>Potter: *Sea power: A naval history* (see n. 64); Maurice Matloff: *American Military History: Army Historical Series*, 1969.

<sup>236</sup>Madison: June 1, 1812: Special Message to Congress on the Foreign Policy Crisis – War Message (see n. 234).

<sup>237</sup>*Ibid.*



nations” and seizing United States citizens has no bearing in international law, which allows only for the seizing of contraband of war.<sup>238</sup> Rather, it is an exercise of British domestic law over the sea. Madison states, “British jurisdiction is thus extended to neutral vessels in a situation where no laws can operate but the law of nations and the laws of the country to which the vessels belong...”<sup>239</sup>

Further, Madison cited the persistent injustice of British paper blockades and the encompassing bans of the Orders in Council.<sup>240</sup> Madison stated that even though the official stance of Britain is that for blockades to be legitimate, physical assets must be present at the blockaded ports and ships attempting to enter must be given prior warning, Great Britain carried on a policy of plundering American commerce “in every sea.”<sup>241</sup> Madison stated, “the great staples of our country have been cut off from their legitimate markets, and a destructive blow aimed at our agricultural and maritime interests.”<sup>242</sup> The purpose for such interference with American commerce on the high seas, Madison argued, was not because the United States was “supplying the wants of her enemies.”<sup>243</sup> Indeed, Madison states that England herself was engaged in trade with those nations with whom she was at war.<sup>244</sup> The reason for curtailing the freedom of the seas was, Madison stated, to maintain “the monopoly which she covets for her own commerce and navigation.”<sup>245</sup>

On June 16, 1812, two days before the U.S. declaration of war, Great Britain rescinded the Orders in Council which prohibited the United States from trading with French controlled ports.<sup>246</sup> This would have mitigated much of the tension between the two nations, however,

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<sup>238</sup>Ibid.

<sup>239</sup>Ibid.

<sup>240</sup>Ibid.

<sup>241</sup>Ibid.

<sup>242</sup>Ibid.

<sup>243</sup>Ibid.

<sup>244</sup>Ibid.

<sup>245</sup>Ibid.

<sup>246</sup>Potter: *Sea power: A naval history* (see n. 64); Matloff: *American Military History: Army Historical Series* (see n. 235), p. 104.

because of the communications delays at this time the United States did not receive word until after their formal declaration of war.<sup>247</sup> When the United States “formally declared war on the Mistress of the Seas,” as E.B. Potter states,<sup>248</sup> the United States military consisted of a militia style army of 11,744 men,<sup>249</sup> 18 seagoing warships, and a smattering of Jeffersonian coastal defense gunboats scattered in ports across the country.<sup>250</sup> However, because Great Britain was simultaneously waging war against Napoleon, the two armies were evenly matched in the American theater until 1814.<sup>251</sup>

In 1813, Russia proposed to mediate between the United States and Great Britain, however, England rejected this offer of mediation.<sup>252</sup> One of the primary reasons that England rejected the overtures of peace was that they believed the issues at hand, namely the issue of impressment and neutral rights on the sea, were matters of British domestic policy.<sup>253</sup> Additionally, The British government believed that continuing the war for a few more months would allow England to dictate peace terms to the United States.<sup>254</sup> On November 4, 1813, England sent an official letter to the Secretary of States of the U.S. stating that Great Britain was willing to discuss peace “with an earnest desire on their part to bring them to a favorable issue, upon principles of perfect reciprocity, not inconsistent with the established maxims of public law, and with the maritime rights of the British empire.”<sup>255</sup> Thereby placing the British Empire’s maritime rights on equal footing with international law.<sup>256</sup> Secretary Monroe, however, accepted the invitation to negotiate peace.<sup>257</sup>

On February 14, 1814, Secretary Monroe wrote to the chosen American delegates stressing

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<sup>247</sup>Matloff: American Military History: Army Historical Series (see n. 235), p. 124.

<sup>248</sup>Potter: Sea power: A naval history (see n. 64), p. 96.

<sup>249</sup>Matloff: American Military History: Army Historical Series (see n. 235), p. 124.

<sup>250</sup>Potter: Sea power: A naval history (see n. 64), p. 96.

<sup>251</sup>Matloff: American Military History: Army Historical Series (see n. 235), pp. 124, 127.

<sup>252</sup>Frank Arthur Updyke: The Diplomacy of the War of 1812, 1915, p. 155.

<sup>253</sup>Ibid., pp. 155, 157.

<sup>254</sup>Ibid., p. 155.

<sup>255</sup>Ibid., p. 165.

<sup>256</sup>Ibid., p. 166.

<sup>257</sup>Ibid., p. 166.

the need to settle the matter of impressment.<sup>258</sup> Monroe stated that “to withdraw from the war” without solving the matter of impressment, “would be to subject the United States to all the expense in blood and treasure which has been and may be incurred, without obtaining the security for which we have contended, and leaving us under the necessity for contending for it again at a like expense, whenever another war shall break out in Europe, which will probably not be distant, and may be very soon.”<sup>259</sup>

On July 18, 1814, Charles Jared Ingersoll, Congressional Representative from Pennsylvania and Chair of the House Judiciary Committee, wrote to President Madison inquiring on the topic of ‘free ships, free goods.’<sup>260</sup> Specifically, Ingersoll asked about the status of ‘free ship, free goods’ in international law and how best to permanently limit larger naval powers from encroaching upon the freedom of the seas at the expense of smaller maritime states.<sup>261</sup> Ingersoll stated that, in his view, there were two ways to rein in the depredations of large naval powers. The first, contrary to Thomas Paine’s disarmament argument, was to maintain a large naval presence to protect the rights of the United States.<sup>262</sup> The second, to codify ‘free ships, free goods’ into international law.<sup>263</sup> However, Ingersoll argued that in his opinion the establishment of ‘free ships, free goods’ into international law was only possible “through the agency of” a large naval fleet.<sup>264</sup> In other words, a large naval fleet would grant the United States the ability to have ‘a seat at the table’ when shaping of international law.

President Madison responded to Congressman Ingersoll on July 28, 1814, agreeing. Madison stated that while ‘free ships, free goods’ is not a settled matter of international law, if the questions were brought before the international community, he believed, there would be

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<sup>258</sup>Ibid., p. 185.

<sup>259</sup>Cited in, *ibid.*, p. 185.

<sup>260</sup>Charles Jared Ingersoll: To James Madison from Charles Jared Ingersoll, 18 July 1814, July 18, 1814, url: <https://founders.archives.gov/documents/Madison/03-08-02-0045>.

<sup>261</sup>Ibid.

<sup>262</sup>Ibid.

<sup>263</sup>Ibid.

<sup>264</sup>Ibid.

overwhelming support for the principle.<sup>265</sup> In his letter, Madison expressed his belief that the United States would soon become a peer competitor with Great Britain at sea.<sup>266</sup> From this position of strength, Madison stated,

... truth, justice, humanity, and universal good, will be inculcated with an advantage which must gradually and peaceably enlist the civilized world against a Code which violates all those obligations; a code as noxious by the wars and calamities it produces, to its overbearing patron, as to the nations protesting against it.

The Law of Nations has been made by the powerful nations; and these having been warlike in their dispositions & institutions, the law has been moulded to suit belligerent rather than peaceable nations. With the faculties for war, it is to be hoped, our Country will continue friendly to peace, and exert the influence belonging to it, in promoting a system favorable to nations cherishing peace and justice, rather than to those devoted to ambition and conquest.<sup>267</sup>

In other words, Madison argued, only from a position of naval strength would the United States be able to uphold freedom of the seas for the betterment of international society at large.

On April 11, 1814, Napoleon abdicated and was exiled to Elba.<sup>268</sup> The defeat of Napoleon freed up resources and troops for Great Britain to increase deployments to the American continent. Because of this, England was able to blockade the American coast and conduct raids with impunity.<sup>269</sup> By the time negotiations between Great Britain and the United States had gotten underway, on August 6, 1814, in the Dutch city of Ghent, the American ministers present unanimously believed that it was England's strategy to stall long enough so that they may gain a decisive victory in the war.<sup>270</sup> However a decisive victory did not come.<sup>271</sup> The

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<sup>265</sup>James Madison: From James Madison to Charles Jared Ingersoll, 28 July 1814, July 28, 1814, url: <https://founders.archives.gov/documents/Madison/03-08-02-0061>.

<sup>266</sup>Ibid.

<sup>267</sup>Ibid.

<sup>268</sup>Potter: *Sea power: A naval history* (see n. 64), p. 105.

<sup>269</sup>Matloff: *American Military History: Army Historical Series* (see n. 235), p. 127.

<sup>270</sup>Updyke: *The Diplomacy of the War of 1812* (see n. 252), pp. 220–221.

<sup>271</sup>Milestones: *War of 1812–1815*, url: <https://history.state.gov/milestones/1801-1829/war-of->

representatives from both war-weary nations signed the Treaty of Ghent on December 24, 1814.<sup>272</sup> The treaty said nothing about either impressment or the rights of neutrals at sea.<sup>273</sup> Rather, the Treaty of Ghent re-established the conditions which had existed prior to the conflict as if there had been no war at all.

When the war with Great Britain ended, the United States reformulated its naval force structure requirements. The burning of Washington forever discredited the reliance on Jeffersonian gunboats rather than a seagoing naval force for national defense.<sup>274</sup> Following the war the United States navy expanded, both to meet the needs of growing post-war American commerce, and also because the naval victories during the war had fixed the U.S. Navy as a point of pride for the American people.<sup>275</sup> In 1816, Congress passed a naval act that allocated funds to “gradually” enlarge the navy over the course of six years and allocated for the construction of nine ships-of-the-line, twelve frigates, and three “experimental steam-driven ‘batteries.’”<sup>276</sup> However, while the force structure shifted from a fleet of Jeffersonian gunboats towards a blue-water navy, the war did nothing to alter the traditional American naval doctrines of coastal defense and commerce raiding.<sup>277</sup> The prevalent American naval strategy still maintained that, in order to protect the interior of the country the Navy’s purpose is “to stop the enemy at the coast.”<sup>278</sup> To do this, the United States aimed to construct robust coastal fortifications, augmented with “floating gun batteries,” to defend the coast, and a seagoing fleet of cruisers to destroy enemy commerce and smaller enemy warships.<sup>279</sup> The purpose of American ships-of-the-line were not to engage in decisive sea battles, but

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1812.

<sup>272</sup>Ibid.

<sup>273</sup>Potter: *Sea power: A naval history* (see n. 64), p. 107.

<sup>274</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), pp. 108, 110.

<sup>275</sup>Potter: *Sea power: A naval history* (see n. 64), p. 109; Sprout/Sprout: *Rise of American Naval Power* (see n. 66), pp. 108–109.

<sup>276</sup>Idem: *Rise of American Naval Power* (see n. 66), p. 111.

<sup>277</sup>Ibid., p. 109.

<sup>278</sup>Ibid., p. 123.

<sup>279</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 123; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 93.

rather to prevent opposing vessels of the same class from blockading a port long enough for American commerce raiding class vessels to take to the sea.<sup>280</sup> Echoing President Madison's statement on the role of the navy in maintaining the freedom of the seas, when President Monroe took office in 1817, he stated that the role of the U.S. Navy would be "in maintaining the neutrality of the United States in the wars of other powers and in saving the property of [American] citizens from spoliation."<sup>281</sup> However, with the peace that followed the Napoleonic Wars in Europe and the War of 1812 in North America, the issue of freedom of the seas, conceptualized as the rights of neutrals trading during times of war, fell by the wayside.

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<sup>280</sup>Hagan: *This people's navy: The making of American sea power* (see n. 65), p. 93.

<sup>281</sup>*Ibid.*, p. 94.

## Chapter 4

# The Institutionalization of ‘Freedom of the Seas’ Discourse

It was not until the 1856 Treaty of Paris that the principle of freedom of the seas became codified into international law. However, the United States refused to become party to the treaty due to national security concerns. The Treaty of Paris abolished the practice of privateers on which American naval strategy depended. Instead, the United States criticized the ‘free ships, free goods’ conception of freedom of the seas as too limiting and urged the international community to unanimously prohibit the seizure or destruction of all private property at sea. This immunity principle would occlude the need for privateers and would ensure that the American merchant fleet would not be disproportionately imperilled by large naval powers. This chapter shows how the United States’ attempt to secure a more liberal conception of freedom of the seas, for the sake of its national security, failed to gain traction in the international community because it ran afoul of England’s own desire to safeguard its trade against the depredations of privateers.

At the outbreak of the American Civil war, however, the United States abandoned the immunity principle and pragmatically sought to become party to the Treaty of Paris on its own terms. At the time, technological advancements had diminished the ability of merchant ships to be deployed as a maritime militia force. Instead, armor plated ships and explosive rounds required that the state produce adequate fighting ships. Because the United States no longer relied on privateers for its national security strategy, it sought to become party

to the Treaty of Paris on its own terms, abandoning if temporarily the immunity principle of private property at sea. The United States likely did this so that the British and French naval forces would be obliged to seek out the Confederate privateering vessels as pirates. When British and French support could not be obtained, however, the United States again refused to agree to the Treaty of Paris which enshrined the principle of freedom of the seas into international law. After the American Civil war freedom of the seas discourse shifted back towards championing the immunity principle that would render all private property at sea free from seizure by belligerent powers so long as the private property was not contraband of war.

## 4.1 1856 Declaration of Paris Respecting Maritime Law

In October of 1853, Russia invaded the territory of the Ottoman Empire in what is now Romania.<sup>1</sup> Afraid that Russia would continue its push south and seize Constantinople, thus dramatically distorting the European Balance of Power, Great Britain, France, and Sardinia sent forces to defend the Ottoman Empire from Russia’s advances.<sup>2</sup> The resulting conflict, known as the Crimean War, resulted in the institutionalization of the ‘free ships, free goods’ conception of freedom of the seas into international law. In the lead up to the Crimean War, the neutral commercial powers of Europe began to take strides to protect their maritime trade in the coming conflict.<sup>3</sup> On January 2, 1854, Denmark and Sweden (and Norway by virtue of Sweden) sent messages to all possible belligerent states committing to remain outside of the conflict if they agreed to abide by a set of neutral rights based on the principle ‘free ships, free goods.’<sup>4</sup> France supported this commitment. According to Charles Hamilton, the French government perceived itself as the primary “guardian of the freedom of the seas”

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<sup>1</sup>Potter: *Sea power: A naval history* (see n. 64), p. 116.

<sup>2</sup>*Ibid.*, p. 116.

<sup>3</sup>Stockton: *The Declaration of Paris* (see n. 28), p. 356.

<sup>4</sup>*Ibid.*, p. 356.



and held it as one of the primary objectives of French naval policy according to a French 1849-1851 “parliamentary inquiry on the navy.”<sup>5</sup> Because of the power imbalance between the French and British naval forces, France viewed itself as the center of a potential alliance with the smaller maritime states that could, if necessary, challenge British “tyranny” over the sea.<sup>6</sup> Charles Hamilton states, that France could not abandon the free seas doctrine of ‘free ships, free goods’ which the majority of maritime states supported without alienating potential future allies and as a result, accepting England’s status as the “undisputed mistress of the seas.”<sup>7</sup>

With its preponderant naval forces, England historically championed a regime of belligerent, rather than neutral, rights.<sup>8</sup> With reference to the historic international code of *Consolato del Mare*, England considered the destruction of enemy commerce, where ever it may be, as a valid objective of sea power during maritime war.<sup>9</sup> However, England also realized that in the coming conflict it would be beneficial to establish a mutually agreed upon code of conduct between belligerents and neutral trading states.<sup>10</sup> While the United States at the time had a “small and obsolete” navy, the country had a substantial merchant fleet.<sup>11</sup> England feared that if they forced their position on belligerent rights, the U.S. would enter the war against England, as they had in 1812, to protect American rights at sea.<sup>12</sup> If that was the case, the American merchant marine “could provide a cloud of privateers to fasten on British sea trade.”<sup>13</sup>

England, France, and their allies eventually agreed that, for the duration of the Crimean

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<sup>5</sup>Charles Iain Hamilton: Anglo-French seapower and the Declaration of Paris, in: The International History Review 4.2 (1982), pp. 166–190, here p. 170.

<sup>6</sup>Ibid., p. 170.

<sup>7</sup>Ibid., pp. 170–171.

<sup>8</sup>Stockton: The Declaration of Paris (see n. 28), p. 358.

<sup>9</sup>Ibid., p. 358.

<sup>10</sup>Ibid., p. 358.

<sup>11</sup>Hamilton: Anglo-French seapower and the Declaration of Paris (see n. 5), p. 171.

<sup>12</sup>Ibid., p. 171.

<sup>13</sup>Ibid., p. 171.

War, the belligerents would abide by the doctrine of 'free ships, free goods.'<sup>14</sup> Immediately before England declared war on the Russian Empire, Queen Victoria issued a March 28, 1854, declaration stating, "To preserve the commerce of neutrals from all unnecessary destruction Her Majesty is willing, for the present to waive a part of the belligerent rights appertaining to her by the Law of Nations, ... Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war."<sup>15</sup> However, in return, England demanded a suspension of the practice of privateering.<sup>16</sup>

On December 4, 1854, President Franklin Pierce delivered a speech to Congress.<sup>17</sup> He stated that American international commerce had reached such a degree that they were nearly on par with the "first maritime power of the earth," Great Britain, "and exceeding that of any other."<sup>18</sup> President Pierce continued, stating that when the great powers of Europe become involved in war, it is the rights of neutral trading nations that suffer.<sup>19</sup> Because of this neutral powers have asserted, individually and through the organization of leagues of armed neutrality, the principle that 'free ships make free goods.'<sup>20</sup> "A doctrine," President Pierce states, "which from the very commencement of our national being has been a cherished idea of the statesmen of this country."<sup>21</sup> Because the doctrine of 'free ships make free goods' is "generally admitted to be sound" by all the current maritime powers, Great Britain and France have agreed to abide by the principles for the limited duration of the current conflict.<sup>22</sup> President Pierce encouraged the maritime powers of Europe and America

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<sup>14</sup>Stockton: The Declaration of Paris (see n. 28), p. 358; Hamilton: Anglo-French seapower and the Declaration of Paris (see n. 5), pp. 171–172.

<sup>15</sup>Cited in, Stockton: The Declaration of Paris (see n. 28), pp. 359–360.

<sup>16</sup>Hamilton: Anglo-French seapower and the Declaration of Paris (see n. 5), pp. 171–172.

<sup>17</sup>Franklin Pierce: December 4, 1854: Second Annual Message, December 4, 1854, url: <https://millercenter.org/the-presidency/presidential-speeches/december-4-1854-second-annual-message>.

<sup>18</sup>Ibid.

<sup>19</sup>Ibid.

<sup>20</sup>Ibid.

<sup>21</sup>Ibid.

<sup>22</sup>Ibid.

to use this rare cooperation, between England and France, as an opportunity to codify ‘free ships, free goods’ into international law via a special convention.<sup>23</sup> In addition to the traditional doctrine that enemy goods, save contraband, carried aboard neutral ships be free from confiscation, Pierce also proposed “the less contested” rule that neutral property, save contraband, on board enemy ships be free from seizure as well.<sup>24</sup> In other words, President Pierce championed the codification of ‘free ships, free goods’ into international law, without the stipulation that ‘enemy ships make enemy goods’. Under this conception all merchant vessels from countries not participating in whatever war was at hand would be allowed to trade freely on the high seas, so long as they did not trade with ports that were in a state of blockade or they did not carry contraband goods of war to belligerent powers. Without the ‘enemy ships, enemy goods’ corollary, non-belligerent countries would have the right to export their goods using the ships of belligerent powers. Belligerents retained the right to stop and seize the trading ships of their enemies, however, once taken to a prize court, any neutral goods found on board would be returned or duly compensated for.

However, President Pierce refused to accept any provision that aimed to abolish the practice of privateering.<sup>25</sup> Such an article, Pierce stated, would vastly privilege states with strong standing navies at the expense of small naval states. Although the United States engaged in foreign trade at an almost equal level with Great Britain, President Pierce argued, the latter possessed a navy ten times larger than the American naval force.<sup>26</sup> Concerns that American privateers would hamper British commerce if Great Britain were to follow a strict definition of belligerent rights during the Crimean War was the very reason that they agreed to abide by ‘free ships, free goods’, for the duration of the conflict.<sup>27</sup> From the American perspective, if following the war ‘free ships, free goods’ was codified into international law

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<sup>23</sup>Ibid.

<sup>24</sup>Ibid.

<sup>25</sup>Ibid.

<sup>26</sup>Ibid.

<sup>27</sup>Hamilton: Anglo-French seapower and the Declaration of Paris (see n. 5), p. 171.

along with a provision banning privateers, there would be no mechanism available for small naval states to ensure that large naval powers did not violate the law and revert back to a policy based on the Thucydidean principle that the 'strong do what they will and the weak do what they must.' President Pierce stated, "If it were adopted as an international rule, the commerce of a nation having comparatively a small naval force would be very much at the mercy of its enemy in case of war with a power of decided naval superiority."<sup>28</sup> Pierce reiterated the American position that just as in conflicts on land, when a country is threatened it depends on citizen volunteers to augment its capabilities, so too in cases of naval warfare, a country should be able to rely on the "patriotism of its citizens" to bolster its naval forces.<sup>29</sup> President Pierce stated, "The bare statement of the condition in which the United States would be placed, after having surrendered the right to resort to privateers, in the event of war with a belligerent of naval supremacy will show that this Government could never listen to such a proposition."<sup>30</sup> If it ever happened that privateering was abolished under international law, Pierce stated, the United States would have no choice but to depart "from our present peaceful policy and become a great naval power."<sup>31</sup>

If the abolition of privateers were insisted upon, however, President Pierce offered a new conception of trading rights, more liberal than 'free ships, free goods,' that would ameliorate the impact on small naval powers and ensure free trade on the high seas during times of war. The proposal President Pierce offered was to declare all private property on the high seas immune from seizure by privateers and government warships alike.<sup>32</sup> Pierce stated,

The proposal to surrender the right to employ privateers is professedly founded upon the principle that private property of unoffending noncombatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle, which equally requires that

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<sup>28</sup>Pierce: December 4, 1854: Second Annual Message (see n. 17).

<sup>29</sup>Ibid.

<sup>30</sup>Ibid.

<sup>31</sup>Ibid.

<sup>32</sup>Ibid.

such private property should not be seized or molested by national ships of war. Should the leading powers of Europe concur in proposing as a rule of international law to exempt private property upon the ocean from seizure by public armed cruisers as well as by privateers, the United States will readily meet them upon that broad ground.<sup>33</sup>

If, according to international law, all private property was immune from seizure on the high seas, there would be no need for privateers and less concern that strong powers would leverage their naval forces to the detriment of trading states.

However, President Pierce's objections and recommendations went unheeded. At the close of the Crimean War, on February 28th, 1856, the belligerents convened in Paris to conclude a treaty of peace.<sup>34</sup> On April 16, 1856, the parties involved, originally Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey, agreed to codify their understanding of neutral rights into a declaration regarding maritime law.<sup>35</sup> The declaration clearly states,

1. Privateering is and remains abolished.
2. The neutral flag covers enemy goods with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.
4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient to prevent access to the coasts of an enemy.<sup>36</sup>

Therefore, this multilateral treaty instituted the principle of 'free ships, free goods,' minus the corollary of 'enemy ships, enemy goods,' as the common legal understanding of freedom of the seas. According to Secretary of State William Seward, the Declaration of Paris aimed "to constitute a new chapter in the law of nations, and each one of the articles was to

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<sup>33</sup>Ibid.

<sup>34</sup>Stockton: The Declaration of Paris (see n. 28), p. 361.

<sup>35</sup>The Declaration of Paris, 1856, in: The American Journal of International Law, Supplement: Official Documents 1.2 (April 1907), pp. 89–90, here p. 89; Stockton: The Declaration of Paris (see n. 28), p. 361.

<sup>36</sup>The Declaration of Paris, 1856 (see n. 35).

be universal and eternal in its application and obligation.”<sup>37</sup> This common understanding institutionalized the rights of neutrals trading during times of war into world politics, where before such rights were only understood on a bilateral and *ad hoc* basis. All countries were invited to adhere to the Declaration of Paris under the condition that they accepted the treaty as a whole and with the understanding that the treaty would only be binding to the states that acceded to it.<sup>38</sup>

Following the Declaration of Paris in 1856, the United States Senate issued a resolution calling for information regarding the treaty concerning neutral rights at sea.<sup>39</sup> President Franklin Pierce provided to Congress a compiled report from Secretary of State William Marcy regarding the American position towards the treaty.<sup>40</sup> Secretary Marcy acknowledged that the second and third points have long been advocated by the United States.<sup>41</sup> The final principle banning paper blockades, Marcy stated, is just a reiteration of a principle that is already codified in international law.<sup>42</sup> The only principle the United States adamantly opposed was the first provision banning privateers. Secretary Marcy, like President Pierce before, wrote that “The right of a commercial State, when unhappily involved in war, to employ its mercantile marine for defence and aggression, has heretofore proved to be an essential aid in checking the domination of a belligerent possessed of a powerful navy.”<sup>43</sup>

At the time the policy of the United States was not to maintain a large standing navy.<sup>44</sup>

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<sup>37</sup>William H. Seward: Mr. Seward to Mr. Dayton - Message of the President of the United States to the Two Houses of Congress, at the Commencement of the Second Session of the Thirty-seventh Congress, Document 152, September 10, 1861, url: <https://history.state.gov/historicaldocuments/frus1861/d152>.

<sup>38</sup>Theodore S Woolsey: United States and the Declaration of Paris, in: Yale LJ 3 (1893), p. 77, here p. 77; Stockton: The Declaration of Paris (see n. 28), p. 361.

<sup>39</sup>Franklin Pierce: Message from the President of the United States, in compliance with a resolution of the senate of the 11th instant, calling for information respecting the procedures of the representatives of the european powers, at a congress held at Paris, relative to neutral rights. In: 1856.

<sup>40</sup>Ibid., p. 1.

<sup>41</sup>Cited in, *ibid.*, p. 5.

<sup>42</sup>Cited in, *ibid.*, p. 5.

<sup>43</sup>Cited in, *ibid.*, p. 6.

<sup>44</sup>Woolsey: United States and the Declaration of Paris (see n. 38), pp. 77–78.

Secretary Marcy wrote that powerful navies, as well as standing armies, were perceived by the United States to be “detrimental to national prosperity and dangerous to civil liberty.”<sup>45</sup> Marcy argued that maintaining such military capability was costly to the American public and posed a “temptation” to become involved in war.<sup>46</sup> Instead, the United States depended on the potential of privateers to destroy enemy commerce and to “enforce the rules of naval war against neutral trade.”<sup>47</sup> The United States must be opposed to any policy, Marcy argued, that would make it necessary to field a powerful navy.<sup>48</sup>

Like President Pierce, Secretary Marcy argued that if the abolition of privateering was codified into international law, it would privilege states with stronger navies at the expense of weaker nations.<sup>49</sup> Marcy wrote, “the mutual surrender [of privateering] places the weaker nation more completely at the mercy of the stronger. While the former loses, the later-gains by the mutual surrender, and the freedom of the seas is much more completely given up to a few great powers which have the means and disposition to maintain large navies.”<sup>50</sup> Marcy stated it would have been “too costly a sacrifice - the surrender of a right which may well be considered as essential to the freedom of the seas.”<sup>51</sup> Secretary Marcy wrote,

Those who may have at any time a control on the ocean will be strongly tempted to regulate its use in a manner to subserve their own interests and ambitious projects. The ocean is the common property of all nations, and instead of yielding to a measure which will be likely to secure to a few — possibly to one — an ascendancy over it, each should pertinaciously retain all the means it possesses to defend the common heritage. A predominant power upon the ocean is more

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<sup>45</sup>Pierce: Message from President Pierce calling for information respecting a congress held at Paris (see n. 39), pp. 13–14.

<sup>46</sup>Ibid., pp. 13–14.

<sup>47</sup>Woolsey: United States and the Declaration of Paris (see n. 38), pp. 77–78.

<sup>48</sup>Pierce: Message from President Pierce calling for information respecting a congress held at Paris (see n. 39), pp. 13–14.

<sup>49</sup>Idem: Message from President Pierce calling for information respecting a congress held at Paris (see n. 39), p. 6; Woolsey: United States and the Declaration of Paris (see n. 38), p. 81.

<sup>50</sup>Pierce: Message from President Pierce calling for information respecting a congress held at Paris (see n. 39), p. 6.

<sup>51</sup>Ibid., p. 8.

menacing to the well-being of others than such a power on land, and all are alike interested in resisting a measure calculated to facilitate the permanent establishment of such a domination, whether to be wielded by one power or shared among a few others.

The injuries likely to result from surrendering the dominion of the seas to one or a few nations which have powerful navies, arise mainly from the practice of subjecting private property on the ocean to seizure by belligerents. Justice and humanity demand that this practice should be abandoned, and that the rule in relation to such property on land should be extended to it when found upon the high seas.<sup>52</sup>

Because of this, Secretary Marcy proposed an additional point be added to the Declaration of Paris which mirrored President Pierce's 1854 address. Marcy's amendment stated that all private property on the ocean, save contraband, regardless of owner, should be free from seizure by both naval forces and privateers.<sup>53</sup> If this measure were adopted the United States would have no need for privateers, but unless it was adopted, the United States could not abandon the capability.<sup>54</sup> The European maritime powers, besides Great Britain, had no issue adopting the Marcy amendment.<sup>55</sup> However, because of Great Britain's refusal, the amendment was rejected.<sup>56</sup> Before serious discussion of the Treaty of Paris got underway in Congress, in 1857, President Pierce was succeeded by President James Buchanan.<sup>57</sup> President Buchanan tabled the treaty negotiations for the duration of his presidency.<sup>58</sup> Writing later in 1864, Ambassador Norman B. Judd, representing the United States in Prussia stated that

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<sup>52</sup>Pierce: Message from President Pierce calling for information respecting a congress held at Paris (see n. 39), p. 16.

<sup>53</sup>Idem: Message from President Pierce calling for information respecting a congress held at Paris (see n. 39), pp. 6, 17; Woolsey: United States and the Declaration of Paris (see n. 38), pp. 77–78; Charles Francis Adams: Seward and the Declaration of Paris: A Forgotten Diplomatic Episode, in: Proceedings of the Massachusetts Historical Society 46 (October 1912), pp. 23–81, here p. 8.

<sup>54</sup>Idem: Seward and the Declaration of Paris: A Forgotten Diplomatic Episode (see n. 53), p. 8.

<sup>55</sup>Ibid., p. 8.

<sup>56</sup>Woolsey: United States and the Declaration of Paris (see n. 38), pp. 77–78; Adams: Seward and the Declaration of Paris: A Forgotten Diplomatic Episode (see n. 53), p. 8.

<sup>57</sup>Stockton: The Declaration of Paris (see n. 28), p. 364.

<sup>58</sup>Ibid., p. 364.



the reason the United States was not a party to the Treaty of Paris is that “greater freedom of the seas was demanded” by the U.S. than was provided by the treaty.<sup>59</sup>

## 4.2 The American Civil War

When the American Civil War officially began, April 12th, 1861, just over a month after Abraham Lincoln succeeded James Buchanan as President, the issue of the Declaration of Paris emerged once again.<sup>60</sup> William H. Seward, Secretary of State under the Lincoln administration was willing to abandon the Marcy amendment and accede to the treaty unconditionally.<sup>61</sup> Between 1815 and 1860, a host of technological developments had diminished the importance of the privateer in waging war.<sup>62</sup> During this time period naval ships began the transition from sails to steam propulsion, and incorporated a host of technological advancements including armor plated and iron hulled ships as well as larger rifled deck guns with percussion fused munitions.<sup>63</sup> War thus shifted more exclusively towards the domain of expensive state commissioned war ships.<sup>64</sup> Further, the agrarian South did not possess a robust shipping industry which to target.<sup>65</sup> By renouncing privateers, the United States also aimed to head off any potential grievance that might bring the European powers to interfere in the American Civil War.<sup>66</sup>

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<sup>59</sup>Norman Buel Judd: Mr. Judd to Mr. Sundell - Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the Second Session Thirty-eighth Congress, Part IV, Document 169, April 6, 1864, url: <https://history.state.gov/historicaldocuments/frus1864p4/d169>.

<sup>60</sup>Woolsey: United States and the Declaration of Paris (see n. 38), p. 78; Potter: Sea power: A naval history (see n. 64), p. 122.

<sup>61</sup>William H. Seward: Mr. Seward to Mr. Sanford - Message of the President of the United States to the Two Houses of Congress, at the Commencement of the Second Session of the Thirty-seventh Congress, Document 26, June 21, 1861, url: <https://history.state.gov/historicaldocuments/frus1861/d26>; Woolsey: United States and the Declaration of Paris (see n. 38), p. 78.

<sup>62</sup>Idem: United States and the Declaration of Paris (see n. 38), p. 80.

<sup>63</sup>Potter: Sea power: A naval history (see n. 64), p. 121.

<sup>64</sup>Woolsey: United States and the Declaration of Paris (see n. 38), p. 80.

<sup>65</sup>Adams: Seward and the Declaration of Paris: A Forgotten Diplomatic Episode (see n. 53), p. 11.

<sup>66</sup>Idem: Seward and the Declaration of Paris: A Forgotten Diplomatic Episode (see n. 53), p. 9; Stockton: The Declaration of Paris (see n. 28), p. 364.

To this end, Secretary Seward wrote to Henry Sanford, U.S. Minister to Belgium, on the 21st of June, 1861, stating that although the United States should “vastly prefer” to have the Marcy amendment included, which protects all non-combatant private property from confiscation, Seward anticipated that Great Britain and France would not allow the US to accede to the declaration under that condition.<sup>67</sup> If the Marcy Amendment was to be a sticking point, Seward instructed that “the convention be made for adherence to the declaration pure and simple.”<sup>68</sup> Charles Francis Adams, U.S. Ambassador in London wrote to Secretary Seward stating in agreement,

... to my mind the failure to reach that extreme point [The Marcy Amendment] will not justify the United States in declining to accept the good which is actually within their grasp. The declaration of the leading powers of civilized Europe, made at Paris in 1856, engrafted upon the law of nations for the first time great principles for which the government of the United States had always contended against some of those powers, and down to that time had contended in vain. ...

And if it so happen that they are not now adopted by others to the exact extent that we would prefer, the obvious course of wisdom would seem to be to accept the good which can be obtained, and patiently to await another opportunity when a continuance of exertions in the same direction may enable us to secure everything that is left to be desired.<sup>69</sup>

In the negotiations with England and France for American accession to the Declaration, however, a number of complications arose. In May of 1861, Great Britain and France declared themselves neutrals in the American Civil War.<sup>70</sup> By declaring themselves neutrals, Britain and France *de facto* recognized the Confederacy as a belligerent under international

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<sup>67</sup>Seward: Mr. Seward to Mr. Sanford 1861 - Document 26 (see n. 61).

<sup>68</sup>Ibid.

<sup>69</sup>Charles Francis Adams: Mr. Adams to Mr. Seward - Message of the President of the United States to the Two Houses of Congress, at the Commencement of the Second Session of the Thirty-seventh Congress, Document 62, July 26, 1861, url: <https://history.state.gov/historicaldocuments/frus1861/d62>.

<sup>70</sup>Brian Holden Reid: Power, sovereignty, and the great republic: Anglo-American diplomatic relations in the era of the Civil War, in: *Diplomacy and Statecraft* 14.2 (2003), pp. 45–76, here p. 19.

law with all the accompanying war time rights.<sup>71</sup> The United States maintained that the conflict was an internal dispute and thus subject to domestic rather than international law. Recognizing the belligerent rights of the Confederacy would implicitly recognize their status as an independent actor. Because of this, an additional goal of Secretary Seward in acceding to the Declaration of Paris was to bind the other maritime powers into denying legitimacy to Confederate privateers and treating them instead as pirates.<sup>72</sup> However, Lord John Russell told Secretary Seward that even if the United States did accede to the Declaration, it could not be imposed *ex post facto* on the conflict already underway.<sup>73</sup> Since the Southern States had already dispatched privateers, Great Britain and France did not want to be responsible for hunting down and “hanging” Confederate sailors as pirates.<sup>74</sup> The primary goal of Great Britain was to stay out of the war, so long as it did not infringe on British interests.<sup>75</sup>

England (and subsequently France) communicated via writing to Mr. Adams, the U.S. Ambassador in London, and Mr. Dayton, the American Ambassador to France, that immediately after the signing the two European countries would issue declarations stating that they would not “undertake any engagement which shall have any bearing, direct or indirect, on the internal difference now prevailing in the United States.”<sup>76</sup> This halted the signing process as Mr. Dayton and Mr. Adams did not feel comfortable proceeding without discussing the matter with the U.S. government.<sup>77</sup> In a letter to the British Foreign Minister Lord Russell, the British Ambassador to France, Lord Cowley, stated that Mr. Dayton “hardly

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<sup>71</sup>Ibid., p. 19.

<sup>72</sup>Adams: Seward and the Declaration of Paris: A Forgotten Diplomatic Episode (see n. 53), pp. 26, 30.

<sup>73</sup>Idem: Seward and the Declaration of Paris: A Forgotten Diplomatic Episode (see n. 53), p. 29; William H. Seward: Mr. Seward to Mr. Adams - Message of the President of the United States to the Two Houses of Congress, at the Commencement of the Second Session of the Thirty-seventh Congress, Document 69, August 17, 1861, url: <https://history.state.gov/historicaldocuments/frus1861/d69>; idem: Mr. Seward to Mr. Dayton 1861 - Document 152 (see n. 37); Woolsey: United States and the Declaration of Paris (see n. 38), p. 78.

<sup>74</sup>Adams: Seward and the Declaration of Paris: A Forgotten Diplomatic Episode (see n. 53), p. 30.

<sup>75</sup>Reid: Power, sovereignty, and the great republic: Anglo-American diplomatic relations in the era of the Civil War (see n. 70), p. 19.

<sup>76</sup>Henry Cowley: No. 30 - Earl Cowley to Earl Russell, vol. Volume 55, Document 30, August 20, 1861.

<sup>77</sup>Ibid.

concealed ... that the object of his government in agreeing to sign the convention was to force the Western powers to treat the Southern privateers as pirates.”<sup>78</sup> The British and French declarations planned to accompany American accession to the Declaration of Paris would have precluded such European intervention against the Southern states.

Mr. Adams wrote to Lord Russell stating that the presence of such an addendum offended the United States as it implied that the U.S. desired to take part in the Declaration “not from any high purpose or durable policy, but with the view of securing some small temporary object in the unhappy struggle which is going on at home.”<sup>79</sup> Adams continued stating,

Rather than that such a record should be made, it were a thousand times better that the Declaration remain unsigned for ever. If the parties to the instrument are not to sign it upon terms of perfect reciprocity, with all their duties and obligations under it perfectly equal, and without equivocation or reservation of any kind on any side, then it is plain that the proper season for such an engagement has not yet arrived. It were much wiser to put it off until nations can understand each other better.”<sup>80</sup>

Lord Russell wrote to Mr. Adams stating that because England recognized the Confederate states as a belligerent, with the accompanying belligerent right to field privateers, he did not want to leave Great Britain exposed to charges of bad faith for not prosecuting Southern privateers.<sup>81</sup> However, dissatisfaction remained. Because the additional declaration was conveyed in writing to the United States ministers, there was ambiguity whether or not it would be received as an official addendum to the treaty, thus putting the United States on unequal terms with the rest of the signatories.<sup>82</sup>

Secretary Seward sent messages for the American Ambassadors in England and France, on September 7th and 10th, 1861 respectively, to convey to their host governments. To

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<sup>78</sup>Cowley: No. 30 - Earl Cowley to Earl Russell (see n. 76).

<sup>79</sup>Charles Francis Adams: No. 31 - Mr. Adams to Earl Russell, vol. Volume 55, Document 31, August 24, 1861.

<sup>80</sup>Ibid.

<sup>81</sup>John Russell: No. 32 - Earl Russell to Mr. Adams, vol. Volume 55, Document 32, August 28, 1861.

<sup>82</sup>Adams: No. 31 - Mr. Adams to Earl Russell (see n. 79).

the government in England, Seward wrote that the United States could not accede to the treaty with any modifications unless such modification was agreed upon by all parties to the Declaration.<sup>83</sup> The United States must accede to the treaty on “the same terms with all the other parties to it, or ... not accede to it at all.”<sup>84</sup> Similarly, to France, Seward wrote that the United States wished to join the Declaration in the same “pure and simple” form that the other forty-six countries had joined.<sup>85</sup> However, Seward noted, France “declines to receive that adhesion unless she be allowed to make a special declaration, which would constitute an additional and qualifying article” that would limit France’s treaty obligations to the United States.<sup>86</sup> Seward wrote that even if the United States did agree to the unequal terms, it would “not be the declaration of the congress of Paris to which we would be adhering, but a different and special and peculiar treaty between France and the United States only.”<sup>87</sup> Secretary Seward concluded his messages by reassuring England and France that even though the United States was refusing to become party to the Declaration of Paris that enshrined freedom of the seas into international law, it would continue to act on the second, third, and fourth principles as it traditionally had.<sup>88</sup> To Ambassador Adams in England, Seward wrote,

Regarding this negotiation as at an end, the question arises, what, then, are to be the views and policy of the United States in regard to the rights of neutrals in maritime war in the present case. My previous despatches [sic.] leave no uncertainty upon this point. We regard Great Britain as a friend. Her Majesty’s flag, according to our traditional principles, covers enemy’s goods not contraband of war. Goods of her Majesty’s subjects, not contraband of war, are exempt from confiscation though found under a neutral or disloyal flag. No depredations shall be committed by our naval forces or by those of any of our citizens, so far as we

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<sup>83</sup>William H. Seward: Mr. Seward to Mr. Adams - Message of the President of the United States to the Two Houses of Congress, at the Commencement of the Second Session of the Thirty-seventh Congress, Document 76, September 7, 1861, url: <https://history.state.gov/historicaldocuments/frus1861/d76>.

<sup>84</sup>Ibid.

<sup>85</sup>Seward: Mr. Seward to Mr. Dayton 1861 - Document 152 (see n. 37).

<sup>86</sup>Ibid.

<sup>87</sup>Ibid.

<sup>88</sup>Seward: Mr. Seward to Mr. Adams 1861 - Document 76 (see n. 83); idem: Mr. Seward to Mr. Dayton 1861 - Document 152 (see n. 37).

can prevent it, upon the vessels or property of British subjects. Our blockade, being effective, must be respected.<sup>89</sup>

Thus reiterating the principle of 'free ships, free goods' without the corollary 'enemy ships, enemy goods'. To Ambassador Dalton in France, Seward conveyed,

Two motives induced them [The United States] to tender their adhesion to that declaration [of Paris] — first, a sincere desire to co-operate with other progressive nations in the melioration of the rigors of maritime war; second, a desire to relieve France from any apprehension of danger to the lives or property of her people from violence to occur in the course of the civil conflict in which we are engaged, by giving her, unasked, all the guarantees in that respect which are contained in the declaration of the congress of Paris. The latter of these two motives is now put to rest, insomuch as France declines the guarantees we offer. Doubtlessly, she is satisfied that they are unnecessary. We have always practiced on the principles of the declaration. We did so long before they were adopted by the congress of Paris, so far as the rights of neutrals or friendly States are concerned. While our relations with France remain as they now are we shall continue the same practice none the less faithfully than if bound to do so by a solemn convention.<sup>90</sup>

Therefore, while it was believed by the British and French that the United States only wanted to adhere to the Declaration of Paris in order to get assistance persecuting Confederate privateers, and while the United States refused to adhere to the treaty unless it could be applied in the current conflict against the South, the United States insisted its motives were solely magnanimous.

A major incident that put both the United States' commitment to 'freedom of the seas' and Great Britain's commitment to neutrality to the test was the Trent affair. On November 8, 1861, Captain Charles Wilkes of the United States Navy boarded the British mail ship *Trent* and removed two Confederate diplomats bound for Great Britain.<sup>91</sup> This act was a

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<sup>89</sup>Seward: Mr. Seward to Mr. Adams 1861 - Document 76 (see n. 83).

<sup>90</sup>Idem: Mr. Seward to Mr. Dayton 1861 - Document 152 (see n. 37).

<sup>91</sup>Potter: Sea power: A naval history (see n. 64), p. 126.

flagrant violation of international law regarding the rights of neutrals at sea. As Secretary of State Madison stated in 1804, regarding the impressment of American sailors by Great Britain, “No where will she find an exception to this freedom of the seas, and of neutral flags, which justifies the taking away of any person not an enemy in military service, found on board a neutral vessel.”<sup>92</sup> Upon hearing of the incident, however, both President Lincoln and Secretary Seward emphasized to the British Ambassador in Washington that Captain Wilkes was acting of his own accord and not under the direction of the U.S. government.<sup>93</sup> While, in a message to Lord Lyons, Secretary Seward attempted to justify the behavior of Captain Wilkes by presenting the Confederate diplomats and their papers as contraband of war, the Confederate diplomats were released and war with Great Britain avoided.<sup>94</sup> On January 20, 1862, J. Lothrop Motely, United States Ambassador to Austria, wrote to Seward remarking on the successful conclusion of the Trent Affair.<sup>95</sup> Motely stated that from his perspective, “our whole history showed us to have been uniformly the champions of the rights of neutrals and of the largest liberty of the seas” and that he could not have imagined throwing that away “in exchange for the violent and lawless practice too often pursued by England.”<sup>96</sup> Motely told Seward that the Trent affair has caused the great maritime powers of Europe to express strong support for “the rights of neutrals and of the freedom of the seas, always cherished by the United States when neutral.”<sup>97</sup>

At the close of the war, Henry Sanford, U.S. Ambassador to Belgium wrote to Secretary Seward informing that the European powers have a “feeling of distrust” about American

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<sup>92</sup>Madison: From James Madison to James Monroe, 5 January 1804 (see n. 159).

<sup>93</sup>Edwin Walter Kemmerer: Congressional Serial Set, vol. 588, 1910, p. 179; Potter: Sea power: A naval history (see n. 64), p. 126.

<sup>94</sup>Kemmerer: Congressional Serial Set (see n. 93), pp. 180–181.

<sup>95</sup>J. Lothrop Motley: Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the Third Session Thirty-seventh Congress, Document 456, January 20, 1862, url: <https://history.state.gov/historicaldocuments/frus1861/d48>.

<sup>96</sup>Ibid.

<sup>97</sup>Ibid.

foreign policy.<sup>98</sup> He wrote that because “It is assumed that our great armies cannot safely be disbanded, and will require employment” the European powers believed that the United States will look for conflict with Mexico or Canada.<sup>99</sup> Secretary Seward wrote back on April 4, 1865, stating that those who expect the United States to become involved in “aggressive wars” because the Civil War has ended, are operating off of European principles rather than American ones.<sup>100</sup> Seward wrote, “We must insist on the freedom of the seas for our commerce and the safety of our borders against external violence. These rights will doubtless be yielded to us, although not without regret and possible reluctance. Beyond that there are no questions which may not be safely and wisely left to the province of diplomacy.”<sup>101</sup> In other words, the aims of the United States military is not territorial aggrandizement, but self-defense and the protection of neutral American shipping.

### 4.3 Postbellum

The Civil War marked a turning point in the technological conduct of naval warfare. Because of the heavy armor plating needed to protect vessels from the devastation of explosive shells, warships could not be rapidly constructed and merchant ships could not be converted into effective tools of war.<sup>102</sup> Further steam vessels, not restricted by wind patterns, proved superior to sailing vessels in the Civil War.<sup>103</sup> However, the United States Navy ignored these lessons, drastically reduced the naval force structure, and “drifted back into the habits

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<sup>98</sup>Henry Shelton Sanford: Mr. Sanford to Mr. Seward - Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the First Session Thirty-ninth Congress, Document 70, March 16, 1865, url: <https://history.state.gov/historicaldocuments/frus1865p3/d70>.

<sup>99</sup>Ibid.

<sup>100</sup>William H. Seward: Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the First Session Thirty-ninth Congress, Document 73, April 4, 1865, url: <https://history.state.gov/historicaldocuments/frus1865p3/d73>.

<sup>101</sup>Ibid.

<sup>102</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 192–193.

<sup>103</sup>Ibid., pp. 192–193.



and routines of the pre-war period.”<sup>104</sup> At the end of the Civil War the U.S. Navy possessed 700 vessels with a total firing capacity of nearly 5,000 heavy guns.<sup>105</sup> By 1870, the number of U.S. Navy ships in commission and fit for service, including hospital and store-ships, numbered only 52 and carried fewer than 500 heavy guns combined.<sup>106</sup> The U.S. Navy also resumed its pre-war responsibility of protecting American commerce. As Harold and Margaret Sprout stated, since 1815, it had been the “chief function” of the U.S. Navy to sail squadrons of cruising vessels in far flung geographical areas in order to protect “American commerce in foreign ports.”<sup>107</sup> Using the technology of 1815, American ships could travel to these areas with ease as the sailing ships of the day were only limited in range by how much food they could carry.<sup>108</sup> However, the incorporation of steam vessels posed problems for the United States which lacked the logistics infrastructure (i.e. overseas colonies) to provide reliable and cheap coal stores.<sup>109</sup> Because of this, following the Civil War the United States reverted back to using sailing vessels instead of vessels powered by steam. A 1869 general order stated that all naval vessels going forward should “have full sail power.”<sup>110</sup> Senator Lot M. Morrill would later justify this in 1873, remarking that the United States is “not trying to build up a fighting force to rival those of France and Great Britain, but simply to provide a naval police force to guard the country’s peacetime commerce.”<sup>111</sup> The prevailing sentiment within the United States government at the time believed that the United States’ geographical separation from Europe, and the preoccupation of the European naval powers with maintaining a European balance of power, ensured the safety of the continental United

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<sup>104</sup>Ibid., p. 194.

<sup>105</sup>Potter: *Sea power: A naval history* (see n. 64), p. 155; Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 195.

<sup>106</sup>Potter: *Sea power: A naval history* (see n. 64), p. 155; Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 195.

<sup>107</sup>Idem: *Rise of American Naval Power* (see n. 66), p. 195.

<sup>108</sup>Ibid., p. 196.

<sup>109</sup>Ibid., p. 196.

<sup>110</sup>Ibid., p. 197.

<sup>111</sup>Ibid., p. 200.

States.<sup>112</sup>

Freedom of the seas discourse in American foreign policy, after the Civil War, shifted away from the 'free ships, free goods' conception of the Declaration of Paris and back toward the broader liberal understanding of the immunity of all private property from seizure on the high seas. On July 30, 1866, Secretary Seward sent a message to Charles Francis Adams that included a speech given by General Banks, Chairman of the House Committee on Foreign Affairs, on the neutrality of the United States. The speech was accompanied by a bill on American Neutrality which aimed to repeal the Neutrality Act of 1818 which prevented the United States from selling ships and materials of war to other states at peace with the U.S.<sup>113</sup> General Banks stated,

The laws of war upon land have been materially and happily modified in the progress of civilization. Nations are no longer compelled to become parties to war. The rights of neutrals have been steadily enlarged; and the rights of non-combatants, both of person and of property, respected. War is now waged against governments, and not, as formerly, against persons. The most enlightened maritime nations have endeavored to modify and reform the laws of war upon the sea as upon the land. Great Britain is the only power that resists the recognition of the rights of neutrals upon the sea as upon the land.<sup>114</sup>

As upon the land meaning the provision stated in the Marcy Amendment, that the goods of non-combatants, neutral or otherwise, be exempt from confiscation in times of war. General Banks continues,

Notwithstanding the sacrifices made by the most enlightened maritime nations to mitigate the laws of war upon the sea, the necessary reform is not yet fully established. Great Britain in theory at least, maintains the ancient and unjust

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<sup>112</sup>Potter: *Sea power: A naval history* (see n. 64), p. 155.

<sup>113</sup>Charles Ghequiere Fenwick: *The neutrality laws of the United States*, 1913, pp. 48–49.

<sup>114</sup>William H. Seward: *Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the Second Session of the Thirty-ninth Congress*, Document 144, July 30, 1866, url: <https://history.state.gov/historicaldocuments/frus1866p1/d144>.

pretensions of belligerents upon the sea, denying that the flag protects the merchandise, condemning as contraband of war material used in the construction of vessels, coal, wood, hemp, and tar, as well as arms, guns, powder, declaring that they ceased to be merchandise, and were contraband of war; denying the convoy of merchant vessels, and asserting the right of search and the theory of paper blockades. It is by the assertion of principles which she does not undertake to enforce that she seeks to maintain her supremacy on the seas. To these pretensions all the maritime nations are opposed.

It is only by monopolizing the naval and commercial forces of the world that she can maintain these unjust pretensions. Whatever increases the maritime force of other nations opens the seas of the world to commerce, which is the handmaid of peace. It is due to the independence of nations, as well as to the freedom of the seas, that the United States should assist in this great work, and the repeal of these provisions cannot be contribute [sic.] in an important degree to this object of universal interest.<sup>115</sup>

According to General Banks, even though Great Britain agreed to abide by the Treaty of Paris, they still advocate for an expansive conception of belligerent rights. General Banks argued that by repealing the Neutrality Act of 1818 and supplying naval stores to other countries, thereby enabling them to build fleets of their own, the United States would facilitate the attainment of freedom of the seas by undermining the British naval monopoly. Undermining the British naval monopoly would increase the scope of commerce and provide security from unilateral depredations of commerce by the British. Thus promoting the freedom of the seas. The Bill passed in the House, however, it failed to make it through the Senate.<sup>116</sup>

George Bancroft, United States Envoy to Germany, wrote to Secretary Seward on April 21st, 1868, informing him that the North German Diet proposed to Count Bismarck that the country should begin to start forging treaties with friendly nations on “the principle of

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<sup>115</sup>Ibid.

<sup>116</sup>Fenwick: The neutrality laws of the United States (see n. 113), p. 51.

the freedom of private property at sea in time of war, so that the principle may become recognized as a part of international law.”<sup>117</sup> The proposal would expand the ‘free ships, free goods’ principle already codified to the more liberal principle that all private property should be immune from seizure on the high seas. Count Bismarck approved and a resolution to proceed with such treaties passed in the diet nearly unanimously.<sup>118</sup> According to Bancroft, this resolution was adopted in the hopes that the United States, based on President Pierce’s 1854 statement on the matter, would join North Germany in establishing the doctrine, that all private property on the high-seas be free from capture, into international law.<sup>119</sup> Bancroft wrote, “The opinion here is that the abandonment of privateering by public ships as well as by private ones will establish effectually the freedom of the seas, and put an end to the arrogant supremacy of any one great maritime power, and that nothing else will do it so effectually.”<sup>120</sup> However, at the end of Andrew Johnson’s presidency, the proposed commercial treaty with North Germany never materialized.

In 1869, Ulysses S. Grant replaced Andrew Johnson as President of the United States. By July 19, 1870, the Franco-Prussian war had broken out in Europe. At the outset of the war, Count Bismarck sent a message to U.S. Secretary of State Hamilton Fish informing him that during the conflict Prussia will not seize any private property on the high-seas without the expectation of reciprocity.<sup>121</sup> Secretary of State Hamilton Fish sent a message in reply to Baron Gerolt, Prussian Minister to the United States. Secretary Fish expressed his gratitude and recounted the American tradition of advocacy for this principle of immunity.<sup>122</sup> Secretary

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<sup>117</sup>George Bancroft: Mr. Bancroft to Mr. Seward - Papers Relating to Foreign Affairs, Accompanying the Annual Message of the President to the Third Session of the Fortieth Congress, Document 54, April 3, 1868, url: <https://history.state.gov/historicaldocuments/frus1868p2/d54>.

<sup>118</sup>Ibid.

<sup>119</sup>Ibid.

<sup>120</sup>Ibid.

<sup>121</sup>Hamilton Fish: Mr. Fish to Baron Gerolt - Papers Relating to the Foreign Relations of the United States, Transmitted to Congress with the Annual Message of the President, December 5, 1870, Document 172, July 22, 1870, url: <https://history.state.gov/historicaldocuments/frus1870/d172>.

<sup>122</sup>Ibid.

Fish stated that first President Pierce in 1854, followed by Secretary Marcy in 1856, and Secretary Seward in 1861 all expressed a desire to exempt private property from seizure at sea by both public and private (privateer) vessels.<sup>123</sup> Secretary Fish communicated that “This gives reason to hope that the Government and the people of the United States may soon be gratified by seeing it universally recognized as another restraining and harmonizing influence imposed by modern civilization upon the art of war.”<sup>124</sup> While France did not agree to abide by the immunity principle as Prussia had done, they stated that they would follow ‘free ships, free goods’. Secretary Fish received a communication that stated in the Franco-Prussian war, France “adheres to the declaration of Paris, as well in regard to United States as other powers, especially Prussian property in American bottoms, respected unless contraband, and American property respected in Prussian bottoms.”<sup>125</sup>

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<sup>123</sup>Ibid.

<sup>124</sup>Ibid.

<sup>125</sup>Hamilton Fish: Mr. Davis to Baron Gerolt - Papers Relating to the Foreign Relations of the United States, Transmitted to Congress with the Annual Message of the President, December 5, 1870, Document 173, July 25, 1870, url: <https://history.state.gov/historicaldocuments/frus1870/d173>.

## Chapter 5

# Doctrinal Change at the Turn of the Century: 1880-1912

The Franco-Prussian War proved calamitous for France and dramatically changed the European security landscape. Violence only spanned the duration of one month, from August 2, 1870 to September 2, 1870.<sup>1</sup> However, during that time France was so thoroughly bested that an article written in *Scientific American* on September 17, 1870, declared that France “had not succeeded in making the least headway against their stern antagonists and have not won a single victory worthy of the name.”<sup>2</sup> The Emperor Napoleon surrendered to King Wilhelm and the Second French Empire gave way to the Third French Republic.<sup>3</sup> Count Otto von Bismark, on the other hand, unified Prussia and the German states to form a singular German Empire placing himself as Chancellor.<sup>4</sup> The newly formed German Empire quickly took its place as one of the dominant European states. The Imperial German navy grew to such a degree that by the end of the nineteenth century it was second only to the British navy in a size and capability.<sup>5</sup> Germany’s imperial ambitions concerned U.S. policy makers.<sup>6</sup> Because of this, there was a strong push within the United States government at the turn of the century to field a navy capable of protecting the United States from the

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<sup>1</sup>The Franco-Prussian War, in: *Scientific American* 23.12 (September 17, 1870), p. 184.

<sup>2</sup>*Ibid.*

<sup>3</sup>*Ibid.*

<sup>4</sup>Henry Kissinger: *Diplomacy*, 1994, p. 138.

<sup>5</sup>Potter: *Sea power: A naval history* (see n. 64), p. 194.

<sup>6</sup>*Ibid.*, p. 194.

rising German and ever present British navy.<sup>7</sup>

Concomitantly, at the end of the nineteenth century, the a new naval doctrinal concept made its debut in the United States. The doctrine of sea control, introduced by Alfred Thayer Mahan, centered around maintaining a large standing naval force with which to bring strategically significant tracts of sea space under control. Such a strategy was made possible by technological innovations in naval science that made steam propelled battleships the corner stone of naval force structure. Within the United States government, proponents seized upon Mahan's doctrine of sea control to justify reformulating U.S. naval strategy and constructing a fleet of battleships that would rival the prominent navies of the day. Mahanin sea control found particularly powerful ally in Theodore Roosevelt whose fixation on the threat of German expansionism and personal desire to expand an American empire solidified the doctrinal concept within the Naval establishment.

Mahanian sea control stood in direct opposition to the *Mare Liberum* principle of freedom of the seas. However, the United States refused to abandon the immunity principle even in the face of Mahan's repeated insistence that it do so. Mahan reflexively argued that the United States was right to champion the concept of freedom of the seas when it was a weak naval state but now that the United States possessed a respectable fleet, Mahan argued that it would be foolish to continue to champion the principle and give away a major source of national strength, the ability to destroy enemy commerce at sea. Mahan's advocacy fell on deaf ears. After the Spanish-American war, the United States continued to advocate for an international legal convention that would expand the scope of the 1856 Treaty of Paris beyond the 'free ships, free goods' conception of freedom of the seas to one that covered all private property at sea. This chapter shows the disjuncture between the naval doctrinal concept of sea control and the *Mare Liberum* understanding of freedom of the seas. The refusal to abandon the immunity principle even in the face of substantial material, technological,

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<sup>7</sup>Ibid., p. 194.

and doctrinal change separates this analysis of freedom of the seas discourse from a purely material critique of American political-military strategy.

## 5.1 A New Navy

During the 1880s the United States experienced a profound economic growth that definitively put the post-Civil War depression in the past.<sup>8</sup> American industrial manufacturing grew at such a rate that there were fears of saturating the domestic market.<sup>9</sup> By 1885, the United States led the world in manufacturing output, surpassing even Great Britain.<sup>10</sup> According to Henry Kissinger, by 1900, the U.S. consumed more energy than “Germany, France, Austria-Hungary, Russia, Japan, and Italy combined” and domestic coal production rose 800% to meet this need.<sup>11</sup> Foreign trade during the period grew concomitantly with American industrial growth.<sup>12</sup> The growth in exports and desire to access new markets for trade brought the U.S. into increasing contact with the mercantilist European maritime nations who, at the time, were attempting to “seize economic control of the world markets.”<sup>13</sup> Because of this, the 1880s saw a revitalization of interest in rebuilding the American merchant marine and fielding a professional navy capable of protecting the increased commerce.<sup>14</sup>

Just prior to his assassination, President James A. Garfield named William H. Hunt, a “big-navy-advocate,” as Secretary of the Navy.<sup>15</sup> While there were disagreements in Congress over how the United States should revitalize its naval force, in the 1880s there was bi-

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<sup>8</sup>Potter: *Sea power: A naval history* (see n. 64), p. 159; Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 215.

<sup>9</sup>Potter: *Sea power: A naval history* (see n. 64), p. 159.

<sup>10</sup>Kissinger: *Diplomacy* (see n. 4), p. 37.

<sup>11</sup>Idem: *Diplomacy* (see n. 4), p. 37; Robert Seager: *Ten years before Mahan: the unofficial case for the New Navy, 1880-1890*, in: *The Mississippi Valley Historical Review* 40.3 (1953), pp. 491–512, here p. 494.

<sup>12</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 215.

<sup>13</sup>Potter: *Sea power: A naval history* (see n. 64), p. 159.

<sup>14</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 215; Potter: *Sea power: A naval history* (see n. 64), p. 159.

<sup>15</sup>Idem: *Sea power: A naval history* (see n. 64), p. 160.



partisan consensus that such a revitalization was necessary.<sup>16</sup> In 1883, Congress authorized the addition of three modern warships to the American fleet. The *Atlanta*, *Boston*, and *Chicago* were protected cruisers that were “built of steel, were steam-propelled, had double hulls and watertight compartments, and they were fully electrified,” however, they did still possess a “partial sail rig.”<sup>17</sup> By 1885, the United States authorized the construction of a battleship, more powerful than the armored cruisers commissioned in 1883 that was “capable of keeping the sea for long periods and of following an enemy’s forces to any menaced point along our coast.”<sup>18</sup>

In conjunction with the change of force structure came a change in naval doctrine. While the official Naval Doctrine of the 1880s was that all new naval developments were to be designed and used for coastal defense and commerce raiding/protection, the Department of the Navy “encouraged contradictory views” of how the new navy should be employed.<sup>19</sup> In Congress, for example, the traditional naval strategy of commerce raiding and coastal defense was a commonly derided subject.<sup>20</sup> In 1887 Senator Matthew C. Butler characterized the traditional doctrine as “an insignificant kind of guerrilla, bushwacking warfare.”<sup>21</sup> Technological developments enabled enemy powers to blockade from afar, rendering traditional coastal defense strategies obsolete. Senator Butler argued that if the U.S. had a strong naval fleet of “first-class battleships” the “coast would take care of itself.”<sup>22</sup> This shift away from commerce raiding and coastal-defense doctrines took hold in the 1890s through the work

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<sup>16</sup>Seager: Ten years before Mahan: the unofficial case for the New Navy, 1880-1890 (see n. 11), p. 498.

<sup>17</sup>Potter: Sea power: A naval history (see n. 64), p. 160.

<sup>18</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 232.

<sup>19</sup>Seager: Ten years before Mahan: the unofficial case for the New Navy, 1880-1890 (see n. 11), pp. 499–500.

<sup>20</sup>Potter: Sea power: A naval history (see n. 64), p. 160.

<sup>21</sup>Idem: Sea power: A naval history (see n. 64), p. 160; Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 233; Seager: Ten years before Mahan: the unofficial case for the New Navy, 1880-1890 (see n. 11), pp. 510–511.

<sup>22</sup>Potter: Sea power: A naval history (see n. 64), p. 160; Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 233.

and influence of Captain Alfred Thayer Mahan.<sup>23</sup>

### 5.1.1 The Introduction of Mahanian Naval Doctrine

In 1886 Captain Alfred Thayer Mahan became “president and chief instructor” of the Naval War College in Newport Rhode Island.<sup>24</sup> Mahan fundamentally changed American naval doctrine by expounding upon what he argued was a neglected yet fundamentally important historical condition that gave rise to great powers; the control of the sea.<sup>25</sup> Control of the sea, or command of the sea, describes a condition where an actor has established, through preponderance of force, the ability to deny enemy access to a maritime space. Mahan argued that the Naval force structure should be oriented towards this end, marking a radical departure from the coastal defense and commerce raiding doctrine held since the country’s founding.<sup>26</sup> These ideas were already beginning to take form when Mahan began his work, however, he, with the help of key figures such as Secretary of the Navy Benjamin Tracy, codified and cemented the concepts as official doctrine of the United States Navy.<sup>27</sup>

As was stated in Chapter 2, Mahan argued that the primary mission for the Navy’s in times of war was “to control the areas of sea communication in order to secure their use to one’s own cargo vessels and transports while denying their use to the enemy.”<sup>28</sup> Areas of sea communication, commonly called Sea Lines of Communication, are the commonly traveled sea routes of shipping and commerce that are generally dictated by maritime geography rendering certain routes ‘the path of least resistance’ between two points.<sup>29</sup> The success of a great power, Mahan argued, lay in the obtaining the preponderant capability to keep these

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<sup>23</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 234.

<sup>24</sup>Potter: *Sea power: A naval history* (see n. 64), p. 161.

<sup>25</sup>*Ibid.*, p. 162.

<sup>26</sup>Baer: *US Naval Strategy 1890-1945* (see n. 32), pp. 6–7.

<sup>27</sup>Seager: *Ten years before Mahan: the unofficial case for the New Navy, 1880-1890* (see n. 11), p. 493; Kissinger: *Diplomacy* (see n. 4), p. 38.

<sup>28</sup>Potter: *Sea power: A naval history* (see n. 64), p. 162.

<sup>29</sup>Mahan: *The interest of America in sea power, present and future* (see n. 14), pp. 41–42.

lines open to national commerce and military transport, while denying the enemy the same access.<sup>30</sup> Mahan stated, “Let us start from the fundamental truth, warranted by history, that the control of the seas, and especially along the great lines drawn by national interest or national commerce [Sea Lines of Communication], is the chief among the merely material elements in the power and prosperity of nations.”<sup>31</sup>

Mahan posited that control of sea lines of communication was the essential condition that afforded national prosperity because it ensured the connection between domestic production and foreign markets. This was because, Mahan stated, the ocean is the “great medium of circulation.”<sup>32</sup> Mahan’s imperialist doctrine argued that a country’s prosperity, and therefore power, was rooted in seizing colonies to guarantee foreign markets for domestic production and expanding the nation’s carrying trade.<sup>33</sup> To compete economically with the states of Europe, Mahan argued that the United States needed a robust merchant marine, sound harbors at the shipping destinations, and the ability to ensure the safety of goods in transit.<sup>34</sup> For this, Mahan argued, it was necessary to possess overseas colonies and maintain a robust naval capability, both to defend the colonies and to protect the sea routes of trade.<sup>35</sup> Because a naval fleet of the day could not carry enough fuel to transit an ocean and arrive in fighting shape, coaling stations were required along its routes, or sea lines of communication, thus spurring a positive feedback loop of naval development and imperialism.<sup>36</sup> To be economically beneficial, Mahan argued that coaling stations should be located in a nation’s colonies in order to be self-sufficient. “Colonies in turn,” Mahan states, “make trade more profitable and thus nourish the merchant marine, which is the *raison d’être* of sea power in the first

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<sup>30</sup>Ibid., p. 52.

<sup>31</sup>Ibid., p. 52.

<sup>32</sup>Ibid., pp. 6, 52.

<sup>33</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 236.

<sup>34</sup>Ibid., pp. 236–237.

<sup>35</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 236–237; Potter: Sea power: A naval history (see n. 64), p. 162.

<sup>36</sup>Idem: Sea power: A naval history (see n. 64), p. 162.

place”.<sup>37</sup> In other words, a nation needs a large navy to protect shipping to its colonies, and it needs colonies to provide for the naval capability to do so. The British Empire possessed these factors which afforded it the undisputed command of the sea and in turn led it to become the world’s foremost power.<sup>38</sup> Mahan argued that while the United States, as a virtual island itself, had the potential to command the sea as Great Britain had done, its current capabilities were underdeveloped.<sup>39</sup>

However, because the United States did not not have large merchant marine, let alone overseas colonies, the issue at hand was not how to command the seas globally, but how to do so within a regional sphere of influence.<sup>40</sup> Command of the sea at the local level would guarantee that “foreign neutral shipping” would still maintain free access to the U.S. coast if the United States became embroiled in war.<sup>41</sup> Ensuring foreign neutral shipping would thus, prevent an “effective blockade” against the key ports of the United States.<sup>42</sup> The only way to prevent such a blockade in times of war, would be by maintaining a fighting force strong enough to establish naval preponderance, or command the sea in a “wide zone contiguous to our continental coastline,” and increasingly in the Caribbean, in order to endanger any blockading fleet.<sup>43</sup> This could only be done, Mahan argued, with a powerful fleet of “capital ships,” or battleships, that had the capability to destroy the fleet of the enemy.<sup>44</sup> To this end, Mahan provided an intellectual justification for what large-navy supporters had already been advocating, an American fleet of battleships that could break distant blockades and rival the predominant navies of the day.<sup>45</sup> A navy that consists primarily of cruisers, whose main purpose is to harass enemy’s trade, is insufficient as it offers no protection to domestic

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<sup>37</sup>Potter: *Sea power: A naval history* (see n. 64), p. 162.

<sup>38</sup>*Ibid.*, p. 162.

<sup>39</sup>*Ibid.*, p. 162.

<sup>40</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 237.

<sup>41</sup>*Ibid.*, p. 237.

<sup>42</sup>*Ibid.*, p. 237.

<sup>43</sup>*Ibid.*, pp. 237–238.

<sup>44</sup>Potter: *Sea power: A naval history* (see n. 64), p. 162.

<sup>45</sup>*Ibid.*, p. 162.

shipping. While cruisers may serve a complementary purpose, the first goal of a Navy at war, Mahan argued, should be to destroy the enemy's fighting capability.<sup>46</sup> By destroying the fighting capability of the enemy and obtaining command of the sea, a state is able to not only impose blockades and choke enemy commerce at will, but also conduct commerce on the "open commons."<sup>47</sup>

In the Caribbean, plans to build a trans-isthmian canal increased the urgency to obtain naval preponderance, or sea control in the region.<sup>48</sup> A link between the Atlantic and Pacific through the Caribbean was predicted to turn the region into a 'new Mediterranean', vastly increasing international commerce thorough the area. The canal was, and is today, a strategic imperative for the United States as a maritime link between the East and West coasts.<sup>49</sup> President Chester Arthur declared, in 1881, that the United States was to be "the chief Pacific power."<sup>50</sup> Having access to the the canal would allow the United States to shift naval assets quickly between the East and West coasts, enabling the U.S. to defend its Pacific coast and expand commercially westward.<sup>51</sup> However, if a foreign nation were to establish control of the Caribbean sea, they would be able to limit access to the canal, potentially denying the United States use of it.<sup>52</sup> Mahan advocated securing command of the sea through the build up of naval forces, but also by securing strategic coaling stations on either side of the isthmus, and denying the same to European powers.<sup>53</sup> Mahan wrote that the United States should control the Caribbean and take on the role of the region's steward on behalf of "the general family of our civilization."<sup>54</sup> Mahan stated,

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<sup>46</sup>Ibid., p. 162.

<sup>47</sup>Baer: US Naval Strategy 1890-1945 (see n. 32), p. 9.

<sup>48</sup>Mahan: The interest of America in sea power, present and future (see n. 14), p. 265.

<sup>49</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 249.

<sup>50</sup>Seager: Ten years before Mahan: the unofficial case for the New Navy, 1880-1890 (see n. 11), p. 507.

<sup>51</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 249.

<sup>52</sup>Baer: US Naval Strategy 1890-1945 (see n. 32), p. 7.

<sup>53</sup>Mahan: The interest of America in sea power, present and future (see n. 14), pp. 264–265; Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 249.

<sup>54</sup>Mahan: The interest of America in sea power, present and future (see n. 14), pp. 264–265.

If, on the other hand, we determine that our interest and dignity require that our rights should depend upon the will of no other state, but upon our own power to enforce them, we must gird ourselves to admit that freedom of interoceanic transit depends upon predominance in a maritime region - the Caribbean Sea - through which pass all approaches to the Isthmus. Control of a maritime region is insured primarily by a navy; secondarily, by positions, suitably chosen and spaced one from the other, upon which as bases the navy rests, and from which it can exert its strength.<sup>55</sup>

Thus, a first argument for 'freedom through control' is offered by Mahan. However, Mahan is quick to acknowledge that the benevolence of such control only extends as far as it benefits the interests of the United States. He wrote, that "if a plea of the world's welfare seem suspiciously like a cloak for national self-interest, let the latter be accepted frankly as the adequate motive which it assuredly is."<sup>56</sup> Therefore such "freedom of interoceanic transit" is not being secured for the benefit of all, but the benefit of the United States.

In this way, Mahan fundamentally opposed the traditional notion of 'freedom of the seas' as defined by the rights of neutrals. Writing in 1894, Mahan stated,

If navies, as all agree, exist for the protection of commerce, it inevitably follows that in war they must aim at depriving their enemy of that great resource; nor is it easy to conceive what broad military use they can subserve that at all compares with the protection and destruction of trade. ...

It is because Great Britain's sea power, though still superior, has declined relatively to that of other states, and is no longer supreme, that she has been induced to concede to neutrals the principle that the flag covers the goods. ...

In the same way it may be asserted quite confidently that the concession of immunity to what is unthinkingly called the "private property" of an enemy on the sea, will never be conceded by a nation or alliance confident in its own sea power. It has been the dream of the weaker sea belligerents in all ages; and their arguments for it, at the first glance plausible, are very proper to urge from their

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<sup>55</sup>Mahan: The interest of America in sea power, present and future (see n. 14), p. 102.

<sup>56</sup>Ibid., p. 51.

point of view.<sup>57</sup>

If the United States had a sufficiently large navy, it could ensure not only the neutral rights accorded to it under international law, but also the “natural” right to further America’s national interests in self-serving fashion.<sup>58</sup> However, while the ‘free seas’ discourse submerged during this period, Mahan was not able to overthrow the traditional ‘freedom of the seas’ foreign policy centered around the rights of neutrals.

### 5.1.2 The Influence of Mahan Upon Sea Power

Mahan’s works were not widely received in the United States when he began at the Naval War College. Rather, the ideas that Mahan advocated were first brought into U.S. foreign policy discourse through key figures in the U.S. Naval establishment, such as Secretary of the Navy Benjamin Tracy under the Harrison administration, and Theodore Roosevelt, in his capacity as Assistant Secretary of the Navy, Vice President, and eventually President of the United States.<sup>59</sup> Scholars point out that it is not possible to know for certain to what degree the actions of these individuals were influenced directly by Mahan rather than the spirit of the times (although as Sprout and Sprout write, Mahan and Tracy did know each other and Tracy held Mahan in “the highest regard”<sup>60</sup>).<sup>61</sup> It falls outside the scope of this work to make that determination. Instead, this dissertation simply intends to show that the large-navy imperial discourse of sea control, most famously espoused by Mahan, entered American political-military strategy during this time.

In 1889 Secretary of the Navy, Benjamin Tracy delivered a report to Congress advocating

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<sup>57</sup>Ibid., pp. 128–131.

<sup>58</sup>Ibid., p. 17.

<sup>59</sup>Potter: *Sea power: A naval history* (see n. 64), p. 163.

<sup>60</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), 241 (footnote 24).

<sup>61</sup>Idem: *Rise of American Naval Power* (see n. 66), pp. 240–241; Seager: *Ten years before Mahan: the unofficial case for the New Navy, 1880-1890* (see n. 11), p. 512; B Franklin Cooling: *The Making of a Navalist: Secretary of the Navy Benjamin Franklin Tracy and Seapower*, in: *Naval War College Review* 1972, pp. 83–90, here p. 83.

the principles espoused in Mahan's *The Influence of Sea Power Upon History*.<sup>62</sup> At this time, due to professional rapport and the poor health of Secretary of State James Blaine, Secretary Tracy acted as President Harrison's top advisor.<sup>63</sup> Tracy, like Mahan, argued that,

The defense of the United States absolutely requires the creation of a fighting force. So far the increase has been mainly in the direction of unarmored cruisers. These vessels, while useful in deterring commercial states from aggression and as an auxiliary to secure celerity and efficiency in larger operations, do not constitute a fighting force, even when it is intended exclusively for defense. To meet the attack of ironclads, ironclads are indispensable. To carry on even a defensive war with any hope of success we must have armored battle-ships. The capture or destruction of two or three dozen or two or three score of merchant vessels is not going to prevent a fleet of ironclads from shelling our cities or exacting as the price of exemption a contribution that would pay for their lost merchantmen ten times over. ... We must have the force to raise blockades, which are almost as disastrous to commercial cities as bombardment. We must have a fleet of battle-ships that will beat off the enemy's fleet on its approach, for it is not to be tolerated that the United States, with its population, its revenue, and its trade, is to submit to attack upon the threshold of its harbors. Finally, we must be able to divert an enemy's force from our coast by threatening his own, for a war, though defensive in principle, may be conducted most effectively by being offensive in its operations.

If the country is to have a navy at all, it should have one that is sufficient for the complete and ample protection of its coast in time of war. If we are to stop short of this, we might better stop where we are, and abandon all claim to influence and control upon the sea.<sup>64</sup>

In his proposal Secretary Tracy argued that the US needed to develop two naval fleets, eight battleships for the Pacific coast and twelve for the Atlantic, as well as sixty additional

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<sup>62</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), pp. 240–241; Potter: *Sea power: A naval history* (see n. 64), p. 160.

<sup>63</sup>Cooling: *The Making of a Navalist: Secretary of the Navy Benjamin Franklin Tracy and Seapower* (see n. 61), p. 88.

<sup>64</sup>Benjamin Tracy: *Annual report of the Secretary of the Navy*, in: 1 (1889), p. 4.



cruisers to support operations.<sup>65</sup> While Congress did not agree on the scale of such a navy, the United States did continue its naval buildup. In 1890 Congress passed a Naval Act appropriating funds to build American “capital ships.”<sup>66</sup> The Naval Act of 1890 stated,

That for the purpose of further increasing the Naval Establishment of the United States the President is hereby authorized to have constructed by contract three sea-going coast-line battle ships designed to carry the heaviest armor and the most powerful ordnance...<sup>67</sup>

The act also allocated funds for the construction of one protected cruiser, one swift torpedo cruiser, and one torpedo boat.<sup>68</sup> The term *coast-line* battle ships is a hold over from the doctrine of coastal defense put in place to appease skeptics of naval expansionism. However, by 1895, Mahan and his doctrine of sea control was “well known, frequently cited, and widely if not universally endorsed in congressional circles.”<sup>69</sup>

In 1897, Mahanian naval doctrine gained another powerful champion in the U.S. naval bureaucracy as Theodore Roosevelt assumed the role of Assistant Secretary of the Navy.<sup>70</sup> Roosevelt was a strident advocate for American imperialism; described by Sprout and Sprout as a “jingoist” archetype.<sup>71</sup> Roosevelt not only subscribed to the Mahanian philosophy of sea power, he also contributed his own perspective to the doctrine.<sup>72</sup> Assistant Secretary Roosevelt believed that the only way to ensure peace for the United States was to develop military force that would “overawe potential aggressors.”<sup>73</sup> As opposed to figures like Secretary of State Marcy who argued that a large standing navy would be a detriment to civil

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<sup>65</sup>Potter: *Sea power: A naval history* (see n. 64), p. 160.

<sup>66</sup>An Act making appropriaitons for the Naval service for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes. Vol. Acts of the Fifty-First Congress of the United States (Session 1, Ch. 640), June 30, 1890.

<sup>67</sup>Ibid.

<sup>68</sup>Ibid.

<sup>69</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 255.

<sup>70</sup>Ibid., p. 262.

<sup>71</sup>Ibid., p. 262.

<sup>72</sup>Ibid., pp. 262–263.

<sup>73</sup>Ibid., pp. 262–263.

liberties and pose a temptation to engage in war,<sup>74</sup> Roosevelt believed the American people were inherently peace-loving.<sup>75</sup> A nation of “merchants and manufacturers, of farmers and mechanics” would not be drawn into conflict because of a navy, but, he argued, they would almost certainly be drawn into conflict without one.<sup>76</sup> The United States would be “an easy prey for any people which still retains those most valuable of all qualities, the soldierly virtues.”<sup>77</sup> Theodore Roosevelt, as Assistant Secretary, argued that international agreements were essentially worthless unless the United States had the capability, of force, to guarantee U.S. interests.<sup>78</sup> Roosevelt proclaimed that “the diplomatist was the servant, not the master, of the soldier.”<sup>79</sup> Because of these beliefs, upon assuming the position of Assistant Secretary of the Navy, Roosevelt devoted all of his energy to transforming the U.S. naval establishment into a formidable fighting force, all while “striving... to indoctrinate his superiors and the public in general with his militant view on national power and policy.”<sup>80</sup>

During this time the American government to begin developing the capabilities to transition away from a small-navy doctrine of coastal defense and commerce raiding, towards the Mahanian large-navy doctrine of sea control. According to E.B. Potter, “By the eve of the Spanish-American War, the United States had acquired a fleet that, though far from being the world’s most powerful, was eminently respectable: 4 first-class battleships, 2 second-class battleships, 2 armored cruisers, 10 protected cruisers, and a considerable number of gunboats, monitors, and torpedo boats.”<sup>81</sup>

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<sup>74</sup>Pierce: Message from President Pierce calling for information respecting a congress held at Paris (see n. 39), pp. 13–14.

<sup>75</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 262–263.

<sup>76</sup>Ibid., pp. 262–263.

<sup>77</sup>Ibid., pp. 262–263.

<sup>78</sup>Ibid., p. 263.

<sup>79</sup>Ibid., p. 263.

<sup>80</sup>Ibid., p. 262.

<sup>81</sup>Potter: Sea power: A naval history (see n. 64), p. 160; Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 252.

## 5.2 The Spanish - American War

At the outbreak of the Spanish American War, April 21, 1898, President William McKinley issued a statement reassuring neutral nations that the United States would abide by the principles laid down in the 1856 Declaration of Paris. In announcing the state of war between the United States and Spain, on April 26, President McKinley stated,

Whereas it being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this Government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris;

Now, therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by the Constitution and the laws, do hereby declare and proclaim:

1. The neutral flag covers enemy's goods, with the exception of contraband of war.
2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.
3. Blockades in order to be binding must be effective. ...<sup>82</sup>

On June 20, 1898, John D. Long, Secretary of the Navy, issued General Orders on how the United States should carry out the blockade of Cuba.<sup>83</sup> Foremost, Secretary long stated that the blockade should be conducted in accordance with international and American treaty law. Blockades, in order to be binding, must be maintained by "a force sufficient to render

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<sup>82</sup>William McKinley: Existence of war - Spain. By the President of the United States of America: a proclamation Whereas by an act of Congress approved , it is declared that war exists and that war has existed since the 21st day of April, A. D. 1898 - Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 5, 1898, April 26 1898, url: <https://history.state.gov/historicaldocuments/frus1898/d638>.

<sup>83</sup>John D. Long: Instructions to blockading vessels and cruisers - Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 5, 1898, Document 642, June 20, 1898, url: <https://history.state.gov/historicaldocuments/frus1898/d642>.

ingress and egress from the port dangerous.”<sup>84</sup> Secretary Long informed the fleet that they may stop and search neutral ships to determine their destination and the character of their cargo.<sup>85</sup> Neutral ships bound for neutral ports should be allowed to continue unimpeded but neutral ships bound for non-blockaded enemy ports should have their cargo examined, yet be allowed to carry on after removing any and all contraband of war.<sup>86</sup> Secretary Long instructed the navy that all merchant vessels of the enemy may be seized as prize anywhere outside of neutral waters.<sup>87</sup> However, in line with the institutionalized conception of freedom of the seas of the time, neutral goods on board enemy ships would be returned or provided compensation for after adjudication by a prize court.

Materially, the Spanish-American War marked the arrival of the United States as a major global power.<sup>88</sup> The conflict, through the blockade of and subsequent invasion of Cuba, justified the Mahanian principles of sea control.<sup>89</sup> The conflict served as a testing ground for the principle and naval conflict centered around seizing command of the Caribbean.<sup>90</sup> The United States’ victory on this front not only furthered U.S. preeminence in the Caribbean, with strategic outposts such as Puerto Rico and Guantanamo, but also conferred a distant overseas empire comprised of the Philippines and Guam.<sup>91</sup> With such far flung colonial holdings, approximately 7,000 miles from the continental United States, the “strategic need” for a Central American canal, and the ability to control the “approaches to such a canal” was highlighted by the situation America found itself in after the war.<sup>92</sup> To this end, at the request of President McKinley, Congress passed a resolution annexing Hawaii on August 12,

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<sup>84</sup>Long: Instructions to blockading vessels and cruisers. 1898 (see n. 83).

<sup>85</sup>Ibid.

<sup>86</sup>Ibid.

<sup>87</sup>Ibid.

<sup>88</sup>Potter: Sea power: A naval history (see n. 64), p. 176.

<sup>89</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 267–268.

<sup>90</sup>Ibid., pp. 267–268.

<sup>91</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 266, 278; Potter: Sea power: A naval history (see n. 64), p. 185.

<sup>92</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 278.

1898.<sup>93</sup>

Following the war President McKinley called once more for the international community to treat all private property at sea as immune from seizure. In his December 5, 1898 message to Congress, President McKinley stated that the recent conflict had made clear the “burdens and the waste” that war inflicts upon commerce.<sup>94</sup> Because of this, the United States wanted, “in common with most civilized nations,” to limit the damage to international commerce during times of war.<sup>95</sup> McKinley wrote,

It should be our object, therefore, to minimize, so far as practicable, this inevitable loss and disturbance. This purpose can probably best be accomplished by an international agreement to regard all private property at sea as exempt from capture or destruction by the forces of belligerent powers. The United States Government has for many years advocated this humane and beneficent principle, and is now in position to recommend it to other powers without the imputation of selfish motives. I therefore suggest for your consideration that the Executive be authorized to correspond with the Governments of the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerent powers.<sup>96</sup>

Shortly after the August 12, 1898, ceasefire that ended the Spanish-American conflict, Tzar Nicolas II of Russia proposed an international conference to discuss global arms limitations and potential mechanisms for settling international disputes.<sup>97</sup> The United States accepted

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<sup>93</sup>MILESTONES: 1866–1898: The Spanish-American War, 1898, url: <https://history.state.gov/milestones/1866-1898/spanish-american-war>.

<sup>94</sup>William McKinley: Message of the President To the Senate and House of Representatives: Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 5, 1898, December 5, 1898, url: <https://history.state.gov/historicaldocuments/frus1898/message-of-the-president>.

<sup>95</sup>Ibid.

<sup>96</sup>Ibid.

<sup>97</sup>Dan L Morrill: Nicholas II and the call for the First Hague Conference, in: *The Journal of Modern History* 46.2 (1974), pp. 296–313, here pp. 296–297; Alan M. Anderson: Mahan’s Interference In U.S. Policy. In: *Naval History* 31.6 (2017), pp. 48–53, url: <http://login.ezproxy.lib.vt.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=126166415&site=eds-live&scope=site>.

the invitation with the intention of enshrining the immunity principle, regarding private property, into international law and replacing the previous principle of ‘free ships, free goods.’

### 5.3 The Hague Conference of 1899 and Mahanian Interference

In preparation for the May 25, 1899, Conference, Secretary of State John Hay sent a message to the appointed delegates instructing them to raise the issue of the immunity of private property at sea.<sup>98</sup> Hay reiterated,

As the United States has for many years advocated the exemption of all private property not contraband of war from hostile treatment, you are authorized to propose to the conference the principle of extending to strictly private property at sea the immunity from destruction or capture by belligerent powers which such property already enjoys on land as worthy of being incorporated in the permanent law of civilized nations.<sup>99</sup>

However, among the delegates sent to negotiate on behalf of the United States was Captain Alfred Thayer Mahan.<sup>100</sup> Alan Anderson writes that Mahan’s inclusion in the conference was “literally an afterthought” as President McKinley asked Secretary Hay if Mahan would be a good addition to the conference in a handwritten postscript of a typed letter.<sup>101</sup>

Shortly after conference had been announced, Mahan started publishing a series of newspaper articles outlining his opposition to the principle he would be instructed to advocate

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<sup>98</sup>John Hay: Mr. Hay to Hon. Andrew D. White, Hon. Beth Low, Hon. Stanford Newel, Capt. Alfred T. Mahan, U. S. N., Capt. William Crozier, U. S. A., delegates on the part of the President of the United States. - Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 5, 1899, Document 522, April 18, 1899, url: <https://history.state.gov/historicaldocuments/frus1899/d522>.

<sup>99</sup>Ibid.

<sup>100</sup>Ibid.

<sup>101</sup>Anderson: Mahan’s Interference In U.S. Policy. (see n. 97); Calvin DeArmond Davis: The United States and the Second Hague Peace Conference: American Diplomacy and International Organization, 1899-1914, 1975, p. 75.

for, the immunity of private property from seizure at sea.<sup>102</sup> On November 15, 1898, Mahan sent a letter to the editor of the *New York Times* arguing that the United States needed to retain the ability to attack enemy commerce as “money is the sinews of war.”<sup>103</sup> By cutting off an enemy’s economic capability peace will come sooner. Mahan’s November 15 letter, which was published November 19, argued,

... when this matter was last agitated at the time of the Treaty of Paris, American diplomacy was, from the National point of view, perfectly sagacious in seeking this immunity for commerce. It was much to our interest, for then we had an immense merchant shipping and almost no navy. Now that our long-voyage merchant shipping is almost naught (though we have a great coasting trade) and that our new transmarine responsibilities [The acquisition of colonial territories in the Pacific,] will entail necessarily a considerable navy, we are rather interested to hold over the heads of a possible enemy the chance of serious injury befalling him by stopping his maritime commerce.<sup>104</sup>

Upon receiving his appointment to serve as an American delegate to the Hague Conference, Mahan wrote to James Ford Rhodes, “I trust the Conference may realize whatever the time is ripe for; what that is is not immediately clear to my mind.”<sup>105</sup>

At the conference, Mahan actively worked against any attempts to limit warfare, save, however, for applying the 1864 Geneva convention rules protecting hospitals to naval warfare.<sup>106</sup> For example, to the embarrassment of his colleagues, Mahan was the only delegate at the conference to oppose banning the use of chemical weapons as a means of waging war.<sup>107</sup>

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<sup>102</sup>Anderson: Mahan’s Interference In U.S. Policy. (see n. 97).

<sup>103</sup>Alfred Thayer Mahan: Letters and Papers of Alfred Thayer Mahan Volume II 1890-11901, ed. by II Robert Seager/Doris D Maguire, 1975, p. 611.

<sup>104</sup>Ibid., p. 611.

<sup>105</sup>Ibid., p. 633.

<sup>106</sup>Ibid., p. 646.

<sup>107</sup>Andrew D White et al.: international conference at the hague—report of the commission of the united states of america: Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 5, 1899, Document 523, July 31, 1899, url: <https://history.state.gov/historicaldocuments/frus1899/d523>; Anderson: Mahan’s Interference In U.S. Policy. (see n. 97); Mahan: Letters and Papers of Alfred Thayer Mahan Volume II 1890-11901 (see n. 103), p. 650.

Further, Mahan undermined the head of the American delegation's attempt to introduce the proposal to prohibit seizing belligerent private property.<sup>108</sup> Although from the outset the proposal faced opposition, namely from Great Britain who at the time was still the world's preponderant naval power, Mahanian interference watered down the U.S. proposal so that it went nowhere.<sup>109</sup> While the committee chair, "paid a hearty tribute to the historical adhesion of the United States to the great principle concerned," the motion was tabled for discussion at a later date.<sup>110</sup>

## 5.4 The Rooseveltian Era and the Second Hague Conference

On September 14, 1901, President William McKinley was assassinated. Because of this, previously Vice President Theodore Roosevelt, long time advocate of the Mahanian large-navy doctrine of sea control, was thrust into the Presidency.<sup>111</sup> President Roosevelt fundamentally changed U.S. foreign policy by conceptualizing American imperialism and foreign engagement with a calculation and prioritization of the national interest.<sup>112</sup> At the time Roosevelt assumed office, the United States was still comprised of two seaboard separated as if they were on the opposite sides of the world.<sup>113</sup> Because of the lack of trans-isthmian canal, the shortest distance, by water, from New York to San Francisco was 13,000 nautical miles.<sup>114</sup> Comparatively, San Francisco to Yokohama Japan measures only 4,475 nautical miles. From a strategic perspective, the only ways to defend such distant populations were to build two

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<sup>108</sup>Anderson: Mahan's Interference In U.S. Policy. (see n. 97).

<sup>109</sup>Ibid.

<sup>110</sup>White et al.: international conference at the hague—report of the commission of the united states of america. (see n. 107).

<sup>111</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 287.

<sup>112</sup>Kissinger: Diplomacy (see n. 4), p. 38.

<sup>113</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 288–289.

<sup>114</sup>Ibid., pp. 288–289.



complete naval forces, one for each coast, or to construct the inter-oceanic canal that would cut the distance between the two points in half.<sup>115</sup> Roosevelt warned, however, that while a canal would enhance the “efficiency” of the navy, unless the United States possessed a sufficient naval force with which to control the canal, it could be used to hold the nation “hostage” in a crisis with a superior maritime power.<sup>116</sup> Because of this, starting in 1903, the United States began building two battleships per year.<sup>117</sup> Roosevelt was primarily, even obsessively, concerned with German expansion into the Caribbean.<sup>118</sup> By 1902 Great Britain had all but abandoned its Caribbean positions.<sup>119</sup> The ascendant naval capability of Germany forced Great Britain to divert its naval resources to countering the maritime threat closer to home.<sup>120</sup> Thus allowing the United States to assume the role of the preponderant power in the Caribbean region. However, while Roosevelt worked to bring America onto the stage of great power politics via naval sea control, he did not share Mahan’s opposition to promoting international laws to reduce the impact of war on commerce.

In his December 7, 1903, State of the Union address, Roosevelt firmly called for a recognition that private property at sea be exempt from seizure by belligerent states.<sup>121</sup> Citing President McKinley’s 1898 address, President Roosevelt “renewed the recommendation” to work with the international community to codify “into the permanent law of civilized nations the principle of the exemption of all private property at sea.”<sup>122</sup> In his address President Roosevelt conveyed a December 11, 1899, Supreme Court opinion that stated that the United States government has “always” been in favor of reducing for noncombatants the “hardships

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<sup>115</sup>Ibid., p. 289.

<sup>116</sup>Ibid., p. 289.

<sup>117</sup>Potter: *Sea power: A naval history* (see n. 64), p. 187.

<sup>118</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 291.

<sup>119</sup>Kissinger: *Diplomacy* (see n. 4), p. 38.

<sup>120</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 290.

<sup>121</sup>Theodore Roosevelt: *Message of the President To the Senate and House of Representatives, vol. Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 7, 1903, December 7, 1903*, url: <https://history.state.gov/historicaldocuments/frus1903/message-of-the-president>.

<sup>122</sup>Ibid.

and horrors of war.”<sup>123</sup> Because of this, the United States has “always advocated those rules which would in most cases do away with the right to capture the private property of an enemy on the high seas.”<sup>124</sup> Drawing on principles that advocate both for American commerce, as well as the new naval doctrine, President Roosevelt declared,

I advocate this as a matter of humanity and morals. It is anachronistic when private property is respected on land that it should not be respected at sea. Moreover, it should be borne in mind that shipping represents, internationally speaking, a much more generalized species of private property than is the case with ordinary property on land—that is, property found at sea is much less apt than is the case with property found on land really to belong to any one nation. Under the modern system of corporate ownership the flag of a vessel often differs from the flag which would mark the nationality of the real ownership and money control of the vessel; and the cargo may belong to individuals of yet a different nationality. Much American capital is now invested in foreign ships; and among foreign nations it often happens that the capital of one is largely invested in the shipping of another. Furthermore, as a practical matter, it may be mentioned that while commerce destroying may cause serious loss and great annoyance, it can never be more than a subsidiary factor in bringing to terms a resolute foe. This is now well recognized by all of our naval experts. The fighting ship, not the commerce destroyer, is the vessel whose feats add renown to a nation’s history, and establish her place among the great powers of the world.<sup>125</sup>

On October 21, 1903, Secretary of State Hay wrote to the American Ambassadors stationed in signatory countries of the 1899 Hague Conference.<sup>126</sup> Hay asked the American ambassadors to discreetly meet with the foreign ministers of their respective host nations to gauge the interest in a second Hague Conference if the United States were to propose one.<sup>127</sup> The conference would cover the three points that the first Hague Conference decided

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<sup>123</sup>Roosevelt: Message of the President To the Senate and House of Representatives (see n. 121).

<sup>124</sup>Ibid.

<sup>125</sup>Ibid.

<sup>126</sup>John Hay: [Untitled], vol. Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 6, 1904, Document 9, October 21, 1904, url: <https://history.state.gov/historicaldocuments/frus1904/d9>.

<sup>127</sup>Ibid.

to address at a later time, namely “the rights and duties of neutrals, the inviolability of private property in naval warfare, and the bombardment of ports, towns, and villages by a naval force.”<sup>128</sup> Writing on the second point, the immunity of private property during times of naval warfare, Hay stated that ever since the Declaration of Paris the nations of the world have tried to limit wars impact on neutrals through international law.<sup>129</sup> Further, Hay cited an April 28, 1904 joint Congressional resolution which urged the President to “endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents.”<sup>130</sup>

On October 4, 1904, at an Interparliamentary Union conference held in the United States President Roosevelt proposed the second ‘Conference of Nations’ in order to raise the issues tabled at the 1899 Hague Conference.<sup>131</sup> However, while there was unanimous agreement for holding such a convention several powers preferred to wait until the conclusion of the Russo-Japanese war then underway.<sup>132</sup> Upon receiving news of the President’s proposal to hold a second Hague Conference, Mahan wrote directly to Roosevelt, again expressing his concern about the immunity of private property.<sup>133</sup> Mahan wrote that President McKinley brought up the issue because it has been the “traditional policy of the United States.” Curiously in harmony with the genealogical critical strategic studies project of the present work, Mahan reflexively argued that “for the very reason that it is traditional” it demands a critical examination to determine “whether it may... have lost the fitness it possibly once had to

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<sup>128</sup>Ibid.

<sup>129</sup>Ibid.

<sup>130</sup>Ibid.

<sup>131</sup>Theodore Roosevelt: Message of the President To the Senate and House of Representatives, vol. Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 5, 1905, December 5, 1905, url: <https://history.state.gov/historicaldocuments/frus1905/message-of-the-president>.

<sup>132</sup>Ibid.

<sup>133</sup>Alfred Thayer Mahan: Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914, ed. by II Robert Seager/Doris D Maguire, 1975, p. 112; Anderson: Mahan’s Interference In U.S. Policy. (see n. 97).

national conditions.”<sup>134</sup> Mahan wrote,

The question is one of expediency; and what was expedient to our weakness of a century ago is not expedient to our strength today. Rather should we [Read: we should] seek to withdraw from our old position of the flag covering the goods. We need to fasten our grip on the sea. I need not, I suppose, assure you that all this in no wise changes my known position about ‘commerce destroying.’ from the first, as now, I have held it ‘a most important *secondary* [emphasis in original] operation, not likely to be abandoned till war itself shall cease’; but as a *primary* [emphasis in original] measure a delusion.<sup>135</sup>

Roosevelt responded to Mahan stating that he would discuss the issue with Secretary Hay, who in turn told Roosevelt in no uncertain terms that “he was not impressed with Mahan’s reasoning and said the arguments were insufficient to cause the United States to reverse its century-old traditional policy.”<sup>136</sup>

During this time, the United States was beginning the long anticipated inter-oceanic canal. On December 6, 1904, President Roosevelt proclaimed an agreement to build the trans-isthmian inter-oceanic canal in the Republic of Panama.<sup>137</sup> In order to thwart an attempt by the Colombian government to seize the assets of the French holding company, in possession the land and material previously owned by Ferdinand de Lesseps’s corporation, who had tried and failed to build a canal through Panama, spokesman Philippe Bunau-Varilla instigated a Panamanian revolution from the Waldorf-Astoria in New York.<sup>138</sup> The United States, who intended to buy the assets from Bunau-Varilla’s holding company sent the U.S. Navy to prevent Colombia from sending forces to Panama, as there was no overland

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<sup>134</sup>Mahan: Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914 (see n. 133), p. 113.

<sup>135</sup>Ibid., p. 113.

<sup>136</sup>Anderson: Mahan’s Interference In U.S. Policy. (see n. 97).

<sup>137</sup>Theodore Roosevelt: By the President of the United States: A Proclamation, vol. Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 6, 1904, Document 542, December 6, 1904, url: <https://history.state.gov/historicaldocuments/frus1904/d542>.

<sup>138</sup>Potter: Sea power: A naval history (see n. 64), pp. 188–189.

route through the Darien Gap.<sup>139</sup> The United States forged an agreement with the newly independent Panama for the canal building rights in exchange for a guarantee to protect the sovereignty of the Republic of Panama and a relatively small sum.<sup>140</sup> The canal was completed by August 1914, just in time for the then burgeoning World War.<sup>141</sup>

On April 3, 1906, the Russian Ambassador sent Secretary of State Elihu Root, who had replaced John Hay in President Roosevelt's second term, a message proposing to convene a second Hague conference to discuss the laws of naval warfare, including the immunity principle.<sup>142</sup> Mahan again sprung into action in an attempt to change the American position on the issue.<sup>143</sup> On April 20, 1906, Mahan wrote to Secretary Root again pressing the argument that the policy of 'freedom of the seas' expressed now in the immunity of private property at sea was "derived from the expediencies of our early weakness," and has been perpetuated to the present day by lack of critical reflection on the underlying change in material capabilities.<sup>144</sup> Secretary Root expressed to Mahan his "serious personal doubts about the policy," however, because the United States had held the position for so long, he was reluctant to deviate from it.<sup>145</sup> Secretary Root did, however, forward Mahan's letter to the Secretary of the Navy asking him to refer the issue to the General Board to discuss the merits of abandoning the traditional policy.<sup>146</sup> The General Board was a group of senior officers who advised the civilian administration on matters pertaining to the technical requirements of the naval force structure and naval strategy. The General Board responded by agreeing that the immunity

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<sup>139</sup>Ibid., p. 189.

<sup>140</sup>Roosevelt: By the President of the United States: A Proclamation (see n. 137); Potter: Sea power: A naval history (see n. 64), p. 189.

<sup>141</sup>Idem: Sea power: A naval history (see n. 64), p. 189.

<sup>142</sup>Theodore Roosevelt: The Russian Ambassador to the Secretary of State. Vol. Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 3, 1906, (In two parts), Part II, Document 597, April 3, 1906, url: <https://history.state.gov/historicaldocuments/frus1906p2/d597>; Anderson: Mahan's Interference In U.S. Policy. (see n. 97).

<sup>143</sup>Idem: Mahan's Interference In U.S. Policy. (see n. 97).

<sup>144</sup>Mahan: Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914 (see n. 133), p. 157.

<sup>145</sup>Anderson: Mahan's Interference In U.S. Policy. (see n. 97).

<sup>146</sup>Ibid.

principle did stem from the “historical weakness of the Navy.”<sup>147</sup> While the General Board did not outright reject the immunity principle, it did state that by continuing to argue for such a principle, the United States would be giving up the military advantage conferred by its sizeable naval capabilities.<sup>148</sup> Particularly since the amount of trade carried in American ships had diminished as of late compared to carrying trade of potential enemies.<sup>149</sup>

To Mahan’s dismay, President Roosevelt persisted in advocating for the immunity principle. At meeting between President Roosevelt and Alfred Thayer Mahan in July of 1906, President Roosevelt again rejected Mahan’s argument to abandon America’s ‘traditional’ policy.<sup>150</sup> Following the meeting Mahan wrote to the President requesting permission to present the issue to the American public.<sup>151</sup> In the letter Mahan couched his opposition to the immunity principle in terms of the potential German threat to American interests, of which Roosevelt was deeply concerned.<sup>152</sup> The protection of private property is meant to protect “maritime transport and commercial movement,” which, Mahan wrote, is a vital interest of the ascendant naval power of Germany.<sup>153</sup> Because Great Britain is geographically positioned directly in the path of all sea routes to and from Germany, the ability to disrupt German commerce is one of the strongest weapons “that the English speaking peoples have” against the continental behemoth.<sup>154</sup> While Mahan did acknowledge that “British interests are not American interests,” he insisted that on this issue, as on the issue of trade, the two countries interests align.<sup>155</sup> Mahan stressed that any matters that impact the United States’ ability to “employ national force” must be considered with utmost importance.<sup>156</sup> President

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<sup>147</sup>Anderson: Mahan’s Interference In U.S. Policy. (see n. 97).

<sup>148</sup>Ibid.

<sup>149</sup>Ibid.

<sup>150</sup>Ibid.

<sup>151</sup>Mahan: Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914 (see n. 133), pp. 164–165; Anderson: Mahan’s Interference In U.S. Policy. (see n. 97).

<sup>152</sup>Mahan: Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914 (see n. 133), p. 165.

<sup>153</sup>Ibid., p. 165.

<sup>154</sup>Ibid., p. 165.

<sup>155</sup>Ibid., p. 165.

<sup>156</sup>Ibid., p. 165.

Roosevelt replied permitting Mahan to present his perspective on the issue to the public.<sup>157</sup>

In April of 1907 Secretary Root held a meeting for the American delegates to the second Hague Conference (Mahan, this time was not included).<sup>158</sup> At the meeting, Root brought up the immunity principle for discussion.<sup>159</sup> While he had personal doubts about the policy, Root did not see how they could abandon the principle having introduced it at the 1899 conference.<sup>160</sup> Later, in a letter of instruction for the American delegates, Root expressed in no uncertain terms the position they should take. Root stated, “You will maintain the traditional policy of the United States regarding the immunity of private property of belligerents at sea.”<sup>161</sup> Root recounted the historical support for the principle in U.S. foreign policy, first occurring in the 1785 treaty with Prussia, and then again in the Marcy amendment of the Declaration of 1856.<sup>162</sup> Root invoked the American founder for legitimacy by specifying that the treaty of 1785 was signed by “Benjamin Franklin, Thomas Jefferson, and John Adams.”<sup>163</sup> Root stated that the principle was “of such permanent and universal importance” that no specific interest of an individual nation “should be permitted to outweigh” this collective good.<sup>164</sup> Root instructed the delegates to present the official American position that,

The private property of all citizens or subjects of the signatory powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas, or elsewhere by the armed vessels or by the military forces of any of the said signatory powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port

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<sup>157</sup>Anderson: Mahan’s Interference In U.S. Policy. (see n. 97).

<sup>158</sup>Ibid.

<sup>159</sup>Ibid.

<sup>160</sup>Ibid.

<sup>161</sup>Elihu Root: To Messrs. Joseph H. Choate, Horace Porter, Uriah M. Rose, David Jayne Hill, George B. Davis, Charles S. Sperry, and William I. Buchanan. Vol. Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 3, 1907, (In two parts), Part II, Document 508, May 31, 1907, url: <https://history.state.gov/historicaldocuments/frus1907p2/d508>.

<sup>162</sup>Anderson: Mahan’s Interference In U.S. Policy. (see n. 97).

<sup>163</sup>Ibid.

<sup>164</sup>Ibid.

blockaded by the naval forces of any of the said powers.<sup>165</sup>

Although Mahan could not effectively sway U.S. policy on the issue, he went to work lobbying Great Britain, who historically had been opposed to the principle, to reject the American proposal.<sup>166</sup> In addition to publishing in British newspapers, Mahan asked “a senior member” of the British Foreign Ministry to deliver copies of a publication he wrote condemning the immunity of private property to Great Britain’s delegates to the upcoming Hague conference.<sup>167</sup> Mahan wrote to the editor of the *National Review* Leopold J. Maxse, “I believe that if this matter can be staved off this Conference, it is very doubtful if it would be renewed by us at a future one. That it should not prevail is to my mind of the utmost importance to Great Britain.”<sup>168</sup> Due to his lobbying, Great Britain spearheaded the campaign to reject the U.S. proposal for the immunity principle at the second Hague Conference.<sup>169</sup> In fact Sir Earnest Satow, a British delegate to the Hague Conference, quoted an article Mahan had written in the *London Times* as justification for the British opposition to the immunity principle.<sup>170</sup>

According to American delegates, Chairman Joseph Choate and Secretary Chandler Hale, at the second Hague Conference the U.S. proposal did not pass because the United States did not champion the principle.<sup>171</sup> The issues proposed at the Fourth Commission, at which the immunity of private property at sea was scheduled to be discussed, were perceived by the participants as corollaries to the Declaration of Paris and principally designed to prevent

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<sup>165</sup>Root: To Messrs. Joseph H. Choate, Horace Porter, Uriah M. Rose, David Jayne Hill, George B. Davis, Charles S. Sperry, and William I. Buchanan. (see n. 161).

<sup>166</sup>Mahan: *Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914* (see n. 133), pp. 213–214.

<sup>167</sup>Anderson: *Mahan’s Interference In U.S. Policy*. (see n. 97).

<sup>168</sup>Mahan: *Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914* (see n. 133), p. 214.

<sup>169</sup>Anderson: *Mahan’s Interference In U.S. Policy*. (see n. 97); Mahan: *Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914* (see n. 133), pp. 220–221.

<sup>170</sup>Idem: *Letters and Papers of Alfred Thayer Mahan Volume III 1902-1914* (see n. 133), p. 221.

<sup>171</sup>Joseph H. Choate/Chandler Hale: [Untitled], vol. *Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 3, 1907*, (In two parts), Part II, Document 508a, 1907, url: <https://history.state.gov/historicaldocuments/frus1907p2/d508a>.



the re-emergence of privateering.<sup>172</sup> Because the United States had not given up its right to privateering, and as such was not a member of the Declaration of Paris, the United States “declined to participate in discussion” and abstained from voting on the issues of the fourth commission. Instead, the American delegation passively stated “If, however, the conference, by its action, should establish the inviolability of private property on the seas, this delegation would be pleased to vote for the abolition of privateering.”<sup>173</sup> The United States did not agree to abolish privateering and the immunity principle was not established.<sup>174</sup> In fact, it was agreed upon at the conference to establish an International Prize Court by which to adjudicate belligerent seizures of private property at sea, the specifications of which were to be agreed upon at a later date.<sup>175</sup>

## 5.5 The London Naval Conference of 1909

In the twelfth convention at the 1907 Hague Conference it was generally agreed upon by the powers present to establish an International Prize Court for fair seizure of property by belligerents at war. England, who at the time possessed the world’s largest navy and merchant marine, spearheaded the initiative to codify the belligerent, and subsequently, neutral rights.<sup>176</sup> To this end, on February 28, 1908, the government in England invited the powers present at the Second Hague Conference to meet in London to agree on a common set of neutral rights for the proposed International Prize Court.<sup>177</sup> The conference, which concluded February 26, 1909, largely reiterated previously established international law as determined by the 1856 Treaty of Paris. The Declaration concerning the Laws of Naval

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<sup>172</sup>Ibid.

<sup>173</sup>Ibid.

<sup>174</sup>Ibid.

<sup>175</sup>Choate/Hale: [Untitled] (see n. 171); Charles H Stockton: The International Naval Conference of London, 1908–1909 1, in: *American Journal of International Law* 3.3 (1909), pp. 596–618, here p. 596.

<sup>176</sup>Idem: The International Naval Conference of London, 1908–1909 1 (see n. 175), pp. 596–597.

<sup>177</sup>Ibid., p. 597.

War was predicated on the assumption that all goods, save contraband, not bound for a blockaded port could travel freely on ships flying a neutral flag.<sup>178</sup> The Declaration also provided that all neutral goods, save contraband, traveling in enemy hulls be deemed free.<sup>179</sup> Thus, reiterating the second and third articles of the Declaration of Paris, and reaffirming the traditional ‘freedom of the seas’ dictum that ‘free ships make free goods,’ but enemy ships do not make enemy goods. Concerning blockade, the Declaration London follows the same precepts. The Second Article of the Declaration state, “In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective – that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline.”<sup>180</sup>

The London Declaration provided a new protection of neutral rights by including a designated list of items that could never be considered contraband. Previously, only contraband and dual use items were specified. This liberal provision added a protection that the list of contraband wouldn’t ‘creep’ during war time.<sup>181</sup> Such guaranteed articles included textiles, rubber, and agricultural equipment.<sup>182</sup> Food products, however, were conditional contraband meaning they could be unilaterally declared contraband by a belligerent power.<sup>183</sup> While the American delegates signed the Declaration of the London Naval Conference, along with the British, French, German, Austro-Hungarian, and Dutch, the treaty was never formally ratified by any signing party.<sup>184</sup>

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<sup>178</sup>Declaration concerning the Laws of Naval War, 208 Consol. T.S. 338 (1909). url: <http://hrlibrary.umn.edu/instree/1909b.htm>, Art. 57.

<sup>179</sup>Ibid., Art. 58.

<sup>180</sup>Ibid.

<sup>181</sup>Declaration concerning the Laws of Naval War, 208 Consol. T.S. 338 (1909). (see n. 178), Art. 28; Stockton: The Declaration of Paris (see n. 28), p. 606.

<sup>182</sup>Declaration concerning the Laws of Naval War, 208 Consol. T.S. 338 (1909). (see n. 178), Art. 28.

<sup>183</sup>Ibid., Art. 23, 24.

<sup>184</sup>Declaration concerning the Laws of Naval War. London, 26 February 1909, url: <https://ihl-databases.icrc.org/ihl/INTRO/255?OpenDocument>; Stockton: The International Naval Conference of London, 1908–1909 1 (see n. 175), p. 601.

# Chapter 6

## Woodrow Wilson and The First World War

In 1914, warfare engulfed Europe. An intricate network of alliances and secret military agreements fueled a conflict which yielded no room for de-escalation.<sup>1</sup> It was the violation of the *Mare Liberum* conception of freedom of the seas, the rights of American merchants to continue to trade during times of war, in the conduct of hostilities that brought the United States into the First World War. This chapter documents how the United States abandoned the immunity principle conceptualization and attempted to mitigate infringements on the rights of neutral American shipping by negotiating an agreement with the belligerent powers based on the ‘free ships, free goods’ concept laid out in the 1856 Treaty of Paris and the 1909 Declaration of Paris. The United States used the *Mare Liberum* discourse during this time period to protest British and German infringements on American merchant trade and Germany’s unrestricted submarine warfare campaigns.

Although the United States entered the war to defend the freedom of the seas, President Wilson abandoned the principle entirely in the post-war peace process in order to win support for the League of Nations. This furthers the argument that the principle of freedom of the seas has not been consistently championed over the course of U.S. foreign policy as is claimed to justify contemporary political-military strategy predicated on the discourse. Further, this chapter sets the stage for a future fundamental discursive shift by illustrat-

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<sup>1</sup>Kissinger: Diplomacy (see n. 4), pp. 201–206.

ing how technological advancements in warfare rendered the international legal conventions surrounding freedom of the seas insufficient.

## 6.1 Neutrality and the British Naval Blockade

On August 4, 1914, President Woodrow Wilson declared neutrality for the United States in the conflict that was breaking across Europe.<sup>2</sup> Two days after the war began, Secretary Bryan instructed the American Ambassadors in Great Britain, France, Russia, Germany, Austria-Hungary, and Belgium, to ask whether the belligerent nations would respect, for the current conflict, the laws of naval warfare as codified in the 1909 Declaration of London.<sup>3</sup> Germany and Austria-Hungary agreed to abide by the declaration on the condition that their enemies did the same.<sup>4</sup> Great Britain agreed to follow the laws expressed in the Declaration, however, they insisted on several unilateral amendments which would expanded the scope of contraband and the rights of blockade.<sup>5</sup> Russia and France agreed with the British position.<sup>6</sup> On September 26, 1914, Acting Secretary of State Robert Lansing sent a message to the American Ambassador, to transmit to the British government, expressing his disappointment at what he considered a rejection of the proposition for all belligerents to abide by a common set of laws.<sup>7</sup> Acting Secretary Lansing stated that, while the U.S. government does not consider the Declaration of London to be the “most equitable of naval war codes, particularly

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<sup>2</sup>Sproul/Sprout: *Rise of American Naval Power* (see n. 66), p. 374; Potter: *Sea power: A naval history* (see n. 64), p. 222.

<sup>3</sup>William Jennings Bryan: *The Secretary of State to the Ambassador in Great Britain (Page)*, vol. *Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War*, Document 356, August 6, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d356>.

<sup>4</sup>Robert Lansing: *The Acting Secretary of State to the Ambassador in Great Britain (Page)*, vol. *Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War*, Document 375, September 26, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d375>.

<sup>5</sup>Walter Hines Page: *The Ambassador in Great Britain (Page) to the Secretary of State*, vol. *Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War*, Document 364, August 26, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d364>.

<sup>6</sup>Lansing: *The Acting Secretary of State to the Ambassador in Great Britain (Page)* (see n. 4).

<sup>7</sup>*Ibid.*

as respects neutral nations,” it was the best instrument with which to mitigate the threat to neutral commerce in the current war.<sup>8</sup> Lansing stated,

As might be expected in a settlement of divergent views and practices by mutual concession the Declaration of London contains provisions both advantageous and disadvantageous to the respective interests of neutrals and belligerents. But it is now proposed by Great Britain to retain all the provisions favorable to belligerents and to recast other provisions so that they will be less favorable to neutral interests. The result is a set of rules which limits neutrals’ rights far more than does the declaration itself treated as a whole. War, in any event, bears heavily upon a neutral nation. The interruption of its commerce and the limitations placed upon its trade are sufficiently burdensome under the rules of the Declaration of London. In consenting to those rules the Government of the United States made great concessions on its part and it does not feel that it can, in justice to its own people, go further.<sup>9</sup>

Acting Secretary Lansing argued that the amendments proposed by Great Britain, such as the ability to stop ships that are “inferred” to be bound for enemy ports, would amount to a revitalization of the practice of “paper blockades,” which had been discredited since the 1856 Declaration of Paris.<sup>10</sup> At the open of the war, Great Britain established a blockade against Germany in the North Sea.<sup>11</sup> Due to technological developments such as the “high-seas naval mine,” the submarine, and “the threat of land-based aircraft,” the close blockade that was required under international law was made impossible to establish.<sup>12</sup> Instead, Great Britain employed a distant blockade which shunted the shipping of contraband goods and enemy commerce in the region as a whole.<sup>13</sup>

On August 11, 1914, the British Charge d’Affairs, Colville Barclay, sent a telegram to Secretary of State William Jennings Bryan, informing the United States that Germany was

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<sup>8</sup>Ibid.

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.

<sup>11</sup>Potter: *Sea power: A naval history* (see n. 64), p. 222.

<sup>12</sup>Ibid., p. 222.

<sup>13</sup>Ibid., p. 222.

deploying free floating naval-mines “in the open sea without regards to merchantmen.”<sup>14</sup> Barclay stated that Great Britain would respond in kind and warned the United States, as a neutral country, to avoid navigation through the North Sea as it would become “an area of exceptional danger.”<sup>15</sup> Secretary Bryan responded to Barclay on August 13, 1914 imploring Great Britain not to resort to a method of war that, not only was made illegal by Article 1 of the 1907 Hague Conference, but also needlessly endangers “the ships and lives of neutrals... when peaceably navigating the high seas.”<sup>16</sup> Secretary Bryan stated, “the Secretary of State perceives no reason for His Majesty’s Government adopting a similar course, which would add further dangers to the peaceful navigation of the high seas by vessels of neutral powers.”<sup>17</sup> Great Britain, however, did not agree with the Secretary. To restrict traffic in the area, Great Britain laid a mine field from “the Thames estuary to the Belgian coast” and insisted that neutral shipping be inspected for contraband at a British port before being given directions to navigate safely through.<sup>18</sup>

Such a paper blockade directly interfered with American trade with neutral Holland.<sup>19</sup> Writing on the situation transpiring in Europe, American Minister to the Netherlands, Henry van Dyke, wrote to Secretary Bryan stating,

The question of the sanctity of neutral rights lies at the root of the conflict in its world aspect. No international agreements will be secure, no hopes of the establishment of peace through justice will be fruitful, no prospect of a pacific cooperation of Europe will remain on the horizon, if the guaranteed neutralities

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<sup>14</sup>Colville Barclay: The British Chargé d’Affaires (Barclay) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 707, August 11, 1914, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d380>.

<sup>15</sup>Ibid.

<sup>16</sup>William Jennings Bryan: The Secretary of State to the British Chargé d’Affaires (Barclay), vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 708, August 13, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d708>.

<sup>17</sup>Ibid.

<sup>18</sup>Potter: Sea power: A naval history (see n. 64), p. 222.

<sup>19</sup>Walter Hines Page: The Ambassador in Great Britain (Page) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 377, September 29, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d377>.

of sovereign states are swept away like burnt paper, on the plea that “necessity knows no law.”

The position of America is universally recognized. She stands outside of the present sphere of conflict. But she has a real interest, not only for her own sake, but for the sake of humanity, in the respect of the neutrality of Holland. The Dutch ports are now the most important open doors for the peaceful trade and intercourse of the Western world. To close or to obstruct them would be to give another check to civilization.

The attitude and action of America in this great European crisis, both in taking care of her own citizens and in aiding the peaceful citizens of other countries, have produced a most favorable effect. The foreign policy of the Administration at Washington has made an impression of fairness, firmness, and a strong will to maintain the right. The United States will be in a position to act as a mediator for the restoration of peace when the time comes.<sup>20</sup>

The Netherlands was the only other signatory of the 1909 Declaration of London to remain neutral in the European conflict. However, it was also located behind the minefield blockade of Great Britain and the floating mines of Germany. Any neutral trade between the United States and the neutral Dutch must pass through the large and sweeping paper blockades of both countries. Thus, posing a significant limitation on the rights of neutral trade. If the United States accepted the British encroachment on the rights of neutrals, commerce between neutral ports would be “dependent upon the pleasure of belligerents.”<sup>21</sup>

Because of this, Acting Secretary Lansing instructed Ambassador Page to issue a threat to the British Secretary of State for Foreign Affairs that stated,

It is a matter of grave concern to this Government that the particular conditions of this unfortunate war should be considered by His Britannic Majesty’s Government to be such as to justify them in advancing doctrines and advocating

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<sup>20</sup>Henry van Dyke: The Minister in the Netherlands (Van Dyke) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 170, August 14, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d170>.

<sup>21</sup>Lansing: The Acting Secretary of State to the Ambassador in Great Britain (Page) (see n. 4).

practices which in the past aroused strong opposition on the part of the Government of the United States, and bitter feeling among the American people. This Government feels bound to express the fear, though it does so reluctantly, that the publicity, which must be given to the rules which His Majesty's Government announce that they intend to enforce, will awaken memories of controversies, which it is the earnest desire of the United States to forget or to pass over in silence. ...<sup>22</sup>

Thus insinuating that the U.S. may decide to enter the war to fight against Britain, as it did in the War of 1812, should it continue to violate the United States' neutral rights.

Upon receiving this, British Secretary of State for Foreign Affairs, Sir Edward Grey, told Ambassador Page that while Great Britain wished to "avoid every action that will give offense to our Government or cause public criticism in the United States," Great Britain had not ratified the Declaration of London and was therefore not beholden to it.<sup>23</sup> Sir Edward Grey, however, expressed that Great Britain only intended to deprive its enemies of food and war materials, and proposed discussions with the American Ambassador in order to come to a mutual understanding.<sup>24</sup> As a result of these discussions, Great Britain agreed to rescind its previous Orders in Council restricting the trade in foodstuffs to neutral countries, specifically the Netherlands, in exchange for a declaration of petroleum products, copper, and barbed wire as contraband.<sup>25</sup> Because British acceptance was the only thing standing in the way of an agreement by all of the belligerents to respect the neutral rights outlined in the Declaration of London, the United States was reluctant to accept any compromise from the British. However, on October 23, 1914, Acting Secretary of State Lansing agreed to withdraw American insistence that "the Declaration of London be adopted as a temporary

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<sup>22</sup>Lansing: The Acting Secretary of State to the Ambassador in Great Britain (Page) (see n. 4).

<sup>23</sup>Page: The Ambassador in Great Britain (Page) to the Secretary of State (see n. 19).

<sup>24</sup>Ibid.

<sup>25</sup>Robert Lansing: Memorandum by the Acting Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 378, September 29, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d378>.



code of naval warfare.”<sup>26</sup> Instead, existing international and treaty law surrounding the rights of neutrals would be observed.<sup>27</sup>

On November 3, 1914, The British Foreign Office issued a pronouncement that, starting November 5, the North Sea, and the waters between Iceland and Norway would be declared a war zone, and ‘closed’ in a Seldinian sense.<sup>28</sup> In the weeks leading up to the British declaration, German ships had been laying mines in the waters north of Ireland, the most direct sea route from Liverpool to the Americas.<sup>29</sup> The British Foreign Office stated,

These mines can not have been laid by any German ship of war. They have been laid by some merchant vessels flying neutral flag which have come along the trade route as if for purposes of peaceful commerce and while profiting to the full by immunity enjoyed by neutral merchant ships have wantonly and recklessly endangered the lives of all who travel on the sea regardless of whether they are friend or foe, civilian or military in character.<sup>30</sup>

Great Britain had in the early stages of the war established command of the sea. German surface ships, naval and merchant marine alike, were driven from the open ocean and “contained within the North Sea and the Baltic.”<sup>31</sup> To compensate for this it was common German naval practice to utilize neutral vessels such as trawlers and hospital ships for military purposes.<sup>32</sup> Because of this, within the area defined, “merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay and from warships searching vigilantly by

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<sup>26</sup>Idem: The Acting Secretary of State to the Ambassador in Great Britain (Page), vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 403, October 22, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d403>.

<sup>27</sup>Ibid.

<sup>28</sup>Cecil Spring Rice: The British Ambassador (Spring Rice) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 721, November 3, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d721>.

<sup>29</sup>Ibid.

<sup>30</sup>Ibid.

<sup>31</sup>Sprout/Sprout: Rise of American Naval Power (see n. 66), p. 375.

<sup>32</sup>Spring Rice: The British Ambassador (Spring Rice) to the Secretary of State (see n. 28).

night and day for suspicious craft.”<sup>33</sup> With consideration to neutral trade and free maritime commerce, Great Britain announced that any nation wishing to trade with countries within the declared war zone, “Norway, the Baltic, Denmark, and Holland,” are instructed to travel through the Channel along the east coast of England, whereby Great Britain promised to do everything in its power to ensure the safe transit of such neutral shipping.<sup>34</sup> The United States did not issue a diplomatic protest, unlike the Scandinavian countries, upon receiving news of the closed North Sea.<sup>35</sup>

By the end of 1914, the United States felt compelled to lodge a protest with Great Britain on behalf of its shipping industries who were being exposed to lengthy detainment’s for inspection.<sup>36</sup> On December 26, 1914, Secretary of State Bryan sent a message of protest to be delivered to the British Foreign Ministry by Ambassador Page.<sup>37</sup> Secretary Bryan explicitly stated the while it is necessary to protest the “frequent seizures and detentions of American cargoes destined to neutral European ports,” it should be done “in the most friendly spirit and in the belief that frankness will better serve the continuance of cordial relations between the two countries than silence...”<sup>38</sup> Secretary Bryan stated,

It is needless to point out to His Majesty’s Government, usually the champion of the freedom of the seas and the rights of trade, that peace, not war, is the normal relation between nations and that the commerce between countries which are not belligerents should not be interfered with by those at war unless such interference is manifestly an imperative necessity to protect their national safety, and then only to the extent that it is a necessity.<sup>39</sup>

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<sup>33</sup>Spring Rice: The British Ambassador (Spring Rice) to the Secretary of State (see n. 28).

<sup>34</sup>Ibid.

<sup>35</sup>William Jennings Bryan: The Secretary of State to the Minister in Norway (Schmedeman), vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 727, November 10, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d727>.

<sup>36</sup>Potter: Sea power: A naval history (see n. 64), p. 226.

<sup>37</sup>William Jennings Bryan: The Secretary of State to the Ambassador in Great Britain (Page), vol. Papers Relating to the Foreign Relations of the United States, 1914, Supplement, The World War, Document 559, December 26, 1914, url: <https://history.state.gov/historicaldocuments/frus1914Supp/d559>.

<sup>38</sup>Ibid.

<sup>39</sup>Ibid.

However, although Great Britain had agreed to allow neutral trade to neutral countries beyond the blockade, in practice such trade was still being interdicted.<sup>40</sup> The United States government recognizes the right of belligerents to stop and search neutral vessels on the high-seas that are suspected of containing contraband, with sufficient evidence that there is contraband aboard.<sup>41</sup> It is the British practice of stopping ships without cause to search for evidence of contraband that the United States protests and which “Producers and exporters, steamship and insurance companies are pressing ... for relief.”<sup>42</sup> As in previous discussions with Great Britain on the issue of neutral rights, Secretary Bryan warned that British actions were threatening the goodwill that exists between the two countries and may arouse the ire of the American public.<sup>43</sup>

## 6.2 The First German U-Boat Campaign

In response to Britain’s economic warfare via blockade, the Central Powers lashed out with the only effective naval platform at their disposal, the submarine.<sup>44</sup> On February 4, 1915, the German Naval Staff announced a submarine blockade of the British Isles.<sup>45</sup> In the same way the British ‘closed’ the North Sea, Germany pronounced that,

(1) The waters around Great Britain and Ireland, including the whole of the English Channel, are hereby declared to be a War Zone. From February 18 onwards every enemy merchant vessel encountered in this zone will be destroyed, nor will it be possible to avert the danger thereby threatened to the crew and passengers.

(2) Neutral Vessels also will run a risk in the War Zone, because in view of the hazards of sea warfare and the British authorization of January 31 of the misuse

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<sup>40</sup>Ibid.

<sup>41</sup>Ibid.

<sup>42</sup>Ibid.

<sup>43</sup>Ibid.

<sup>44</sup>Potter: Sea power: A naval history (see n. 64), p. 223.

<sup>45</sup>Ibid., p. 223.

of neutral flags, it may not always be possible to prevent attacks on enemy ships from harming neutral ships.<sup>46</sup>

On January 31 prior, the Great Britain authorized British merchant ships to fly the flags of neutral countries in order to avoid being attacked.<sup>47</sup> Although Germany's submarine blockade was a violation of international law and neutral rights just as England's blockade, because Great Britain had control of the sea, German submarines could not stop and search merchant ships to determine the veracity of their belligerent or neutral status.<sup>48</sup> Thus the proclamation amounted to an announcement that Germany would destroy all shipping, enemy and neutral alike, on sight.<sup>49</sup>

On February 10, 1915, Secretary of State William Jennings Bryan delivered a message to the German Government warning them against "destroying any merchant vessel of the United States or cause the death of American citizens."<sup>50</sup> Secretary Bryan wrote,

It is of course not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial

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<sup>46</sup>Cited in, Potter: *Sea power: A naval history* (see n. 64), p. 223.

<sup>47</sup>William Jennings Bryan: *The Secretary of State to the Ambassador in Great Britain (Page)*, vol. *Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War*, Document 134, February 10, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d134>.

<sup>48</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 375; Cecil Spring Rice: *The British Ambassador (Spring Rice) to the Secretary of State*, vol. *Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War*, Document 178, March 1, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d178>.

<sup>49</sup>Sprout/Sprout: *Rise of American Naval Power* (see n. 66), p. 375; Spring Rice: *The British Ambassador (Spring Rice) to the Secretary of State* (see n. 48).

<sup>50</sup>William Jennings Bryan: *The Secretary of State to the Ambassador in Germany (Gerard)*, vol. *Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War*, Document 133, February 10, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d133>.

Government of Germany in this case contemplates it as possible.<sup>51</sup>

The United States warned Germany that if U.S. shipping was attacked, or American lives imperiled as a result of the new policy, the United States would hold the German government responsible and “take any steps it might be necessary to take... to secure American citizens the full enjoyment of their acknowledged rights on the high seas.”<sup>52</sup> Thus, threatening to enter the war in opposition to Germany if American neutral rights are violated.

Germany responded by saying that its civilian population was being killed by “famine” as a result of the British maritime policies.<sup>53</sup> The German State Secretary of the Foreign Office, Von Jaglow, wrote to American Ambassador Gerard, “If England invokes the powers of famine as an ally in its struggle against Germany with the intention of leaving a civilized people the alternative of perishing in misery or submitting to the yoke of England’s political and commercial will, the German Government are today determined to take up the gauntlet and to appeal to the same grim ally.”<sup>54</sup> While not accusing the United States of violating their stated neutrality, State Secretary Von Jaglow wrote that Germany held the neutral nations complicit in its’ suffering as they did not intervene and demand British compliance with international law.<sup>55</sup> Germany, therefore, could make no guarantees of the safety of United States vessels in the blockaded zone.

On May 7, 1915, the *Lusitania*, a British ocean liner, was torpedoed by a German submarine off the coast of Ireland.<sup>56</sup> Previously, the *Lusitania* was widely reported to have flown

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<sup>51</sup>Ibid.

<sup>52</sup>Ibid.

<sup>53</sup>James W. Gerard: The Ambassador in Germany (Gerard) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 156, February 17, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d156>.

<sup>54</sup>Ibid.

<sup>55</sup>Ibid.

<sup>56</sup>Walter Hines Page: The Ambassador in Great Britain (Page) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 560, May 7, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d560>; Potter: Sea power: A naval history (see n. 64), p. 223.

an American flag in an attempt to pose as a neutral upon entry into British waters.<sup>57</sup> Killed aboard the *Lusitania* were 128 American citizens.<sup>58</sup> On May 13, Secretary Bryan transmitted a message, originally drafted by President Wilson, to the German Minister of Foreign Affairs expressing sharp condemnation of the attack.<sup>59</sup> President Wilson wrote that the United States had already warned the German government that it would be held accountable for any actions taken that interfere with the neutral rights of American citizens and their vessels whether “intentional or incidental.”<sup>60</sup> The United States had assumed Germany would abide “the rule that the lives of non-combatants, whether they be of neutral citizenship or citizens of one of the nations at war, can not lawfully or rightfully be put in jeopardy by the capture or destruction of an unarmed merchantman...”<sup>61</sup> Instead, it is the responsibility of all belligerents to stop and search vessels to determine if it is in fact a belligerent ship or if a neutral ship is carrying contraband of war.<sup>62</sup> Instead, the use of submarines make such a responsibility an impossible practicality as they have no capability to seize a ship as prize.<sup>63</sup> Even so, Wilson writes, that does not give Germany the right to sink merchant ships and leave “her crew and all on board of her to the mercy of the sea.”<sup>64</sup> Wilson expressed that American citizens trust their government to safeguard their “indisputable rights” to conduct trade on the high seas, and trust that their lives will not be unduly jeopardized “by acts done in clear violation of universally acknowledged international obligations.”<sup>65</sup> To this end,

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<sup>57</sup>Bryan: The Secretary of State to the Ambassador in Great Britain (Page) (see n. 47).

<sup>58</sup>Potter: Sea power: A naval history (see n. 64), p. 226.

<sup>59</sup>William Jennings Lansing: The Counselor for the Department of State (Lansing) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 350, May 12, 1915, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d350>; William Jennings Bryan: The Secretary of State to the Ambassador in Germany (Gerard), vol. Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 575, May 13, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d575>.

<sup>60</sup>Idem: The Secretary of State to the Ambassador in Germany (Gerard) (see n. 59).

<sup>61</sup>Ibid.

<sup>62</sup>Ibid.

<sup>63</sup>Ibid.

<sup>64</sup>Ibid.

<sup>65</sup>Ibid.

Wilson expressed his hope that the German government “will correct the unfortunate impressions which have been created, and vindicate once more the position of that Government with regard to the sacred freedom of the seas.”<sup>66</sup>

The attacks by Germany firmly shifted U.S. opinion in favor of the Allied cause.<sup>67</sup> President Wilson wrote to Secretary Bryan, “My Dear Mr. Secretary: It is interesting and significant how often the German Foreign Office goes over the same ground in different words, and always misses the essential point involved, that England’s violation of neutral rights is different from Germany’s violation of the rights of humanity.”<sup>68</sup>

On May 28, 1915, the American Ambassador in Germany, John W. Gerard, wrote a telegram to Secretary Bryan stating, “Best naval sources state no change will be made in method of submarine blockade even if consequences involve war between Germany and United States.”<sup>69</sup> The following day, Ambassador Gerard received an official response from the German Government regarding President Wilson’s May 13 message.<sup>70</sup> The German response stated that the *Lusitania* was transporting weapons and accused the British trading company of using American lives as shields for the materials of war.<sup>71</sup> An accusation that the British Ambassador in Washington denied.<sup>72</sup> Regarding the German reply, on June 1, 1915, The Counselor for the Department of State, Robert Lansing, wrote to Secretary of State Bryan, stating,

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<sup>66</sup>Ibid.

<sup>67</sup>Potter: *Sea power: A naval history* (see n. 64), p. 226.

<sup>68</sup>Wilson Woodrow: President Wilson to the Secretary of State, vol. *Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 380, June 2, 1915*, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d380>.

<sup>69</sup>James W. Gerard: The Ambassador in Germany (Gerard) to the Secretary of State, vol. *Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 614, May 28, 1915*, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d614>.

<sup>70</sup>Idem: The Ambassador in Germany (Gerard) to the Secretary of State, vol. *Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 615, May 29, 1915*, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d615>.

<sup>71</sup>Ibid.

<sup>72</sup>Cecil Spring Rice: The British Ambassador (Spring Rice) to the Secretary of State, vol. *Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 618, May 31, 1915*, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d618>.

The American note of May 13th was founded on the following principles of law and humanity:

1. Citizens of neutral nationality are entitled to traverse the high seas in merchant vessels of any nationality.
2. They are entitled to be protected from danger to life by the exercise of the belligerent right of visit and by the performance of the belligerent duty of placing passengers and crew of an enemy or neutral merchant vessel in safety in the event that the vessel is destroyed.
3. To destroy a merchant vessel without safeguarding the lives of the persons on board is inhuman and morally wrong.

The German note of May 28th does not admit, deny or even discuss these principles which affect the future as well as the past conduct of the German naval authorities.<sup>73</sup>

Lansing proposed that no discussion take place between the United States and Germany prior to receiving an acknowledgement that Germany agrees to the principles of the rights of neutrals. Secretary Bryan, however, was of the opinion that the American government should not “object to arbitration where arbitration is possible.”<sup>74</sup> The United States should, Secretary Bryan argued to President Wilson, promise to keep American shipping unarmed and warn merchants away from the German danger zone.<sup>75</sup> President Wilson disagreed with Secretary Bryan.<sup>76</sup>

In a draft response to Germany, President Wilson wrote that the United States cannot ignore the fact that by establishing a war zone that explicitly targets neutrals, the German government is imposing an “unprecedented infringement upon the freedom of the seas and

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<sup>73</sup>William Jennings Lansing: The Counselor for the Department of State (Lansing) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, June 1, 1915.

<sup>74</sup>William Jennings Bryan: The Secretary of State to President Wilson, vol. Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 381, June 3, 1915, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d381>.

<sup>75</sup>Ibid.

<sup>76</sup>Woodrow: President Wilson to the Secretary of State (see n. 68).



the rights of neutral nations and their citizens.”<sup>77</sup> It is not possible, Wilson argued, to obtain the freedom of the seas “for which the Imperial German Government is contending,” by violating the principles themselves.<sup>78</sup>

On June 9, 1914, Secretary of State *ad interim* Robert Lansing delivered President Wilson’s response to the German government.<sup>79</sup> Earlier that day, Secretary Bryan resigned in protest because of his conviction that the response was too harsh and would bring America into the war.<sup>80</sup> In his message President Wilson stated that the circumstances surrounding the sinking of the *Lusitania* did not matter. “The principal fact,” Wilson wrote, “is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare.”<sup>81</sup> The sinking of a ocean liner was a violation of the principles of humanity that exceeded any wartime claim. That the ship was carrying over one hundred American citizens impels the United States to take a stand and shoulder the responsibility to protect “the principle of the freedom of all parts of the open sea to neutral ships.”<sup>82</sup> Wilson wrote,

The Government of the United States is contending for something much greater than mere rights of property or privileges of commerce. It is contending for nothing less high and sacred than the rights of humanity, which every Government honors itself in respecting and which no Government is justified in resigning

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<sup>77</sup>William Jennings Lansing: The Counselor for the Department of State (Lansing) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 392, June 7, 1915, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d392>.

<sup>78</sup>Ibid.

<sup>79</sup>William Jennings Lansing: The Secretary of State *ad interim* to the Ambassador in Germany (Gerard), vol. Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 632, June 9, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d632>.

<sup>80</sup>Potter: Sea power: A naval history (see n. 64), p. 226.

<sup>81</sup>Lansing: The Secretary of State *ad interim* to the Ambassador in Germany (Gerard) (see n. 79).

<sup>82</sup>Ibid.

on behalf of those under its care and authority. Only her actual resistance to capture or refusal to stop when ordered to do so for the purpose of visit could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy. This principle the Government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea to have recognized and embodied, as do the naval codes of all other nations, and upon it every traveler and seaman had a right to depend. It is upon this principle of humanity as well as upon the law founded upon this principle that the United States must stand.<sup>83</sup>

In other words, the protection of the ‘freedom of the seas’ was no longer simply a legal-commercial issue but, through Wilson, it was an issue of universal moral right. Such a proclamation still stressed the neutral rights that had come under attack in this recent European conflict. Rights such as the “lives of non-combatants can not lawfully or rightfully be put in jeopardy by the capture or destruction of an unresisting merchantman,” and that they have an “obligation to take sufficient precaution to ascertain whether a suspected merchantman is in fact of belligerent nationality or is in fact carrying contraband of war under a neutral flag.”<sup>84</sup> The United States refused to acknowledge that the German war zone represented a legitimate abridgement of American citizens’, and their vessels, neutral rights of travel at sea and demanded Germany change its policy of unrestricted submarine warfare.<sup>85</sup>

The U.S. Ambassador in Germany James Gerard, reported that the general understanding in Germany was that while the United States did not want war, war would come if there was another incident like the *Lusitania*.<sup>86</sup> The German government responded to President

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<sup>83</sup>Lansing: The Secretary of State ad interim to the Ambassador in Germany (Gerard) (see n. 79).

<sup>84</sup>Ibid.

<sup>85</sup>Ibid.

<sup>86</sup>James W. Gerard: The Ambassador in Germany (Gerard) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 655, June 26, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d655>.

Wilson's second message stating that they would be willing to permit American passenger ships through the war zone, under the condition that the German government was notified in advance and the ships bore markings indicating they had been cleared of contraband before entering the region.<sup>87</sup> The German government also proposed increasing the number of neutral passenger ships, by turning over captured enemy liners to be sailed under the American flag if need be, so that American citizens would not feel the need to travel to Europe in steamers under flags at war with Germany.<sup>88</sup> President Wilson demonstrated his universalist conception of 'freedom of the seas' with regards to the rights of neutrals. In a message to Secretary Bryan regarding the German communique, President Wilson stated,

We cannot discuss special arrangements whereby a few vessels may enjoy the rights all are entitled to, nor admit that such arrangements would be in any way adequate to meet the contentions of this Government. ... We are not merely contending the rights of Americans to cross the seas as they will without fear of deliberate breaches of international law, but conceive ourselves as speaking for the rights of neutrals everywhere, rights in which the whole world is interested and which every nation must wish to see kept inviolable.<sup>89</sup>

On July 21, 1915, Secretary Lansing conveyed to the German government that the United States did not find their proposed solution acceptable.<sup>90</sup> Rather than bringing Germany back into line with "the accepted principles of law and humanity" the proposal arranged to set those principles aside for the present conflict.<sup>91</sup> The United States acknowledged that military technological advancement had changed the way war was conducted to such an extent that was never anticipated when the laws of naval warfare were created,<sup>92</sup> However,

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<sup>87</sup>Idem: The Ambassador in Germany (Gerard) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 672, July 8, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d672>.

<sup>88</sup>Ibid.

<sup>89</sup>Woodrow Wilson: President Wilson to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 403, July 13, 1915, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d403>.

<sup>90</sup>Lansing: The Counselor for the Department of State (Lansing) to the Secretary of State (see n. 73).

<sup>91</sup>Ibid.

<sup>92</sup>Ibid.

as Lansing wrote “the rights of neutrals in time of war are based upon principle, not upon expediency, and the principles are immutable.”<sup>93</sup> Therefore, “it is the duty and obligation of belligerents to find a way to adapt the new circumstances to them.”<sup>94</sup> Regardless of the actions of Great Britain, the United States refused to absolve Germany of the responsibility to honor the “fundamental” neutral rights of Americans at sea.<sup>95</sup> The American reply stated,

The Government of the United States and the Imperial German Government are contending for the same great object, have long stood together in urging the very principles upon which the Government of the United States now so solemnly insists. They are both contending for the freedom of the seas. The Government of the United States will continue to contend for that freedom, from whatever quarter violated, without compromise and at any cost.<sup>96</sup>

On August 19, 1915, the *Arabic*, a British passenger liner departing from Liverpool, was torpedoed by a German U-Boat killing 44 passengers, including three Americans. On September 1, the German Ambassador in Washington informed Secretary Lansing that the German government would promise that, going forward, that “Liners will not be sunk by our submarines without warning and without safety of the lives of non-combatants, provided that the liners do not try to escape or offer resistance.”<sup>97</sup> While the United States urged Germany to extend the declaration to all merchant vessels, the issue was not pressed and the German concession was accepted for the time being.<sup>98</sup>

At the start of the war in Europe, President Wilson sent Colonel House, a close friend and advisor to Europe to engage in discussions of peace with the European capitals. In a

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<sup>93</sup>Lansing: The Counselor for the Department of State (Lansing) to the Secretary of State (see n. 73).

<sup>94</sup>Ibid.

<sup>95</sup>Ibid.

<sup>96</sup>Ibid.

<sup>97</sup>Johann Heinrich von Bernstorff: The German Ambassador (Bernstorff) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1915, Supplement, The World War, Document 767, September 1, 1915, url: <https://history.state.gov/historicaldocuments/frus1915Supp/d767>.

<sup>98</sup>Robert Lansing: The Secretary of State to President Wilson, vol. Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 432, September 13, 1915, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d432>.

December 24, 1915, letter, President Wilson told House that he had free reign in discussions with the European governments as their “views and purposes” were the same.<sup>99</sup> However, Wilson told House that the only possible guarantees for the “future peace of the world” were “(a) military and naval disarmament and (b) a league of nations to secure each nation against aggression and maintain the absolute freedom of the seas.”<sup>100</sup>

### 6.3 Wilson's Naval Buildup

No sooner had Wilson claimed naval disarmament as a cornerstone of peace did he launch the largest naval construction program in American history.<sup>101</sup> Following the attack on the *Lusitania*, President Wilson instructed the Departments of War and Navy to draft appropriations bills in order to expand their capabilities.<sup>102</sup> To garner support for the military expansion, President Wilson delivered a series of speeches around the country.<sup>103</sup> On February 3, 1916, President Wilson told a crowd in St. Louis, Missouri, that the United States should have “incomparably the greatest navy in the world.”<sup>104</sup> Reiterating the doctrinal shift from coastal defense to Mahanian sea control, in 1916 the General Board called for a navy that has the capacity to “protect our sea-borne commerce and drive that of the enemy from the sea” and do so “at a distance from our coast sufficiently great to prevent interruption of our normal course of national life.”<sup>105</sup> By August 29 of the same year, Congress passed the Naval Act of 1916 which scheduled the construction of “10 battleships, 6 battle cruisers, 10

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<sup>99</sup>Woodrow Wilson: To Edward Mandell House, vol. The Papers of Woodrow Wilson Digital Edition. Originally published in The Papers of Woodrow Wilson 1966–1994, Princeton University Press, December 24, 1915, url: <https://rotunda.upress.virginia.edu/founders/WILS-01-35-02-0407>.

<sup>100</sup>Ibid.

<sup>101</sup>Ibid.

<sup>102</sup>Hagan: This people's navy: The making of American sea power (see n. 65), p. 249.

<sup>103</sup>Ibid., p. 252.

<sup>104</sup>Hagan: This people's navy: The making of American sea power (see n. 65), p. 252; Sprout/Sprout: Rise of American Naval Power (see n. 66), pp. 381–382.

<sup>105</sup>Baer: US Naval Strategy 1890-1945 (see n. 32), p. 13.

scout cruisers, 50 destroyers, and 67 submarines” over the span of three years.<sup>106</sup>

Although the current conflict highlighted the need for an enlarged naval capability, the appropriations bill was not proposed with the intention of preparing to enter the fray.<sup>107</sup> The naval build up was designed to prepare for the future potentiality of a two front naval war in both the Atlantic and Pacific, as well as to cement the United States’ status as a world leader after the current war.<sup>108</sup> Regardless of the outcome of the war, President Wilson wanted the capability to back up his global vision of a new world order.<sup>109</sup> When Great Britain expressed displeasure about the American announcement to surpass its naval capabilities, Wilson simply stated, “Let us build a bigger Navy than hers and do what we please.”<sup>110</sup>

## 6.4 The Second German U-Boat Campaign

On March 24, 1916, Germany violated its pledge guaranteeing the immunity of passenger vessels from submarine attack.<sup>111</sup> The unarmed French cross-channel passenger liner, the *Sussex* was torpedoed by a German U-boat, injuring three American citizens.<sup>112</sup> In days following, the liners *Englishmen* and *Manchester Engineer* were also torpedoed without warning and with American citizens on board.<sup>113</sup> Secretary Lansing wrote to President Wilson urging

<sup>106</sup>Potter: *Sea power: A naval history* (see n. 64), p. 226.

<sup>107</sup>Idem: *Sea power: A naval history* (see n. 64), p. 226; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 253.

<sup>108</sup>Potter: *Sea power: A naval history* (see n. 64), p. 226; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 253.

<sup>109</sup>Baer: *US Naval Strategy 1890-1945* (see n. 32), pp. 13–14.

<sup>110</sup>Idem: *US Naval Strategy 1890-1945* (see n. 32), p. 13; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 253.

<sup>111</sup>Walter Hines Page: *The Ambassador in Great Britain (Page) to the Secretary of State*, vol. *Papers Relating to the Foreign Relations of the United States, 1916, Supplement, The World War*, Document 276, March 25, 1916, url: <https://history.state.gov/historicaldocuments/frus1916Supp/d276>.

<sup>112</sup>Idem: *The Ambassador in Great Britain (Page) to the Secretary of State* (see n. 111); Potter: *Sea power: A naval history* (see n. 64), p. 223.

<sup>113</sup>Robert Lansing: *The Secretary of State to the Ambassador in Germany (Gerard)*, vol. *Papers Relating to the Foreign Relations of the United States, 1916, Supplement, The World War*, Document 283, March

action be taken in response to the attacks, which was the product of a March 1 declaration resuming unrestricted submarine warfare.<sup>114</sup> Secretary Lansing, with President Wilson's approval, began to draft a response to send to the German Government. The April 6 drafted response by Secretary Lansing stated that the United States abhorred Germany's "policy of wanton and indiscriminate slaughter of helpless men, women and children traversing the high seas in the enjoyment of their recognized rights."<sup>115</sup> By resuming the policy of unrestricted submarine warfare, especially against passenger liners, Germany demonstrates a flagrant disregard for the "rules of international law and the principles of humanity."<sup>116</sup> Because of this, Germany no longer has the right to continue to interact with other governments as a peer. In drafting his response Secretary Lansing aimed to sever diplomatic ties with Germany until it demonstrated the cessation of "the employment of submarines against commercial vessels of belligerent as well as of neutral nationality."<sup>117</sup>

President Wilson, however, tempered Secretary Lansing's desire to immediately sever diplomatic ties with Germany.<sup>118</sup> The message sent to the German Secretary of Foreign Affairs, on April 18, 1916, outlined American grievances and asked Germany to renounce its unrestricted submarine warfare or else the United States would sever diplomatic ties.<sup>119</sup>

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29, 1916, url: <https://history.state.gov/historicaldocuments/frus1916Supp/d283>; idem: The Secretary of State to the Ambassador in Germany (Gerard), vol. Papers Relating to the Foreign Relations of the United States, 1916, Supplement, The World War, Document 284, March 29, 1916, url: <https://history.state.gov/historicaldocuments/frus1916Supp/d283>.

<sup>114</sup>Idem: The Secretary of State to President Wilson, vol. Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 507, March 27, 1916, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d507>.

<sup>115</sup>Idem: Draft Instructions to the Ambassador in Germany (Gerard), vol. Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 509, April 6, 1916, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d509>.

<sup>116</sup>Ibid.

<sup>117</sup>Ibid.

<sup>118</sup>Woodrow Wilson: President Wilson to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, The Lansing Papers, 1914–1920, Volume I, Document 521, April 17, 1916, url: <https://history.state.gov/historicaldocuments/frus1914-20v01/d521>.

<sup>119</sup>Robert Lansing: The Secretary of State to the Ambassador in Germany (Gerard), vol. Papers Relating to the Foreign Relations of the United States, 1916, Supplement, The World War, Document 308, April 18, 1916, url: <https://history.state.gov/historicaldocuments/frus1916Supp/d308>.

The “vessels of neutral ownership, even vessels of neutral ownership bound from neutral port to neutral port” the message stated, “have been destroyed along with vessels of belligerent ownership in constantly increasing numbers.”<sup>120</sup> The international laws protecting the rights of neutrals at sea is not a new phenomenon, but rather is predicated on “principles of humanity and has long been established with the approval and by the express assent of all civilized nations.”<sup>121</sup> The message stated,

If it is still the purpose of the Imperial Government to prosecute relentless and indiscriminate warfare against vessels of commerce by the use of submarines without regard to what the Government of the United States must consider the sacred and indisputable rules of international law and the universally recognized dictates of humanity, the Government of the United States is at last forced to the conclusion that there is but one course it can pursue. Unless the Imperial Government should now immediately declare and effect an abandonment of its present methods of submarine warfare against passenger and freight-carrying vessels, the Government of the United States can have no choice but to sever diplomatic relations with the German Empire altogether. This action the Government of the United States contemplates with the greatest reluctance but feels constrained to take in behalf of humanity and the rights of neutral nations.<sup>122</sup>

On May 4, 1916, Germany responded to the American note with what has become known as the “Sussex Pledge.”<sup>123</sup> Germany announced that, while resentful of the American tolerance for Britain’s distant blockade of Germany and strict definition of contraband, it would make a “further concession” in order to prevent war from breaking out between the two countries.<sup>124</sup> The German Secretary of State, Von Jagow, stated that orders had been issued to Germany’s naval forces requiring submarines to abide by the “principles of visit and search”

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<sup>120</sup>Lansing: The Secretary of State to the Ambassador in Germany (Gerard) (see n. 119).

<sup>121</sup>Ibid.

<sup>122</sup>Ibid.

<sup>123</sup>James W. Gerard: The Ambassador in Germany (Gerard) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1916, Supplement, The World War, 337, May 4, 1916, url: <https://history.state.gov/historicaldocuments/frus1916Supp/d337>; Potter: Sea power: A naval history (see n. 64), p. 223.

<sup>124</sup>Gerard: The Ambassador in Germany (Gerard) to the Secretary of State (see n. 123).



for neutral vessels will not sink ships “without warning and without saving human lives.”<sup>125</sup> On May 8, the United States accepted Germany’s pledge and stated their continued desire to maintain a peaceful relationship.<sup>126</sup> Until September 1916, the Sussex pledge was upheld, restricting German submarine attacks to belligerent naval forces.<sup>127</sup>

On May 16, 1916, President Wilson wrote to Colonel House expressing that the “temporary removal of the acute German question has concentrated attention here on the altogether indefensible course Great Britain is pursuing with regard to trade to and from neutral ports.”<sup>128</sup> President Wilson told House that the United States must press for an end to the war, or else it would have to treat the British violations with the same “firmness” as used against Germany.<sup>129</sup> Any peace, Wilson stated, should guarantee “a universal alliance to maintain freedom of the seas and to prevent any war begun either a) contrary to treaty covenants or b) without warning and full inquiry, - a virtual guarantee of territorial integrity and political independence.”<sup>130</sup>

## 6.5 America Enters the War

As early as October 4, 1916, the United States became aware of a growing movement within the German Admiralty to resume their unrestricted warfare campaign.<sup>131</sup> The German Admiralty realized that they were losing the war for the sole reason that they were limiting

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<sup>125</sup>Ibid.

<sup>126</sup>Robert Lansing: The Secretary of State to the Ambassador in Germany (Gerard), vol. Papers Relating to the Foreign Relations of the United States, 1916, Supplement, The World War, Document 342, May 8, 1916, url: <https://history.state.gov/historicaldocuments/frus1916Supp/d342>.

<sup>127</sup>Potter: Sea power: A naval history (see n. 64), p. 224.

<sup>128</sup>Woodrow Wilson: To Edward Mandell House, vol. The Papers of Woodrow Wilson Digital Edition. Originally published in The Papers of Woodrow Wilson 1966–1994, Princeton University Press, May 16, 1916, url: <https://rotunda.upress.virginia.edu/founders/WILS-01-37-02-0051>.

<sup>129</sup>Ibid.

<sup>130</sup>Ibid.

<sup>131</sup>Frank Polk: The Acting Secretary of State to the Chargé in Germany (Grew), vol. Papers Relating to the Foreign Relations of the United States, 1916, Supplement, The World War, Document 388, October 4, 1916, url: <https://history.state.gov/historicaldocuments/frus1916Supp/d388>.

their own capability.<sup>132</sup> If Germany resumed is unrestricted submarine warfare, German Admiral Henning von Holtzendorff argued, Germany would be able to force Great Britain to surrender by June 1917.<sup>133</sup> However, the German Chancellor, Bethmann-Holweg, objected to the resumption of attacking neutral merchant vessels and maneuvered politically to stall his political opponents on this matter.<sup>134</sup>

In January 1917, President Wilson addressed the United States Senate announcing his proposed plan to ensure global peace in the aftermath of the war.<sup>135</sup> While it would be up to the belligerents to decide the terms of peace, Wilson stated the United States must be a part of the process and provide it's "power and authority" to ensure lasting peace.<sup>136</sup> Wilson proposed the establishment of a "universal covenant" rooted in collective security to replace the old balance of power system with an "organized common peace" based on shared international norms.<sup>137</sup> In laying out the tenets he thought fundamental to mitigate future global conflict, Wilson stated,

... the paths of the sea must alike in law and in fact be free. The freedom of the seas is the sine qua non of peace, equality, and cooperation. No doubt a somewhat radical reconsideration of many of the rules of international practice hitherto thought to be established may be necessary in order to make the seas indeed free and common in practically all circumstances for the use of mankind, but the motive for such changes is convincing and compelling. There can be no trust or intimacy between the peoples of the world without them. The free, constant, unthreatened intercourse of nations is an essential part of the process of peace and of development. It need not be difficult either to define or to secure the freedom of the seas if the governments of the world sincerely desire to come

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<sup>132</sup>Potter: *Sea power: A naval history* (see n. 64), p. 224.

<sup>133</sup>*Ibid.*, p. 224.

<sup>134</sup>Joseph Grew: *The Chargé in Germany (Grew) to the Secretary of State*, vol. *Papers Relating to the Foreign Relations of the United States, 1916, Supplement, The World War*, Document 389, October 5, 1916, url: <https://history.state.gov/historicaldocuments/frus1916Supp/d389>.

<sup>135</sup>Woodrow Wilson: *Address of the President of the United States to the Senate, January 1917*, vol. *Papers Relating to the Foreign Relations of the United States, 1917, Supplement 1, The World War*, Document 22, January 15, 1917, url: <https://history.state.gov/historicaldocuments/frus1917Supp01v01/d22>.

<sup>136</sup>*Ibid.*

<sup>137</sup>*Ibid.*

to an agreement concerning it.

It is a problem closely connected with the limitation of naval armaments and the cooperation of the navies of the world in keeping the seas at once free and safe...<sup>138</sup>

Wilson tied the principle of freedom of the seas to the limitation of global naval armaments, just as Thomas Paine had done in 1806, so that military forces would serve as instruments of order rather than aggression.<sup>139</sup> On January 15, President Wilson sent copies of this message to the belligerent nations to make known the terms the United States would support, and to encourage a “peace without victory.”<sup>140</sup>

On January 31, 1917, the German Ambassador in Washington replied to President Wilson’s message.<sup>141</sup> Germany, Ambassador Bernstorff stated, would “gladly cooperate in all efforts to prevent future wars,” as “The freedom of the seas, being a preliminary condition of the free existence of nations and the peaceful intercourse between them, as well as the open door for the commerce of all nations, has always formed part of the leading principles of Germany’s political program.”<sup>142</sup> However, Ambassador Bernstorff turned the point in order to condemn the British blockade of Germany as the primary threat to the freedom of the seas.<sup>143</sup> Bernstorff stated that the British blockade “mercilessly increases the sufferings of the world indifferent to the laws of humanity” and that shortening the war would be to the benefit of the neutral nations and mankind as a whole.<sup>144</sup> To this end, Germany announced that it would resume its policy of unrestricted submarine warfare.<sup>145</sup> Bernstorff

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<sup>138</sup>Ibid.

<sup>139</sup>Paine: To Thomas Jefferson from Thomas Paine, 30 January 1806 (see n. 178); Wilson: Address of the President of the United States to the Senate, January 1917 (see n. 135).

<sup>140</sup>Idem: Address of the President of the United States to the Senate, January 1917 (see n. 135).

<sup>141</sup>Johann von Bernstorff: The German Ambassador ( Bernstorff) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1917, Supplement 1, The World War, Document 92, January 31, 1917, url: <https://history.state.gov/historicaldocuments/frus1917Supp01v01/d92>.

<sup>142</sup>Ibid.

<sup>143</sup>Ibid.

<sup>144</sup>Ibid.

<sup>145</sup>Ibid.

informed Secretary Lansing that beginning February 1, “all sea traffic will be stopped with every available weapon and without further notice” in blockade zones around Great Britain, France, Italy, and the eastern Mediterranean.<sup>146</sup>

In direct response, President Wilson severed ties with Germany on February 3, 1917.<sup>147</sup> In a February 3 address to Congress President Wilson announced that he was loathe to believe that the German government would actually carry out a policy that deliberately targets American citizens and their ships.<sup>148</sup> However, if it proved to be the case, Wilson stated that he would return to Congress to request authority “to use any means that may be necessary for the protection of our seamen and our people in the prosecution of their peaceful and legitimate errands on the high seas.”<sup>149</sup>

On February 26, President Wilson Addressed Congress asking authorization to arm American merchant vessels.<sup>150</sup> Wilson stated, “Since it has unhappily proved impossible to safeguard our neutral rights by diplomatic means against the unwarranted infringements they are suffering at: the hands of Germany, there may be no recourse but to armed neutrality, which we shall know how to maintain and for which there is abundant American precedent.”<sup>151</sup> President Wilson emphasized that he was not asking for a declaration of war, but rather for the authority to “to supply our merchant ships with defensive arms, should that become necessary, and with the means of using them... to protect our ships and our people in their legitimate and peaceful pursuits on the seas.”<sup>152</sup>

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<sup>146</sup>Bernstorff: The German Ambassador ( Bernstorff) to the Secretary of State (see n. 141).

<sup>147</sup>Robert Lansing: The Secretary of State to the German Ambassador ( Bernstorff), vol. Papers Relating to the Foreign Relations of the United States, 1917, Supplement 1, The World War, Document 97, February 3, 1917, url: <https://history.state.gov/historicaldocuments/frus1917Supp01v01/d97>.

<sup>148</sup>Wilson: Address of the President of the United States to the Senate, January 1917 (see n. 135).

<sup>149</sup>Ibid.

<sup>150</sup>Cited in, Frank Polk: The Acting Secretary of State to the Diplomatic Representatives in all countries except Liberia and Morocco, vol. Papers Relating to the Foreign Relations of the United States, 1917, Supplement 1, The World War, Document 162, February 26, 1917, url: <https://history.state.gov/historicaldocuments/frus1917Supp01v01/d162>.

<sup>151</sup>Cited in, *ibid.*

<sup>152</sup>Cited in, *ibid.*

On April 2, 1917, President Wilson called an extraordinary session of Congress to request a formal declaration of war against Germany.<sup>153</sup> The policy of armed neutrality that President Wilson proposed in his February 26 address had proven impossible.<sup>154</sup> Merchant ships were not able to defend themselves, or deter, the German naval submarine forces.<sup>155</sup> President Wilson stated that in the face of of such issue, the one choice the United States could not make was to “choose the path of submission and suffer the most sacred rights of our nation and our people to be ignored or violated.” The violation of these sacred neutral rights proved to be the explicit cause of Wilson’s request for a declaration of war.<sup>156</sup> However, while the United States held these rights sacred for its citizens, Wilson held these rights sacred for humanity as well.<sup>157</sup> Wilson stated,

International law had its origin in the attempt to set up some law which would be respected and observed upon the seas, where no nation had right of dominion and where lay the free highways of the world. By painful stage after stage has that law been built up, with meagre enough results, ... but always with a clear view, at least, of what the heart and conscience of mankind demanded. ... I am not now thinking of the loss of property involved, immense and serious as that is, but only of the wanton and wholesale destruction of the lives of noncombatants, men, women, and children, engaged in pursuits which have always, even in the darkest periods of modern history, been deemed innocent and legitimate. Property can be paid for; the lives of peaceful and innocent people can not be. The present German submarine warfare against commerce is a warfare against mankind.<sup>158</sup>

To secure peace and justice for mankind, Wilson proposed what would later be known as the League of Nations. A concert of democratic, “self-governed peoples” to confront international

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<sup>153</sup>Woodrow Wilson: Address of the President of the United States Delivered at a Joint Session of the Two Houses of Congress, April 2, 1917, vol. Papers Relating to the Foreign Relations of the United States, 1917, Supplement 1, The World War, Document 231, April 2, 1917, url: <https://history.state.gov/historicaldocuments/frus1917Supp01v01/d231>.

<sup>154</sup>Ibid.

<sup>155</sup>Ibid.

<sup>156</sup>Ibid.

<sup>157</sup>Ibid.

<sup>158</sup>Ibid.

issues on the principle of collective security.<sup>159</sup> To shape the post-war world in this image, President Wilson requested that Congress “accept the status of belligerent which has been thrust upon it.”<sup>160</sup> Four days later, on April 6, 1917, the United States declared war on Germany.<sup>161</sup> As freedom of the seas was tied to the rights of neutrals, once the United States entered the war as a belligerent actor, the discourse of freedom of the seas dropped away.

## 6.6 Wilson’s Fourteen Points and the Paris Peace Conference

Shortly after the United States entered the war, President Wilson assembled a committee of experts, known as the Inquiry, to help him formulate a post-war peace plan that would radically reshape international politics in order to secure lasting peace.<sup>162</sup> In a December 22, 1917, memorandum, the Inquiry discussed the formation of “a League of Nations for common protection, for the peaceful settlement of international disputes, for the attainment of a joint economic prosperity, including equal opportunity upon the highways of the world.”<sup>163</sup> The Inquiry thereby put forth that the notion of ‘freedom of the seas’ be a bedrock principle for this new institution. The Inquiry did not propose any specific international legal definition of ‘freedom of the seas,’ insisting that instead was the purview of the State Department

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<sup>159</sup>Wilson: Address of the President of the United States Delivered at a Joint Session of the Two Houses of Congress, April 2, 1917 (see n. 153).

<sup>160</sup>Ibid.

<sup>161</sup>Woodrow Wilson: Proclamation of April 6, 1917, of the Existence of a State of War between the United States and Germany, vol. Papers Relating to the Foreign Relations of the United States, 1917, Supplement 1, The World War, Document 240, April 6, 1917, url: <https://history.state.gov/historicaldocuments/frus1917Supp01v01/d240>.

<sup>162</sup>Milestones in the History of U.S. Foreign Relations: Wilson’s Fourteen Points, 1918, url: <https://history.state.gov/milestones/1914-1920/fourteen-points>.

<sup>163</sup>The Inquiry—Memorandum Submitted December 22, 1917, vol. Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume I, Document 35, December 22, 1917, url: <https://history.state.gov/historicaldocuments/frus1919Parisv01/d35>.

alone.<sup>164</sup> However, the memo also stressed that one of the strongest mechanisms that the Allies have at their disposal is “our economic weapon” of sea control.<sup>165</sup> The Memo stated,

The commercial control of the outer world, and the possibility of German exclusion both from the sources of raw materials and the richer markets, and from the routes of communication, lie in our hands. ... If the possibility of exclusion from economic opportunity is associated with a vision of a world co-operation realized, the double motives of fear and hope can be used upon the German people. This is our strongest weapon, and the Germans realize its menace. Held over them, it can win priceless concessions.<sup>166</sup>

This “economic weapon” was perceived to be the strongest tool for the Allied nations to shift German governmental control to democratic institutions and force institutional reforms.<sup>167</sup> The proposal implied that the states of the League of Nations would control the sea together. Such sea control would preserve the freedom of the seas for international society and allow the League to punish wayward states by denying the use of the ocean.

On January 8, 1918, President Wilson delivered his Fourteen Point speech to Congress, outlining the post-war future he intended to create.<sup>168</sup> Wilson again proclaimed the universal principles that the United States was acting upon. Wilson told Congress that the United States had only entered the war because it could not tolerate the “violations of right” and had to act to ensure such violations would not be inflicted on any nation again.<sup>169</sup> Rather than American aggrandizement, the United States, according to Wilson, wanted to make the world “fit and safe to live in... for every peace-loving nation.”<sup>170</sup> Therefore, Wilson stated,

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<sup>164</sup>Walter Lippmann: Mr. Walter Lippmann to Colonel E. M. House, vol. Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume I, Document 36, December 28, 1917, url: <https://history.state.gov/historicaldocuments/frus1919Parisv01/d36>.

<sup>165</sup>The Inquiry—Memorandum Submitted December 22, 1917 (see n. 163).

<sup>166</sup>Ibid.

<sup>167</sup>Ibid.

<sup>168</sup>Woodrow Wilson: Address of the President of the United States Delivered at a Joint Session of the Two Homes of Congress, January 8, 1918, vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 5, January 8, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d5>.

<sup>169</sup>Ibid.

<sup>170</sup>Ibid.

“The programme of the world’s peace... is our programme.”<sup>171</sup> The specific program Wilson laid out consisted of fourteen points that would be essential to ensuring post-war peace. The second point, after stating that all peace negotiations would be held in public view, resolved to address the issue that brought America into the war, that of ‘freedom of the seas.’<sup>172</sup> The second of Wilson’s fourteen points called for,

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.<sup>173</sup>

Applied literally, this would mean the abolition of blockade as a practice of war outside of collective action.<sup>174</sup> In addition, this point would also nullify the long standing principle of search and seizure of contraband goods on the high seas.<sup>175</sup> The proposition, in essence, was a condominium of the seas. Whereby international society, through the League of Nations, would exercise control of the seas and decide exceptional cases in the name of collective security rather than national interest. The adoption of such a principle would undermine the unilateral benefits afforded by possessing superior sea power, and thus, the British were staunchly opposed.<sup>176</sup>

At the end of a speech given by British Prime Minister Lloyd George, on January 18, 1918, Lloyd George was asked if Great Britain shared the views regarding the ‘freedom of the seas’ that Wilson outlined in his fourteen point plan.<sup>177</sup> Prime Minister Lloyd George responded by stating,

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<sup>171</sup>Wilson: Address of the President of the United States Delivered at a Joint Session of the Two Homes of Congress, January 8, 1918 (see n. 168).

<sup>172</sup>Ibid.

<sup>173</sup>Ibid.

<sup>174</sup>Potter: Sea power: A naval history (see n. 64), p. 232.

<sup>175</sup>Ibid., p. 232.

<sup>176</sup>Ibid., p. 232.

<sup>177</sup>Robert P. Skinner: The Consul General at London (Skinner) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 52, January 19, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d52>.



I want to know what freedom of the seas means. Does it mean freedom from submarines, and does it mean starvation for this country? After all, we are in a very different position from America or Germany or France or any other continental country. We are an island, and we must scrutinise with the very greatest care any proposal which might impair our ability to protect our lines of communication across the seas. Freedom of the seas is a very elastic term. There is a sense in which we would rejoice to accept it, but we must guard very carefully against any attempt to interfere with the capacity to protect our shores and our shipping that has alone enabled us even to exist up to the present moment.<sup>178</sup>

This was a question that the United States was not able to answer. In an October 15 message to the Secretary of State, the Chargé in Great Britain, Irwin Laughlin, reported that Great Britain still strongly felt that Wilson's second point was "detrimental" to British interests.<sup>179</sup> Laughlin wrote that Great Britain perceived the survival of the British state to be inherently entwined with "her foreign trade and premier position as a carrier for the world" and therefore could not relinquish control of the waters surrounding the country.<sup>180</sup> At the very least, Laughlin wrote, Great Britain required "an assurance that such control will not pass into the hands of any other power or group of powers."<sup>181</sup>

Before Wilson traveled to Paris to engage in peace negotiations himself, Colonel House conducted preliminary discussions with Prime Ministers Lloyd George and Clemenceau as to what might be included. On October 29, 1918, House wrote to President Wilson, transmitted through Secretary Lansing, on what he believed to be the specific problem with the second point on 'freedom of the seas.'<sup>182</sup> Regarding the second point, House stated,

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<sup>178</sup>Ibid.

<sup>179</sup>Irwin B. Laughlin: The Chargé in Great Britain ( Laughlin) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 312, October 15, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d312>.

<sup>180</sup>Ibid.

<sup>181</sup>Ibid.

<sup>182</sup>Edward M. [Colonel] House: The Special Representative (House) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 340, October 29, 1918, url: <https://history.state.gov/historicaldocuments/>

This proposition must be read in connection with number 11 which proposes a league of nations. It refers to navigation under the three following conditions: (1) general peace; (2) a general war, entered into by the League of Nations for the purpose of enforcing international covenants; (3) limited war, involving no breach of international covenants.

Under (1) General peace no serious dispute exists. There is implied freedom to come and go [on the high seas].

No serious dispute exists as to the intention under (2) A general war entered into by the League of Nations to enforce international covenants. Obviously such a war is conducted against an outlaw nation and complete non-intercourse with that nation is intended.

(3) A limited war, involving no breach of international covenants is the crux of the whole difficulty. The question is, what are to be the rights of neutral shipping and private property on the high seas during a war between a limited number of nations when that war involves no issue upon which the League of Nations cares to take sides. In other words, a war in which the League of Nations remains neutral. Clearly, it is the intention of the proposal that in such a war the rights of neutrals shall be maintained against the belligerents, the rights of both to be clearly and precisely defined in the law of nations.<sup>183</sup>

President Wilson agreed that that the crux of the issue lay in House's interpretation but desired to reserve discussion of the specifics for the Peace Conference.<sup>184</sup> House responded to President Wilson informing him that Prime Minister Lloyd George refused to discuss the matter of 'freedom of the seas' with Germany, and if acceptance of the principle without qualification was a requirement for peace, specifically a qualification that guaranteed Britain the "power of blockade," Great Britain would not agree to it.<sup>185</sup>

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frus1918Supp01v01/d340.

<sup>183</sup>House: The Special Representative (House) to the Secretary of State (see n. 182).

<sup>184</sup>Woodrow Wilson: The President to the Special Representative (House), vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 348, October 30, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d348>.

<sup>185</sup>Edward M. [Colonel] House: The Special Representative (House) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 349, October 30, 1918, url: <https://history.state.gov/historicaldocuments/>

President Wilson responded to House by stating, "I feel it my solemn duty to authorize you to say that I cannot consent to take part in the negotiation of a peace which does not include freedom of the seas because we are pledged to fight not only to do away with Prussian militarism but with militarism everywhere."<sup>186</sup> If Great Britain were to refuse to discuss this principle, the United States would feel obliged to reconsider whether the U.S. should continue to fight "for the aims of Great Britain, France, and Italy."<sup>187</sup> House informed Lloyd George that if the British insisted on this stance, it would "lead to the establishment of the greatest naval program by the United States that the world had ever seen."<sup>188</sup> As Colonel House stated that he "did not believe that the United States would consent for any [power] to interpret for them the rules under which American commerce could traverse the sea."<sup>189</sup>

The British replied with a drafted memorandum stating "Clause 2, relating to what is usually described as the freedom of the seas, is open to various interpretations, some of which they could not accept. They must therefore reserve to themselves complete freedom on this subject when they enter the peace conference."<sup>190</sup> President Wilson responded stating,

I fully and sympathetically recognize the exceptional position and necessities of Great Britain with regard to the use of the seas for defence both at home and throughout the Empire and also realize that freedom of the seas needs careful definition and is full of questions upon which there is need of the freest discussion

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frus1918Supp01v01/d349.

<sup>186</sup>Woodrow Wilson: The President to the Special Representative (House), vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 350, October 30, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d350>.

<sup>187</sup>Edward M. [Colonel] House: The Special Representative (House) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 351, October 30, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d351>.

<sup>188</sup>Ibid.

<sup>189</sup>Ibid.

<sup>190</sup>Edward M. [Colonel] House: The Special Representative (House) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 353, October 30, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d353>.

and the most liberal interchange of views, but I am not clear that the reply of the Allies quoted in your [previous message] definitely accepts the principle of freedom of the seas and means to reserve only the free discussion of definitions and limitations. ...<sup>191</sup>

President Wilson was unsure whether Britain and France wanted to discuss how to accomplish the task of freedom of the seas or whether they wanted to discuss the applicability of freedom of the seas itself. Wilson continued that he could not accept any peace without some stipulation regarding the freedom of the seas. He stated,

Terms one, two [freedom of the seas], three, and fourteen are the essentially American terms in the programme and I cannot change what our troops are fighting for or consent to end with only European arrangements of peace. Freedom of the seas will not have to be discussed with Germany if we agree among ourselves beforehand but will be if we do not. Blockade is one of the many things which will require immediate redefinition in view of the many new circumstances of warfare developed by this war. There is no danger of its being abolished.<sup>192</sup>

On November 3, 1918, House conveyed this message to Prime Ministers Lloyd George and Clemenceau and asked for clarification on whether they accepted the principle of freedom of the seas yet wished to debate its implementation, or whether they intend to debate the necessity of the principle as a whole.<sup>193</sup> France, according to Clemenceau, accepted the principle but wished to discuss its implications practically.<sup>194</sup> Lloyd George, however, insisted that “in light of the new conditions which have arisen by reason of the war” the relevance of the principle of freedom of the seas in and of itself had to be discussed.<sup>195</sup> House

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<sup>191</sup>Woodrow Wilson: The President to the Special Representative (House), vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 355, October 31, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d355>.

<sup>192</sup>Ibid.

<sup>193</sup>Edward M. [Colonel] House: The Special Representative (House) to the Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, 1918, Supplement 1, The World War, Volume I, Document 376, November 3, 1918, url: <https://history.state.gov/historicaldocuments/frus1918Supp01v01/d376>.

<sup>194</sup>Ibid.

<sup>195</sup>Ibid.

advised President Wilson to accept the British stance and discuss the principle in full at the peace conference to avoid “serious friction and delay.”<sup>196</sup> House told President Wilson that he would proceed under the assumption that further discussion of this point would be done upon the President's arrival to Paris for the conference, unless instructed otherwise.<sup>197</sup> President Wilson accepted the situation, but told House that “I suggest that you urge that if the British cannot, relying upon our friendship and good faith, accept the principle of the freedom of the seas, they can count upon the certainty of our using our present great equipment to build up the strongest navy our resources permit, as our people have long desired.”<sup>198</sup>

President Wilson arrived in Paris on December 13, 1918 with the primary goal of establishing a League of Nations.<sup>199</sup> The issue of freedom of the seas, however, still loomed over the conference as an intractable issue.<sup>200</sup> When Wilson set out to draft the charter of his proposed League, in January of 1919, he did not include a definition of freedom of the seas.<sup>201</sup> Previously, President Wilson's advisors, David Miller and James Scott, had prepared a draft treaty defining rights on the high seas in the same language of President Wilson's May 16, 1916, message to Colonel House in which he advocated securing freedom of the seas through collective security.<sup>202</sup> Miller and Scott proposed,

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<sup>196</sup>Ibid.

<sup>197</sup>Ibid.

<sup>198</sup>Woodrow Wilson: Two Telegrams to Edward Mandell House, vol. The Papers of Woodrow Wilson Digital Edition, Originally published in The Papers of Woodrow Wilson 1966–1994, Princeton University Press, November 4, 1918, url: <https://rotunda.upress.virginia.edu/founders/WILS-01-51-02-0571>.

<sup>199</sup>Margaret MacMillan: Peacemakers: The Paris Peace Conference of 1919 and its attempt to end war, 2001, p. 98.

<sup>200</sup>John W. Davis: The Ambassador in Great Britain (Davis) to the Acting Secretary of State, vol. Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume I, Document 413, December 19, 1918, url: [https://history.state.gov/historicaldocuments/frus1919Parisv01/pg\\_413](https://history.state.gov/historicaldocuments/frus1919Parisv01/pg_413).

<sup>201</sup>Woodrow Wilson: President Wilson's First Draft - Covenant, vol. Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume I, Page 501, January, 1919, url: [https://history.state.gov/historicaldocuments/frus1919Parisv01/pg\\_501](https://history.state.gov/historicaldocuments/frus1919Parisv01/pg_501).

<sup>202</sup>Idem: To Edward Mandell House (see n. 128); David H. Miller/James B. Scott: The Technical Advisors to the Commission to Negotiate Peace (Miller, Scott) to the Secretary of State, vol. Papers Relating to the

13. Each Member Power severally covenants and guarantees that it will not violate the territorial integrity or impair the political independence of any other Member Power.

14. Any interference with a vessel on the high seas... which interference is not affirmatively sanctioned by the law of nations, shall be deemed a breach of the covenant and guaranty contained in Article 13...<sup>203</sup>

However, President Wilson's first draft of the Covenant of the League of Nations did not include this provision.<sup>204</sup> Instead, the draft contained a stipulation regarding blockades, that stated the League members would "cease all commerce and intercourse" and "unite together to blockade" any state that engages in conflict rather than arbitration.<sup>205</sup> However, this provision regarding blockades was not included in the final draft either.

Although Wilson had stated previously that the purpose of the League of Nations was to ensure freedom of the seas, the President gave up the principle in order to win support for his League.<sup>206</sup> Subsequent drafts of the Covenant did not mention freedom of the seas or Wilson's second point and the issue was dropped with regards to the League of Nations. On July 30, 1919, Colonel House advised President Wilson that nothing more could be done on the issue of freedom of the seas.<sup>207</sup> He stated, "This question of the freedom of the seas is the one thing above all others that brought us into the war, and yet it is no nearer solution today than it was before Germany collapsed."<sup>208</sup> The best course of action, House told President Wilson would be to make it known that the United States plans to address the issue at a

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Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume I, Page 316, January 9, 1919, url: [https://history.state.gov/historicaldocuments/frus1919Parisv01/pg\\_316](https://history.state.gov/historicaldocuments/frus1919Parisv01/pg_316).

<sup>203</sup>Miller/Scott: The Technical Advisors to the Commission to Negotiate Peace (Miller, Scott) to the Secretary of State (see n. 202).

<sup>204</sup>Wilson: President Wilson's First Draft - Covenant (see n. 201).

<sup>205</sup>Ibid.

<sup>206</sup>Wilson: To Edward Mandell House (see n. 99); idem: To Edward Mandell House (see n. 128); MacMillan: Peacemakers: The Paris Peace Conference of 1919 and its attempt to end war (see n. 199), p. 98.

<sup>207</sup>Edward M. [Colonel] House: Colonel E. M. House to President Wilson, vol. Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume XI, Document 302, July 30, 1919, url: <https://history.state.gov/historicaldocuments/frus1919Parisv11/d302>.

<sup>208</sup>Ibid.

later date.<sup>209</sup>

Later that year, giving a speech after a dinner in San Francisco on September 19, 1919, President Wilson told the guests in attendance,

And one of the things that occurred in this conference, as a sort of practical joke on myself, was this. One of the principles that I went to Paris most insisting on was the freedom of the seas. Now, the freedom of the seas means the definition of the right of neutrals to use the seas when other nations are at war. But under the League of Nations there are no neutrals. And, therefore, what I have called the practical joke on myself was that, by the very thing that I was advocating, it became unnecessary to define the freedom of the seas. All nations are engaged to maintain the right, and in that sense no nation can be neutral when the right is invaded. And, all being comrades and partners in a common cause, we all have an equal right to use the seas. To my mind it is a much better solution than had occurred to me, or than had occurred to anyone else with regard to that single definition of right.<sup>210</sup>

In other words, Wilson argued that freedom of the seas is fundamentally inherent within a collective security model of global governance because it eliminates the possibility of neutrality.

## 6.7 Wilson and Sea Power

One of the great contradictions of the Wilson presidency was the push for reducing global armaments while simultaneously pursuing a massive Naval development program at home.<sup>211</sup>

President Wilson stated himself, “There is no subject in connection with the League of Nations that has caused so much perplexity, both at home and abroad, as the apparent

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<sup>209</sup>Ibid.

<sup>210</sup>Wilson: An After-Dinner Speech in San Diego (see n. 3).

<sup>211</sup>Idem: Enclosure - Confidential. U.S. Naval Advisory Staff, Paris. Memorandum No. XXV., vol. The Papers of Woodrow Wilson Digital Edition. Originally published in *The Papers of Woodrow Wilson 1966–1994*, Princeton University Press, April 7, 1919, url: <https://rotunda.upress.virginia.edu/founders/WILS-01-57-02-0076-0002>, p. 180.

inconsistency of the United States in advocating a general reduction of armaments, while itself undertaking an intensified Naval Building programme.”<sup>212</sup> Indeed, following the war, President Wilson not only resumed the capital ship construction program started in 1916, but proposed a bill in 1919 that would double the 1916 construction program.<sup>213</sup> Even by the 1916 building standards the United States would field a fleet of thirty-five capital ships, all technologically superior to British vessels.<sup>214</sup> The proposed 1919 plan aimed to “utterly eclipse the British navy” with a fleet of fifty capital ships.<sup>215</sup> All while Germany, a preeminent naval power before the war and primary strategic concern for the U.S., was stripped of its naval capability by the Treaty of Versailles.<sup>216</sup>

On April 7, 1919, President Wilson wrote to the U.S. Naval Advisory Staff in Paris discussing the naval buildup with regards to United States Naval Policy.<sup>217</sup> Wilson argued that it was time for the United States to step up, as a great power, and shepherd the “unorganized society of nations.”<sup>218</sup> To this end, a large United States Navy would serve two purposes. First, “To promote and guard the interests of the United States in every way consonant with justice,” and second, “To assist in promoting the welfare of the world.”<sup>219</sup>

It is the nature of the international realm, Wilson contended, that strong states do what they will and weak states do what they must.<sup>220</sup> He stated that when States negotiate with each other, due to anarchy, “they are free from the restraining influence of law and may exact every advantage which their position makes it possible for them to exact.”<sup>221</sup> Because of this, the only mutually productive negotiations can come from a situation where any participant

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<sup>212</sup>Wilson: Enclosure - Memorandum No. XXV. (see n. 211), p. 180.

<sup>213</sup>Potter: Sea power: A naval history (see n. 64), p. 232.

<sup>214</sup>Ibid., p. 232.

<sup>215</sup>Ibid., p. 232.

<sup>216</sup>Ibid., p. 231.

<sup>217</sup>Wilson: Enclosure - Memorandum No. XXV. (see n. 211), p. 180.

<sup>218</sup>Ibid., p. 188.

<sup>219</sup>Ibid., p. 181.

<sup>220</sup>Ibid., p. 182.

<sup>221</sup>Ibid., p. 182.



party is unable to dominate the others.<sup>222</sup> Wilson stated that states can only be expected to abide by principles of justice when dealing with minor issues.<sup>223</sup> When core national interests are at stake, “expediency rather than principle governs.”<sup>224</sup> Even in diplomacy, “Governments are influenced less by words than by material facts.”<sup>225</sup> When looking at the United States’ role “in the new order of things,” as a great power, Wilson stated,

... we realise that all of our important international relations and all of our important international questions hinge upon matters relating to the sea and sea communications. We cannot advance our external interests, nor can we influence world policy, except by way of the sea. Practically all of our great commerce is sea commerce. If any foreign State desires to bring military pressure to bear upon us, it must be a pressure based upon possible operations by way of the sea. The attack of our Colonies, of our commerce, of our frontiers, depends first of all upon what happens at sea. Conversely if we desire to retaliate or to exert opposing military pressure, we must base our efforts upon our sea power.<sup>226</sup>

Because the preponderant British navy was more materially capable than the United States Navy, the core national interests of the U.S. at sea were fundamentally at risk.<sup>227</sup> Especially because throughout history, British policy has been to destroy its commercial rivals and to solidify control of the global sea trade.<sup>228</sup> “We are ,” Wilson proclaimed, “setting out to be the greatest commercial rival of Great Britain on the seas.”<sup>229</sup> Because of its population, natural resources, and lack of dependence on the rest of the world, Wilson predicted the United States would become a greater power than any state could foresee.<sup>230</sup> Wilson stated,

Heretofore we have lived apart, but now we are to live in constant and intimate relation with the rest of the world. We must be able to enter every world confer-

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<sup>222</sup>Ibid., p. 182.

<sup>223</sup>Ibid., p. 182.

<sup>224</sup>Ibid., p. 182.

<sup>225</sup>Ibid., p. 183.

<sup>226</sup>Ibid., pp. 182–183.

<sup>227</sup>Ibid., p. 183.

<sup>228</sup>Ibid., p. 183.

<sup>229</sup>Ibid., p. 185.

<sup>230</sup>Ibid., p. 185.

ence with the confidence of equality. We can have this confidence in but one way and that is by actually being equal to the greatest. The equality that counts in conferences as well as in conflicts is the equality of power, and specially for us the equality of sea power. Given that equality, our superiority of motive will attract to us a following that will mean better days in the world. But while we are weak we may expect the powers of the world to group themselves about strength rather than about the promise of a distant justice.<sup>231</sup>

The strength that comes from the possession of sea power would enable the United States to construct a world order based on Wilson's principles of order and justice. Wilson wanted sea power, not for the sake of exclusive control or stewardship of the ocean for the United States. Instead, Wilson wanted the strength to negotiate and protect an order where the states of the world, through the League of Nations, wielded Grotian *condominium* over the ocean.

Without peer, the British navy's capability to "dominate the seas" in whatever part of the world necessary posed a threat to the interests of the United States as well as the world.<sup>232</sup> Regardless of a League of Nations, a state with the strength to disregard the rights of others with impunity would be less likely to act within the bounds of justice than if there was "a balancing influence of force as well as of world opinion to oppose it."<sup>233</sup> The League of Nations, Wilson claimed, would ultimately would serve as a collective security organization.<sup>234</sup> For the success of the organization, there must be a force capable of guaranteeing security if Great Britain, or any other future preponderant state, were to be the aggressor.<sup>235</sup> Such a force cannot be found in a ragtag grouping of small naval craft.<sup>236</sup> Wilson argued that there must be at least a single state of equal force able to balance the potential belligerent, "and we may be sure that the minor Powers of the League will furnish the additional force to swing

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<sup>231</sup>Wilson: Enclosure - Memorandum No. XXV. (see n. 211), p. 185.

<sup>232</sup>Ibid., p. 183.

<sup>233</sup>Ibid., p. 183.

<sup>234</sup>Ibid., p. 186.

<sup>235</sup>Ibid., p. 186.

<sup>236</sup>Ibid., p. 186.

the League to the side of justice against the efforts of a navy as powerful as any, whether that Navy be our own or the British Navy.”<sup>237</sup> Wilson told the U.S. Naval Advisory Staff,

We want the world League to be secure, to endure, and to establish a new order—the reign of law among nations. This cannot be brought about if some one Power is to dominate the decisions of the League by a world wide predominance of naval strength. We do not need to argue that whoever dominates the sea exercises more control over world policies than any other Power may do. As the interdependence of nations increases this dominance of sea power over world policies will become more and more complete.<sup>238</sup>

The United States, as the only state in the world able to physically and financially compete, would undertake a naval competition with Great Britain if they did not agree to maintain a parity of forces.<sup>239</sup> Parity, Wilson proposed, should be established by a reduction in British naval forces and maintained by periodic agreement of force structure. With a naval balance of power, no state would fear for the economic life of their country. Mutual understanding between the United States and Great Britain, Wilson wrote, would “go farther than anything else toward the establishment of just maritime law upon the high seas both in peace and in war.”<sup>240</sup>

Wilson would leave office, however, with his dreams unfulfilled. On November 19, 1919 the United States Senate rejected the League of Nations. Congress too rejected Wilson’s 1919 naval program.<sup>241</sup> President Harding seceded President Wilson on March 4, 1921, under a banner of a “return to normalcy.”<sup>242</sup> Interpreted largely as a promise to reduce the American military infrastructure to ‘normal’ peace-time levels.<sup>243</sup>

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<sup>237</sup>Ibid., p. 186.

<sup>238</sup>Ibid., p. 186.

<sup>239</sup>Ibid., p. 187.

<sup>240</sup>Ibid., p. 187.

<sup>241</sup>Potter: Sea power: A naval history (see n. 64), p. 233.

<sup>242</sup>Ibid., p. 233.

<sup>243</sup>Ibid., p. 233.

## Part II

### *Mare Imperium*

# Chapter 7

## The Second World War

Over the course of the Second World War the discourse of freedom of the seas underwent a radical transformation in meaning. Freedom of the seas shifted away from encapsulating the rights of neutrals to trade during times of war which had characterized the discourse since Hugo Grotius' 1609 treatise *Mare Liberum*. As conflict was engulfing Europe, the United States abandoned its neutral rights to trade and enacted a series of Neutrality Acts which made it illegal for American vessels to trade with belligerent powers. Rather than securing neutral trading rights for the ship, the United States along with the American republics of the Western Hemisphere instituted an American neutrality zone. This zone, established and maintained by Mahanian sea control, endeavored to prevent the European war from spreading to the Western Hemisphere. Within this zone, the navies of the American republics, foremost the United States Navy, would patrol and ensure that no belligerent actors were engaging in hostilities within the maritime sphere of influence. By preventing the conflict within the neutrality zone, neutral regional trade would also be secured. Thus, through the American neutrality zone the discourse of freedom of the seas became territorialized and entangled with Mahanian sea control practices.

Additionally, during this conflict the discourse of freedom of the seas was stripped of all pretense of neutrality. In United States foreign policy freedom of the seas was championed in opposition to the American neutrality acts to provide justification for shipping weapons and material of war to Britain in American vessels. Previously, it was ubiquitously understood that transporting contraband of war to belligerent powers was not a freedom possessed by

neutral trading states. Once neutrality was stripped from the discourse, freedom of the seas was deployed in order to prevent “totalitarian regimes” from gaining control over the sea. Thus, for the first time, freedom of the seas discourse supported control of the sea by the ‘free world.’ The discourse of freedom of the seas fundamentally broke from the *Mare Liberum* typology during the Second World War and took on a new *Mare Imperium* conceptualization.

## 7.1 A Prelude to War

In 1929, Herbert Hoover assumed the role of President of the United States. Declaring in his inaugural address, “Peace can be promoted by the limitation in arms,” President Hoover set to work securing global naval armament reductions.<sup>1</sup> In June of the same year, President Hoover sent Ambassador Charles G. Dawes to London to propose a future conference, what would become the London Naval Conference of 1930, to limit armaments of cruisers, destroyers, and submarines.<sup>2</sup> In preliminary discussions with British Prime Minister MacDonald, Ambassador Dawes agreed to table any discussion of freedom of the seas until a later date.<sup>3</sup> Such a date would arise that Autumn when British Prime Minister MacDonald insisted on visiting the United States.<sup>4</sup> With no prearranged issues to discuss with President Hoover, the British Prime Minister set sail for the United States on September 28, 1929.<sup>5</sup>

Sitting around a campfire at President Hoover’s summer retreat in Rapidan Virginia,

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<sup>1</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), p. 277.

<sup>2</sup>Ibid., p. 277.

<sup>3</sup>Charles G. Dawes: The Ambassador in Great Britain (Dawes) to the Secretary of State, vol. Papers relating to the foreign relations of the United States, 1929, Volume I, Document 75, June 17, 1929, url: <https://history.state.gov/historicaldocuments/frus1929v01/d75>.

<sup>4</sup>Idem: The Ambassador in Great Britain (Dawes) to the Secretary of State (see n. 3); Henry L. Stimson: The Secretary of State to the Ambassador in Great Britain (Dawes), vol. Papers relating to the foreign relations of the United States, 1929, Volume III, Document 1, June 28, 1929, url: <https://history.state.gov/historicaldocuments/frus1929v03/d1>.

<sup>5</sup>Charles G. Dawes: The Ambassador in Great Britain (Dawes) to the Secretary of State, vol. Papers relating to the foreign relations of the United States, 1929, Volume III, Document 3, September 28, 1929, url: <https://history.state.gov/historicaldocuments/frus1929v03/d3>.

President Hoover broached the issue of freedom of the seas.<sup>6</sup> President Hoover, suggested that the two countries agree to declare food ships immune from attack during times of war in order to ameliorate the suffering of civilians.<sup>7</sup> In the same way Red Cross ships and hospitals were deemed immune from attack.<sup>8</sup> Prime Minister MacDonald was optimistic about the proposal, however, suggested the term “rights and immunities at sea during war” be used instead of “freedom of the seas” in order to prevent a backlash from the British public.<sup>9</sup> In an October 6, 1929 memorandum, President Hoover wrote,

We recognize that one of the most troublesome questions in international relations is that of freedom of the seas. (Some other expression to be substituted) [sic]. Not only does this subject arouse fear and stimulate naval preparation, but it is one of the pregnant causes of expansion of the area of war once it may have broken out, by dragging other nations in as the result of controversies with belligerents.

Misunderstandings arising out of these questions have been the most pregnant cause of controversies in the past between our two countries. We have resolved therefore that we will examine this question fully and frankly.

The President proposes, and he hopes the American people would support the proposal, that food ships should be declared free from interference during times of war, and thus to remove starvation of women and children from the weapons of warfare. That would reduce the necessity for naval arms in protection of avenues of food supplies. Such a proposal goes wider than the rights of neutrals in times of war and would protect from interference all vessels solely laden with food supplies in the same fashion that we now immunize hospital and medical supplies.<sup>10</sup>

President Hoover elaborated, stating that due to rapid industrialization over the past fifty

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<sup>6</sup>Henry L. Stimson: Memorandum by the Secretary of State, vol. Papers relating to the foreign relations of the United States, 1929, Volume III, Document 4, October 7, 1929, url: <https://history.state.gov/historicaldocuments/frus1929v03/d4>.

<sup>7</sup>Ibid.

<sup>8</sup>Ibid.

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.

years, the populations of many countries far exceed their domestic food production.<sup>11</sup> This fact, Hoover argued, is one of the primary causes of naval aggrandizement as nations seek to protect their food supply lines.<sup>12</sup> Also, countries who predominantly export foodstuffs are dependant on maintaining access to markets in times of war and are therefore driven to armament.<sup>13</sup> Thus, President Hoover stated, “the fear of an interruption in seaborne food supplies has powerfully tended towards naval development in both importing and exporting nations.”<sup>14</sup> This fear is justified as previous wars have demonstrated that the blockade of supplies constitutes a primary component of naval strategy.<sup>15</sup> Hoover stated that starvation should no longer be allowed as a weapon of war.<sup>16</sup> Steps should be taken to make free the food supplies of all countries during times of war.<sup>17</sup> This, Hoover stated, “would constitute a most important contribution to the rights of parties whether neutrals or belligerents and would greatly tend towards lessening the pressure for naval strength.”<sup>18</sup>

Additionally, to reflect the parity of the world’s two largest naval forces, Hoover and MacDonald agreed to divide the oceans into two spheres of influence. The United States secured guarantees from Great Britain not to construct additional naval bases in the Western Hemisphere, or fortify existing bases there, and the United States agreed to do the same in the Eastern Hemisphere.<sup>19</sup>

The lessening of naval strength served to be a more pressing issue for President Hoover than the lessening of its purported cause. At the London Naval Conference, the United

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<sup>11</sup>Cited in, Henry L. Stimson: Memorandum by the Secretary of State: Memorandum of Papers Drawn Up During Prime Minister MacDonald’s Visit, vol. Papers relating to the foreign relations of the United States, 1929, Volume III, Document 5, October 9, 1929, url: <https://history.state.gov/historicaldocuments/frus1929v03/d5>.

<sup>12</sup>Cited in, *ibid.*

<sup>13</sup>Cited in, *ibid.*

<sup>14</sup>Cited in, *ibid.*

<sup>15</sup>Cited in, *ibid.*

<sup>16</sup>Cited in, *ibid.*

<sup>17</sup>Cited in, *ibid.*

<sup>18</sup>Cited in, *ibid.*

<sup>19</sup>Stimson: Memorandum by the Secretary of State (see n. 6).



States, Great Britain, and Japan agreed to abide by the ‘parity’ ratios of 5:5:3 for battle ships and aircraft carriers, but increased the ratio for cruisers and destroyers 10:10:7.<sup>20</sup> The conference also established a moratorium on capital ship construction until 1936.<sup>21</sup> However, the issue of the immunity of food ships, or the broader issue of freedom of the seas was not discussed at the London Naval Conference.

At the abortive Geneva Disarmament Conference of 1932 the issue was bypassed once again.<sup>22</sup> Secretary Stimson wrote to the Acting Chairman of the American Delegation to the Geneva Disarmament Conference stating, “We do not consider the present time opportune for us formally to revive the President’s ‘food ships’ proposal, which was never officially submitted to any Government but merely put forth as a suggestion... we should prefer to continue the policy we held to during the London Naval Conference of not permitting the direct issues of naval limitation and reduction to become befogged as a result of the concurrent discussion of such complicating political issues as the freedom of the seas.”<sup>23</sup>

In 1933, Franklin Delano Roosevelt assumed the office of the Presidency. At the time he took office, the emaciated United States Navy was well below the levels permitted in the London Naval Treaty.<sup>24</sup> As former Assistant Secretary of the Navy, President Roosevelt was a strong advocate for the service.<sup>25</sup> While President Roosevelt and members of his administration supported reconstructing a large navy, the American public remained staunchly in favor of disarmament.<sup>26</sup> A popular narrative at the time was that weapons manufacturers were responsible for dragging the United States into the First World War in the pursuit of

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<sup>20</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 278.

<sup>21</sup>Potter: *Sea power: A naval history* (see n. 64), p. 235; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 278.

<sup>22</sup>Henry L. Stimson: *The Secretary of State to the Acting Chairman of the American Delegation* (Gibson), vol. *Foreign Relations of the United States Diplomatic Papers, 1932, General, Volume I, Document 22*, February 17, 1932, url: <https://history.state.gov/historicaldocuments/frus1932v01/d22>.

<sup>23</sup>*Ibid.*

<sup>24</sup>Potter: *Sea power: A naval history* (see n. 64), p. 239.

<sup>25</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 281.

<sup>26</sup>*Ibid.*, p. 283.

profit.<sup>27</sup>

In the midst of the Great Depression, Congress appropriated \$3.3 billion to the American Public Works Administration.<sup>28</sup> On the same day, June 16, 1933, President Roosevelt diverted \$238 million from the fund to pay for “two aircraft carriers, four cruisers, twenty destroyers, four submarines, and two gunboats.”<sup>29</sup> Described as an effort to provide relief for American the steel and shipbuilding industries, President Roosevelt put forth a naval bill to bring the U.S. up to full capacity as specified by international law.<sup>30</sup> The Vinson-Trammell Act of 1934 provided the authorization, however, not the appropriation of funds, to build seventy vessels and 730 aircraft between 1935 and 1939.<sup>31</sup>

On August 31, 1935, in response to the naval rearmament of Nazi Germany, Congress passed what would be the first of a series of acts designed to ensure American neutrality in future wars.<sup>32</sup> These self-inflicted acts stripped away the neutral rights which the United States had in previous times gone to war to protect.<sup>33</sup> In effect, the United States forfeited its own neutral rights before any other power could infringe upon them. In an attempt to prevent being dragged into war the United States fled from the sea. The first neutrality act of 1935 forced the President to halt the sale of “arms, ammunition, and implements of war” to any country declared a belligerent power.<sup>34</sup> To American representatives abroad, the neutrality acts definitively signaled the abandonment of the principle freedom of the seas.<sup>35</sup> A

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<sup>27</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 283.

<sup>28</sup>*Ibid.*, p. 283.

<sup>29</sup>*Ibid.*, p. 283.

<sup>30</sup>Potter: *Sea power: A naval history* (see n. 64), p. 239.

<sup>31</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 284.

<sup>32</sup>Potter: *Sea power: A naval history* (see n. 64), p. 239; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 284.

<sup>33</sup>Potter: *Sea power: A naval history* (see n. 64), p. 239.

<sup>34</sup>Milestones in the History of U.S. Foreign Relations: *The Neutrality Acts, 1930s*, url: <https://history.state.gov/milestones/1921-1936/neutrality-acts>; Potter: *Sea power: A naval history* (see n. 64), p. 239; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 284.

<sup>35</sup>Cornelius Van H. Engert: *The Chargé in Ethiopia* (Engert) to the Secretary of State, vol. *Foreign Relations of the United States Diplomatic Papers, 1935, General, The Near East and Africa, Volume I, Document 643, October 30, 1935*, url: <https://history.state.gov/historicaldocuments/frus1935v01/d643>; Jesse I. Straus: *The Ambassador in France* (Straus) to the Secretary of State, vol. *Foreign Relations*

February 29, 1936, neutrality act renewed the 1935 act and additionally prohibited Americans from loaning money to belligerents.<sup>36</sup> The Neutrality Act of 1937 further restricted neutral rights by forbidding American citizens from traveling on ships of belligerent nations and prohibiting American ships from delivering all weaponry, even weapons produced outside the United States, to warring parties.<sup>37</sup> The act also gave the President the authority to ‘close’ American seas, to prevent all belligerent states access to U.S. territorial waters.<sup>38</sup> The 1937 Neutrality Act did, however, concede the permission to sell American products to belligerents, barring “arms, ammunition, and implements of war,” under the condition that the warring party paid for the goods in cash and picked them up from the United States in their own ships.<sup>39</sup> This way, no American life or vessel would be jeopardized in potential unrestricted commercial warfare campaigns. President Roosevelt, however, opposed the American turn away from the world stage.<sup>40</sup>

On October 5, 1937, President Roosevelt delivered what has come to be known as the Quarantine Speech in Chicago, Illinois.<sup>41</sup> Roosevelt proclaimed that for the sake of America’s future, the United States must engage with the world.<sup>42</sup> The international political situation had devolved to such a degree, Roosevelt stated, that the past hopes of a world founded on “law, order, and justice are being wiped away.”<sup>43</sup> Roosevelt spoke against the Neutrality Acts stating,

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of the United States Diplomatic Papers, 1936, General, British Commonwealth, Volume I, Document 158, January 2, 1936, url: <https://history.state.gov/historicaldocuments/frus1936v01/d158>.

<sup>36</sup>Milestones in the History of U.S. Foreign Relations: The Neutrality Acts, 1930s (see n. 34); Potter: Sea power: A naval history (see n. 64), p. 239; Hagan: This people’s navy: The making of American sea power (see n. 65), p. 284.

<sup>37</sup>Milestones in the History of U.S. Foreign Relations: The Neutrality Acts, 1930s (see n. 34).

<sup>38</sup>Ibid.

<sup>39</sup>Milestones in the History of U.S. Foreign Relations: The Neutrality Acts, 1930s (see n. 34); Potter: Sea power: A naval history (see n. 64), p. 239; Hagan: This people’s navy: The making of American sea power (see n. 65), p. 284.

<sup>40</sup>Franklin D. Roosevelt: October 5, 1937: Quarantine Speech, October 5, 1937, url: <https://millercenter.org/the-presidency/presidential-speeches/october-5-1937-quarantine-speech>.

<sup>41</sup>Ibid.

<sup>42</sup>Ibid.

<sup>43</sup>Ibid.

The peace-loving nations must make a concerted effort in opposition to those violations of treaties and those ignorings of humane instincts which today are creating a state of international anarchy and instability from which there is no escape through mere isolation or neutrality.<sup>44</sup>

President Roosevelt advocated for returning to a world where the national morality is perceived as important as individual morality.<sup>45</sup> To this end President Roosevelt sought to “quarantine” the “epidemic of lawlessness,” and stem the contagion of war, in order to protect the health of the international community.<sup>46</sup>

In December 1937, President Roosevelt sent Admiral Royal E. Ingersoll to England to begin to coordinating an Anglo-American naval war against a potential German *guerre de course* in the Atlantic.<sup>47</sup> Much as President Wilson had done with Admiral Sims prior to World War I. President Roosevelt had suggested the possibility that the United States could help the British keep the sea lanes of the Atlantic open against German submarine warfare.<sup>48</sup> A month later, in January 1938, President Roosevelt requested the Congress authorize the construction of “three new battleships, two carriers, nine light cruisers, twenty-three destroyers, nine submarines, and 950 naval aircraft.”<sup>49</sup> On May 7, 1938, Congress approved the funding. During the winter of 1938 - 1939, President Roosevelt began the process of shifting the Navy’s emphasis to the Atlantic.<sup>50</sup> Roosevelt established the Atlantic squadron which boasted fourteen new ships.<sup>51</sup>

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<sup>44</sup>Roosevelt: October 5, 1937: Quarantine Speech (see n. 40).

<sup>45</sup>Ibid.

<sup>46</sup>Ibid.

<sup>47</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), p. 286.

<sup>48</sup>Warren F Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes, 2015, p. 24.

<sup>49</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), p. 286.

<sup>50</sup>Ibid., p. 288.

<sup>51</sup>Ibid., p. 288.

## 7.2 Territorialized Neutrality: The American Neutrality Zone

On September 1, 1939, World War II began with the German invasion of Poland. Two days later, Britain and France declared war on Germany. On September 1, Chief of Naval Operations, Admiral Harold Rainsield Stark advised U.S. forces that Germany was poised to begin submarine operations in the Atlantic.<sup>52</sup> Admiral Stark advised that “neutral merchantmen, including U.S. flag ships, could expect similar actions by the British and that it was the duty of the U.S., as a neutral, to prevent such activities in our territorial waters and to assure no interference with our rights on the high seas.”<sup>53</sup> The prior April, Roosevelt had begun hatching the idea for an American security zone in the western Atlantic.<sup>54</sup> Roosevelt informed his cabinet that he wanted “a patrol from Newfoundland down to South America and if some submarines are laying there and try to interrupt an American flag and our Navy sinks them it’s just too bad.”<sup>55</sup> On September 4, Admiral Stark announced that the United States Navy would begin patrols of U.S. waters to monitor the movements of belligerent powers.<sup>56</sup> The so called ‘neutrality patrols’ would monitor an area “bounded on the north by a line east from Boston to latitude 42-30, longitude 65; south to latitude 19; then around the the windward and leeward islands to Trinidad.”<sup>57</sup> Within the monitoring zone U.S. ships would monitor and document all belligerent warships bound for U.S. territorial waters on the eastern seaboard or in the Caribbean.<sup>58</sup> On September 5, President Roosevelt issued a statement proclaiming that “any use of U.S. territorial waters for hostile operations would

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<sup>52</sup>William E. Scarborough: *The Neutrality Patrol: To Keep Us Out of World War II?*, March - April 1919, here p. 18.

<sup>53</sup>*Ibid.*, p. 18.

<sup>54</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 289.

<sup>55</sup>Cited in, *ibid.*, p. 289.

<sup>56</sup>Scarborough: *The Neutrality Patrol: To Keep Us Out of World War II?* (see n. 52), p. 19; Potter: *Sea power: A naval history* (see n. 64), p. 254.

<sup>57</sup>Scarborough: *The Neutrality Patrol: To Keep Us Out of World War II?* (see n. 52), p. 19.

<sup>58</sup>*Ibid.*, p. 19.

be regarded as unfriendly, offensive, and a violation of U.S. neutrality.”<sup>59</sup>

On September 3, 1939, Secretary of State Hull contacted the Argentine government asking if they would be willing to join the United States in calling for a meeting of the “American Republics” to discuss the outbreak of general war in Europe.<sup>60</sup> The meeting was scheduled to take place from September 23 - October 3, 1939, between Argentina, Brazil, Chile, Colombia, Cuba, Mexico, Panama, Peru, and the United States.<sup>61</sup> The two primary points of discussion were neutrality, and the “protection of the peace of the western hemisphere.”<sup>62</sup> With regards to neutrality, the United States aimed to discuss the “rights and duties of neutrals and belligerents in the present situation with a view to the preservation of the integral sovereignty and the peace of the nations of the Western Hemisphere.”<sup>63</sup> The discussion of belligerent and neutral rights decidedly shifted from the realm of protecting economic trade towards the realm of security and the protection of sovereignty and peace. The United States wanted to extend its territorialized armed neutrality zone to encompass the entire western hemisphere. President Roosevelt envisioned relying on the Argentine navy to patrol the waters south of Rio de Janeiro, and “the Brazilians from there on as far north as they could.”<sup>64</sup> President Roosevelt anticipated that Brazil would invite the American Navy to patrol Brazilian waters down to Cape São Roque.<sup>65</sup> The purpose of the South American patrol, Secretary Hull stated, would be to prevent belligerent powers, i.e. Nazi Germany, from getting a foothold in the

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<sup>59</sup>Scarborough: *The Neutrality Patrol: To Keep Us Out of World War II?* (see n. 52), p. 19.

<sup>60</sup>Cordell Hull: *The Secretary of State to the Ambassador in Argentina (Armour)*, vol. *Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V*, Page 15-16, September 3, 1939, url: [https://history.state.gov/historicaldocuments/frus1939v05/pg\\_15](https://history.state.gov/historicaldocuments/frus1939v05/pg_15).

<sup>61</sup>*Ibid.*

<sup>62</sup>Cordell Hull: *The Secretary of State to the Ambassador in Brazil (Caffery)*, vol. *Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V*, Page 17-18, September 4, 1939, url: [https://history.state.gov/historicaldocuments/frus1939v05/pg\\_17](https://history.state.gov/historicaldocuments/frus1939v05/pg_17).

<sup>63</sup>*Ibid.*

<sup>64</sup>Cordell Hull: *The Secretary of State to the American Delegate (Welles)*, vol. *Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 58*, September 29, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d58>.

<sup>65</sup>*Ibid.*

hemisphere.<sup>66</sup> It aimed to deny belligerent powers the use of the coast so that submarine bases could not be established in the region.<sup>67</sup> To accomplish this, the agenda suggested that the Union together or as individual states take action to;

1. To suppress violations of neutrality and subversive activities by nationals of belligerent countries or others seeking to promote the interests of belligerent powers in the territory and jurisdiction of any or all of the American Republics.
2. To enforce the obligations of belligerent public and merchant vessels and aircraft in neutral territorial waters and areas.
3. To safeguard the carrying on of legitimate international trade, commerce, and communications of the American Republics on the high seas, on land and in the air.
4. To discharge neutral obligations toward belligerent nations.<sup>68</sup>

On September 12, 1939, Secretary Hull transmitted a note to the Argentine Ambassador arguing that that “the Pan American Union should be authorized by all the American republics to propose to the belligerents that certain sections of the southern Atlantic and Pacific be closed to naval warfare and that the belligerents should come to some arrangement with the Union as to the protection of neutral shipping.”<sup>69</sup> The plan proposed to create a multi-national neutrality patrol monitoring a safety-zone that extended “a considerable distance from shore and entirely around this hemisphere to the Canadian border.”<sup>70</sup>

Previously, in 1936 at the Inter-American Conference for Maintenance of Peace, the 21 Republics of the Western Hemisphere ratified the Convention for the Maintenance, Preser-

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<sup>66</sup>Cordell Hull: Memorandum of Conversation, by the Secretary of State, vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 55, September 27, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d55>.

<sup>67</sup>Ibid.

<sup>68</sup>Hull: The Secretary of State to the Ambassador in Brazil (Caffery) (see n. 62).

<sup>69</sup>Idem: The Secretary of State to the Ambassador in Argentina (Armour), vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 50, September 12, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d50>.

<sup>70</sup>Idem: Memorandum of Conversation, by the Secretary of State (see n. 66).

vation and Reestablishment of Peace.<sup>71</sup> This convention stipulated that, in order to prevent conflict in the Western Hemisphere, originating both from within and without, the American Republics should cooperate “in order to preserve the peace of the American continents.”<sup>72</sup> In 1938, while the spectre of war loomed over Europe, the American Republics renewed their commitment for hemispheric peace and established an institutional architecture in which the Foreign Ministers of the gathered nations could discuss danger posed by the coming conflict.<sup>73</sup> When the ministers of the American Republics convened in Panama on September 23, they did so with the intention of providing for “the maintenance of a common policy of neutrality,” protecting “the American continents as far as possible from the effects of the hostilities of Europe by the establishment of a security zone,” and “to initiate measures of economic cooperation intended to protect American Republics as far as possible from the economic effects of the disruption of trade with the European states.”<sup>74</sup> In order to accomplish this, the meeting formed the Inter-American Neutrality Committee, a body that would offer non-binding recommendations to the 21 states on how best they could uniformly accomplish their “neutral duties” and maintain their “neutral rights.”<sup>75</sup>

The October 3, 1939, Declaration of Panama reiterated the neutral intentions of the American Republics, stating “there can be no justification for the interests of the belligerents to prevail over the rights of neutrals.”<sup>77</sup> The Declaration stated that the exigencies of the current conflict do not justify disrupting “the normal maritime routes of communication and trade between the countries of America.”<sup>78</sup> In order to secure those maritime routes

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<sup>71</sup>Charles G Fenwick: The inter-American neutrality committee, in: American Journal of International Law 35.1 (1941), pp. 12–40, here p. 12.

<sup>72</sup>Ibid., p. 12.

<sup>73</sup>Ibid., p. 12.

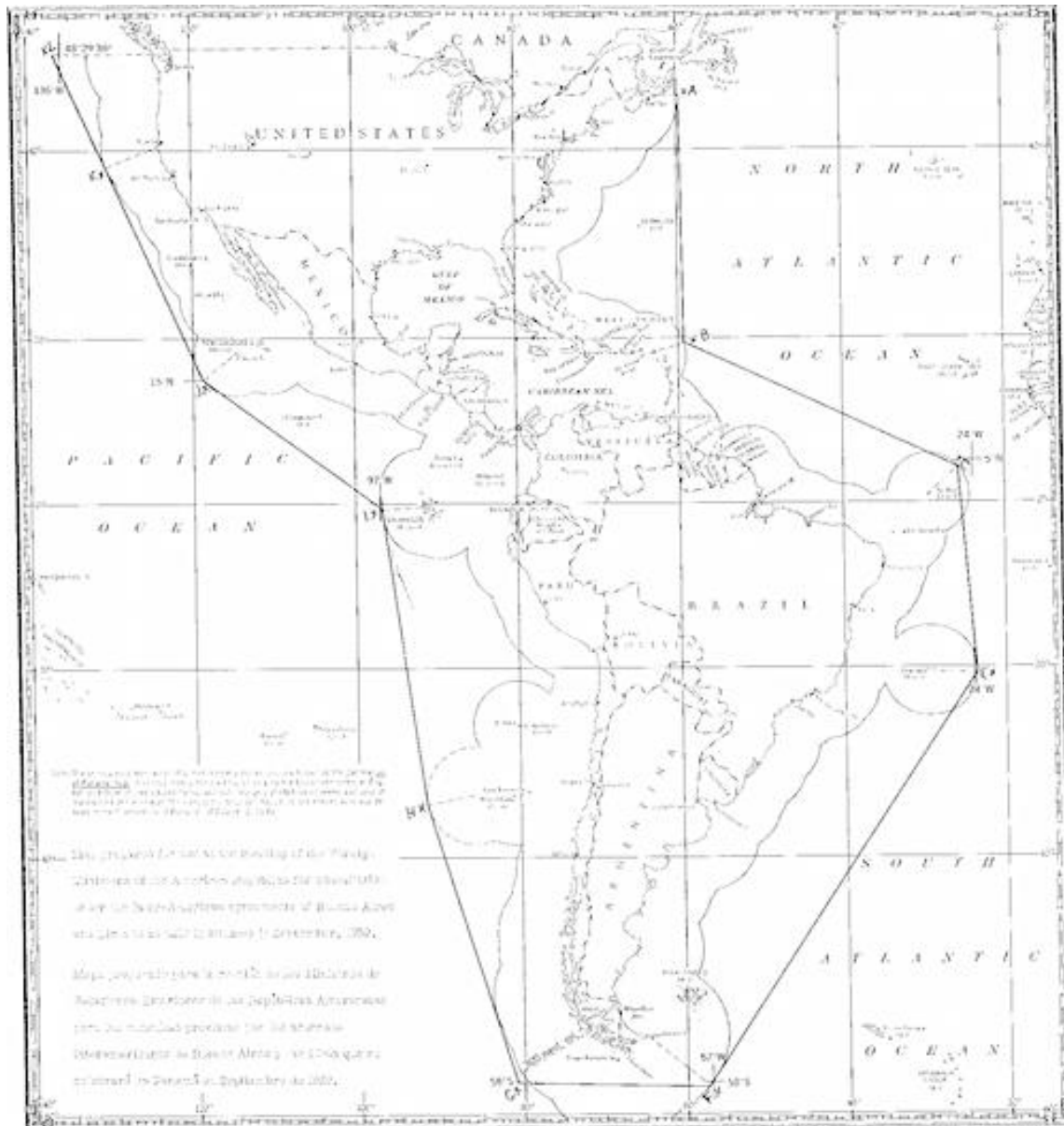
<sup>74</sup>Ibid., p. 13.

<sup>75</sup>Ibid., p. 14.

<sup>77</sup>Declaration of Panamá, vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 60, October 3, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d60>.

<sup>78</sup>Ibid.



Figure 7.1: Declaration of Panama Map, Hemispheric Neutrality Zone<sup>76</sup>

of communication on behalf of the neutral countries to protect their neutral rights, the Declaration of Panama established the Hemispheric Neutrality Zone; “a zone of security including all the normal maritime routes of communication and trade between the countries

of America.”<sup>79</sup> The zone demarcated a territory in which all “hostile acts by belligerents” was to be excluded.<sup>80</sup> The establishment of this zone was founded on the justification that the Western Hemispheric countries had “an inherent right” to self-protection.<sup>81</sup> According to Charles Fenwick, an American citizen on the Inter-American Neutrality Committee<sup>82</sup>,

... the claim of the American Republics in respect to the zone had resulted from the adoption by the belligerents of methods of warfare which had ‘practically closed the highways of neutral commerce with many nations of Europe,’ resulting in heavy losses to neutral shipping. The establishment by the belligerents of war zones fully justified the neutral American States in making their continental waters a zone of peaceful activities by segregating them from the theater of war.<sup>83</sup>

Therefore, the territorialized neutrality zone contained, and enabled, the “open sea” for the purpose of international maritime trade.<sup>84</sup> The zone extended beyond the territorial waters of the individual states in order to secure the international sea lines of communication. It was not the purpose to simply protect the coasting trade of the hemisphere, but all international commerce between the continents.<sup>85</sup> The Declaration of Panama stated that if belligerents engaged in hostilities in the cordoned sea-space, the American republics would meet to discuss an appropriate response; threatening military action to defend the integrity of the Neutrality Zone.<sup>86</sup> To monitor, the fourth provision of the Declaration of Panama established that, during times of war, the American Republics will patrol, “her individually or collectively, as may be agreed upon by common consent, and in so far as the means and

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<sup>79</sup>Declaration of Panamá (see n. 77).

<sup>80</sup>Fenwick: The inter-American neutrality committee (see n. 71), p. 19.

<sup>81</sup>Ibid., pp. 19, 22.

<sup>82</sup>The Inter-American Neutrality Committee was made up of seven “experts of international law who were designated by the Governing Board of the Pan American Union.”*ibid.*, p. 13 The members were not to be conceived of as representatives of their home countries, but representatives of the American Republics as a whole.

<sup>83</sup>Ibid., p. 22.

<sup>84</sup>Ibid., p. 24.

<sup>85</sup>Ibid., p. 22.

<sup>86</sup>Hull: Memorandum of Conversation, by the Secretary of State (see n. 66).

resources of each may permit,” within the territory as specified in Figure 6.1.<sup>87</sup>

When the French Ambassador requested more information on the practicalities of the hemispheric safety zone, Secretary of State Cordell Hull responded stating “that it was really just an extension to the lower end of the Caribbean of our present patrol policy in the Atlantic.”<sup>88</sup> Thus, the purpose of organizing the Pan-American states for this task, from the perspective of the United States, was to ensure U.S. military access into Caribbean and South American waters.

For example, to this end Secretary Hull transmitted a message to the Chargé in Guatemala instructing him to come to an arrangement with the government of Guatemala to allow the United States access to Guatemalan territorial waters for patrol.<sup>89</sup> Secretary Hull stated, “it is believed that it would be desirable if arrangements could be concluded to grant a general authorization for flights by aircraft of this Government over the territory of Guatemala, with any necessary landings at airports, and for entrance into its territorial waters of vessels of the United States Navy in connection with the carrying out of the observation patrols.”<sup>90</sup> While allowing the United States to patrol foreign waters was “a matter for the determination of the governments of those countries,” the United States, according to Secretary Hull, felt that it was “essential” to uphold the hemispheric neutrality zone.<sup>91</sup> Guatemala agreed to allow

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<sup>87</sup>Declaration of Panamá (see n. 77).

<sup>88</sup>Cordell Hull: Memorandum of Conversation, by the Secretary of State, vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 62, October 7, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d62>.

<sup>89</sup>Sumner Welles: The Secretary of State to the Chargé in Guatemala (Cabot), vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 74, December 12, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d74>.

<sup>90</sup>Ibid.

<sup>91</sup>Ibid.

U.S. warships<sup>92</sup>, along with Nicaragua<sup>93</sup>, Costa Rica<sup>94</sup>, Honduras<sup>95</sup>, and El Salvador.<sup>96</sup>

As a direct result of the American Security Zone organized and established by the United States of America, in April of 1940, Uruguay proposed that instead of simply defending an arbitrary swath of seascape off the coasts of the American states, that the Western Hemisphere endeavour to extend the sovereign maritime territory of each state.<sup>97</sup> Charles Fenwick of the Inter-American Neutrality Committee recounted Uruguay's proposal that

instead of establishing a contiguous zone, indefinite and vague, for the exercise of a limited jurisdiction for the protection of certain interests which, in the majority of cases, are in the end bound up with those of security, it is better to give effect to the unequivocal aspiration of the American Republics to establish a definitive rule of maritime sovereignty on the part of each state to a distance of maritime area greater than the present obsolete conception of three miles<sup>98</sup>

While Uruguay originally proposed a 25 mile territorial sea, the Inter-American Neutrality Committee settled on recommending extending the sovereign maritime territory from the traditional three nautical miles to twelve.<sup>99</sup> Only Charles Fenwick lodged a dissenting opinion.<sup>100</sup> Fenwick argued that extending the maritime territorial seas would not provide

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<sup>92</sup>John Moors Cabot: The Chargé in Guatemala (Cabot) to the Secretary of State, vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 81, January 18, 1940, url: <https://history.state.gov/historicaldocuments/frus1939v05/d81>.

<sup>93</sup>Baldwin: The Chargé in Nicaragua (Baldwin) to the Secretary of State, vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 75, December 29, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d75>.

<sup>94</sup>William Hornibrook: The Minister in Costa Rica (Hornibrook) to the Secretary of State, vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 76, December 30, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d76>.

<sup>95</sup>John D. Erwin: The Minister in Honduras (Erwin) to the Secretary of State, vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 77, December 30, 1939, url: <https://history.state.gov/historicaldocuments/frus1939v05/d77>.

<sup>96</sup>Frazer: The Minister in El Salvador (Frazer) to the Secretary of State, vol. Foreign Relations of the United States Diplomatic Papers, 1939, The American Republics, Volume V, Document 78, January 5, 1940, url: <https://history.state.gov/historicaldocuments/frus1939v05/d78>.

<sup>97</sup>Charles G Fenwick: The inter-American neutrality committee, in: American Journal of International Law 36.1 (1942), pp. 17–22, here p. 18.

<sup>98</sup>Ibid., p. 18.

<sup>99</sup>Ibid., p. 19.

<sup>100</sup>Ibid., p. 21.

any more security to the American states than was already being gained by the Security Zone.<sup>101</sup> Fenwick urged that the matter be seriously considered after the war and include the entire international community so that a meaningful change to the law of the sea could be made.<sup>102</sup> While the matter was not pursued further during the war, it set the stage for the post-war United Nations Conventions on the Law of the Sea around which American post-war freedom of the seas discourse would be shaped.

On June 14, 1940, eight days before France signed an armistice with Germany, the Inter-American Neutrality Committee submitted a memorandum to the Declaration of Panama member states recommending a change in administering the hemispheric security zone.<sup>103</sup> The memorandum stated that the conditions of the present war have changed to such a degree since the original Declaration of Panama, that the strict conception of impartiality on which it was based could no longer apply.<sup>104</sup> Following the invasion of Holland, Belgium, and Luxemburg the month prior, the Inter-American Neutrality Committee stated that German actions were undermining the law of neutrality as a whole.<sup>105</sup> The unprovoked German invasions, Fenwick stated, were “wrongs committed against all other neutral States,” because they were “an attack against upon the fundamental principles of neutrality upon which all the rights and duties associated with that status are dependent.”<sup>106</sup> Fenwick, the American member of the Inter-American Neutrality Committee, later concluded,

.. neutrality as a system of legal rights and duties necessarily implied the relations of neutral states to belligerents which were acting within the scope of their own acknowledged rights and duties. But the time had passed when war could be accepted as a legal procedure. The experience of the World War, and even more

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<sup>101</sup>Ibid., p. 21.

<sup>102</sup>Ibid., p. 21.

<sup>103</sup>Philip W. Bonsai: Memorandum by Mr. Philip W. Bonsai of the Division of the American Republics, vol. Foreign Relations of the United States Diplomatic Papers, 1940, The American Republics, Volume V, Document 407, June 14, 1940, url: <https://history.state.gov/historicaldocuments/frus1940v05/d407>.

<sup>104</sup>Ibid.

<sup>105</sup>Fenwick: The inter-American neutrality committee (see n. 71), pp. 25–26.

<sup>106</sup>Ibid., pp. 25–26.

so of the present war, had shown that the institution of war, as it was understood at The Hague in 1907 [Which reiterated the precepts of the 1856 treaty of Paris], could not be restrained and kept within legal bounds; that war was essentially a lawless and anarchical procedure which tended of its very nature to break through all restraints; and that neutrality was of itself no protection for the small state, no matter how careful it might be to fulfill the duties which the status of neutrality imposed upon it. There was, therefore, no “future” for neutrality.<sup>107</sup>

It therefore raised the question of whether the American Republics could remain impartial between the belligerent powers while remaining outside the war.<sup>108</sup> Fenwick argued, according to a memorandum to the U.S. Under Secretary of State, that the American Republics adopt a posture of “defensive neutrality” whereby they adopt a conception of neutrality that signifies their non-belligerent status but does not preclude partiality.<sup>109</sup> While the Pan American Union as a whole vacillated on its response for fear of German retaliation, for the United States, it signified “a determination to render all possible material aid to the Allies.”<sup>110</sup>

### 7.3 Neutrality Without Impartiality: The Undeclared War in the Atlantic

On July 17, 1940, just three days after German troops took Paris, President Roosevelt, via Admiral Stark, requested \$4 billion in order to build a “two ocean” navy.<sup>111</sup> The U.S. government was worried that Britain would fall next, and with it, deliver the sea power of the Royal Navy to Nazi Germany.<sup>112</sup> Congress approved the request. On July 19, 1940, an

<sup>107</sup>Fenwick: The inter-American neutrality committee (see n. 71), p. 40.

<sup>108</sup>Ibid., p. 26.

<sup>109</sup>Ellis O. Briggs: Memorandum by the Assistant Chief of the Division of the American Republics (Briggs) to the Under Secretary of State (Welles), vol. Foreign Relations of the United States Diplomatic Papers, 1940, The American Republics, Volume V, Document 417, August 14, 1940, url: <https://history.state.gov/historicaldocuments/frus1940v05/d417>.

<sup>110</sup>Bonsai: Memorandum by Mr. Philip W. Bonsai of the Division of the American Republics (see n. 103).

<sup>111</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), p. 289.

<sup>112</sup>Potter: Sea power: A naval history (see n. 64), p. 255.

additional “thirteen battleships, six carriers, thirty-two cruisers, 101 destroyers, and thirty-nine submarines” were authorized for construction.<sup>113</sup> When France fell to Germany on June 22, 1940, the last disarmament hold outs in Congress capitulated.<sup>114</sup> From that point forward, American naval production was limited only by the country’s physical industrial capacity.<sup>115</sup>

When France signed the armistice with Germany, on June 22, 1940, the German navy gained the use of France’s Atlantic ports.<sup>116</sup> This allowed Germany to extend its unrestricted submarine warfare campaign from the coast of Europe into the mid-Atlantic.<sup>117</sup> During the summer of 1940, between June and October, German submarines sank 274 Allied merchant ships from the newly acquired French ports.<sup>118</sup> This done, according to Hagan, with only 25 submarines in operation in a given month and only six to eight boats on patrol at a time.<sup>119</sup>

On December 7, 1940, British Prime Minister Winston Churchill sent a telegram to President Roosevelt asking for assistance.<sup>120</sup> Churchill stated that in the coming year, the survival of Britain would depend upon securing the carrying trade to the British isles.<sup>121</sup> German naval gains, particularly around the northern and western coasts of France, had cut off all but one sea route to Great Britain.<sup>122</sup> Churchill stated that unless Britain could ensure its ability to import food and munitions, and ensure the transport of fighting forces to enemy theaters, Britain would fall to Germany before the defensive preparations of the United States are complete.<sup>123</sup> “It is therefore in shipping and in the power to transport across the oceans,

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<sup>113</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 289.

<sup>114</sup>Potter: *Sea power: A naval history* (see n. 64), p. 235.

<sup>115</sup>*Ibid.*, p. 235.

<sup>116</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 291.

<sup>117</sup>*Ibid.*, p. 291.

<sup>118</sup>*Ibid.*, p. 291.

<sup>119</sup>*Ibid.*, p. 291.

<sup>120</sup>Winston Churchill: *The British Prime Minister (Churchill) to President Roosevelt*, vol. *Foreign Relations of the United States Diplomatic Papers, 1940, The British Commonwealth, The Soviet Union, The Near East and Africa, Volume III, Document 20, December 7, 1940*, url: <https://history.state.gov/historicaldocuments/frus1940v03/d20>.

<sup>121</sup>*Ibid.*

<sup>122</sup>*Ibid.*

<sup>123</sup>*Ibid.*

particularly the Atlantic Ocean,” Churchill stated, “that in 1941 the crunch of the whole war will be found.”<sup>124</sup> Churchill suggested a number of ways that President Roosevelt could contribute to the “common purpose” of defeating “Nazi and Fascist tyranny,” including,

(1) the reassertion by the United States of the doctrine of the freedom of the seas from illegal and barbarous warfare in accordance with the decisions reached after the late Great War, and as freely accepted and defined by Germany in 1935. From this, the United States ships should be free to trade with countries against which there is not an effective legal blockade. ...

(3) Failing the above, the gift, loan or supply of a large number of American vessels of war, above all destroyers already in the Atlantic, is indispensable to the maintenance of the Atlantic route. Further, could not United States naval forces extend their sea control over the American side of the Atlantic, so as to prevent molestation by enemy vessels of the approaches to the new line of naval and air bases which the United States is establishing in British islands in the Western Hemisphere. The strength of the United States naval forces is such that the assistance in the Atlantic that they could afford us, as described above, would not jeopardise control over the Pacific.”<sup>125</sup>

Churchill indicated, however, that Britain’s need for materiel was far greater than her cash reserves. If the U.S. held to its policy of cash-and-carry, even if Great Britain won the war, the nation would be left “stripped to the bone.”<sup>126</sup>

Roosevelt, who had just been elected to an unprecedented third term in office, responded proposing what would later be known as the Lend-Lease plan.<sup>127</sup> Roosevelt informed Churchill that it was the United States’ belief that the security of Great Britain was the best defense for the U.S. itself.<sup>128</sup> The development of weapons for Great Britain would provide the im-

<sup>124</sup>Churchill: The British Prime Minister (Churchill) to President Roosevelt (see n. 120).

<sup>125</sup>Ibid.

<sup>126</sup>Ibid.

<sup>127</sup>Cordell Hull: The Secretary of State to the Chargé in the United Kingdom (Johnson), vol. Foreign Relations of the United States Diplomatic Papers, 1940, The British Commonwealth, The Soviet Union, The Near East and Africa, Volume III, Document 22, December 20, 1940, url: <https://history.state.gov/historicaldocuments/frus1940v03/d22>.

<sup>128</sup>Ibid.



petus to develop the shipyards and munitions facilities needed for U.S. national defense.<sup>129</sup> Roosevelt stated, “The narrow-minded fellow had assumed that the only way [to provide Great Britain with materiel] was to repeal certain existing statutes like the Neutrality Act... and then lend the money to Great Britain to be spent here.”<sup>130</sup> Instead, Roosevelt proposed a mechanism whereby the United States would lend Great Britain the resources needed and then “get them back after the war, if they are intact.”<sup>131</sup> If they are not intact, the United States could enter into an agreement with Great Britain to be reimbursed at a later date.<sup>132</sup> Thus, the new ‘Lend-Lease’ agreement “would substitute for the dollar sign a gentleman’s obligation to repay in kind.”<sup>133</sup> On May 11, 1941, the Lend-Lease Act was passed by Congress giving the President the authority to “to sell, transfer title to, exchange, lease, lend, or otherwise dispose of” goods of war to any country that the President “deems vital to the defense of the United States.”<sup>134</sup>

On May 27, 1941, President Roosevelt delivered a Fireside Chat to the American public on ‘An Unlimited National Emergency.’<sup>135</sup> In the presence of the Pan American Union Governing Board and the Canadian Minister, hemispheric representatives, President Roosevelt announced that what started as a European war had become, as the Nazis intended, a world war for global domination.<sup>136</sup> Because of this, unless the advance of Hitlerism was “forcibly checked now,” the western hemisphere would face the direct threat of Nazi attack.<sup>137</sup> President Roosevelt reiterated that his advocacy for the aid of fellow democracies was based on “hard-headed concern for our own security and for the kind of safe and civilized world in

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<sup>129</sup>Ibid.

<sup>130</sup>Ibid.

<sup>131</sup>Ibid.

<sup>132</sup>Ibid.

<sup>133</sup>Ibid.

<sup>134</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 294.

<sup>135</sup>Franklin Delano. Roosevelt: Fireside Chat 17: On An Unlimited National Emergency, May 27, 1941, url: <https://millercenter.org/the-presidency/presidential-speeches/may-27-1941-fireside-chat-17-unlimited-national-emergency>.

<sup>136</sup>Ibid.

<sup>137</sup>Ibid.

which we wish to live.”<sup>138</sup> However, President Roosevelt stated, the only way that the Axis Powers could achieve their goal of world domination would be by securing control of the seas.<sup>139</sup> Without it, the Nazi and Fascist dictatorships would be defeated. For this reason, Roosevelt asserted, Germany is striving so hard to defeat Great Britain.<sup>140</sup> Because of this, the United States must not let command of the sea fall in the hands of the Axis Powers. President Roosevelt stated,

All freedom- meaning freedom to live, and not freedom to conquer and subjugate other peoples-depends on freedom of the seas. All of American history—North, Central, and South American history – has been inevitably tied up with those words, “freedom of the seas.”

Since 1799, 142 years ago, when our infant Navy made the West Indies and the Caribbean and the Gulf of Mexico safe for American ships ... we have striven and fought in defense of freedom of the seas for our own shipping, for the commerce of our sister Republics, for the right of all Nations to use the highways of world trade – and for our own safety.

During the first World War we were able to escort merchant ships by the use of small cruisers, gunboats, and destroyers; and that type, called a convoy, was effective against submarines. In this second World War, however, the problem is greater. It is different because the attack on the freedom of the seas is now fourfold: first – the improved submarine; second – the much greater use of the heavily armed raiding cruiser or the hit-and-run battleship; third – the bombing airplane, which is capable of destroying merchant ships seven or eight hundred miles from its nearest base; and fourth – the destruction of merchant ships in those ports of the world that are accessible to bombing attack.<sup>141</sup>

The attack on the freedom of the seas could be mitigated, Roosevelt stated, by increasing domestic ship production and by helping to protect vessels on the high seas.<sup>142</sup>

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<sup>138</sup>Roosevelt: Fireside Chat 17: On An Unlimited National Emergency (see n. 135).

<sup>139</sup>Ibid.

<sup>140</sup>Ibid.

<sup>141</sup>Ibid.

<sup>142</sup>Ibid.

Allowing Germany to gain footholds in Greenland, Iceland, or the Azores and the Cape Verde Islands, would greatly threaten the “freedom of the Atlantic,” and provide stepping stones for an attack on the western hemisphere.<sup>143</sup> Because of this, President Roosevelt outlined a two part national policy. The first policy of the United States was to actively resist “every attempt by Hitler to extend his Nazi domination to the Western Hemisphere” and to prevent his “attempt to gain control of the seas.”<sup>144</sup> The second policy put forth was to provide all necessary assistance to Britain in resisting Hitler.<sup>145</sup> To do this, Roosevelt announced, “All additional measures necessary to deliver the goods will be taken.”<sup>146</sup> In his fireside chat Roosevelt declared,

As the President of a united and determined people, I say solemnly:

We reassert the ancient American doctrine of freedom of the seas.<sup>147</sup>

Thus, President Roosevelt definitively severed the connection between neutrality and impartiality which characterized freedom of the seas in centuries prior. As stated previously, before President Roosevelt’s intervention in the discourse, neutral merchants were prohibited from supplying belligerents with materiel of war. It remained squarely within the rights of belligerent parties to interdict such materiel that was considered contraband. However, Roosevelt’s invocation of freedom of the seas to render American assistance to England’s fight against Germany stripped any pretence of impartiality from the discourse as it existed prior.

In June of 1941, the United States government announced that, in order to prevent Iceland from falling to Germany the U.S. would take responsibility for its defense and replace the British troops garrisoned on the Island with ‘neutral’ American forces.<sup>148</sup> Although Chief

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<sup>143</sup>Ibid.

<sup>144</sup>Ibid.

<sup>145</sup>Ibid.

<sup>146</sup>Ibid.

<sup>147</sup>Ibid.

<sup>148</sup>The British Embassy to the Department of State, vol. Foreign Relations of the United States Diplomatic

of Naval Operations Harold Stark advised that the plan would be constituted as a “virtual act of war,” President Roosevelt authorized the American Neutrality Zone to be extended as far eastward as 26 degrees west longitude, encompassing practically the entire Atlantic ocean.<sup>149</sup> The decision to unilaterally extend the “so-called security zone and patrol areas” was discussed between Roosevelt and Churchill in April of that year.<sup>150</sup> Roosevelt stated that such an extension would facilitate the security of the Western Hemisphere and “favorably affect” the British “shipping problem.”<sup>151</sup> The June U.S. announcement stated,

It is the declared policy of the United States to keep Hitlerism away from any points in the world which could be used and would be used as bases of attack against the Americas. Iceland constitutes one of these points and its occupation by the Nazis would involve an immediate threat to the United States. It would also gravely menace the delivery of supplies to Britain which the United States in conformity with the ancient American doctrine of freedom of the seas and the declared intention to render all possible aid to the democracies in the fight against Hitlerism, are determined shall be delivered.<sup>152</sup>

In July of 1941 the United States began stationing Marines in Iceland and establishing aerial convoy coverage to monitor shipping in the Atlantic between Iceland and Newfoundland.<sup>153</sup> In September of 1941, U.S. warships began escorting British merchant ships from the American coast to a ‘mid-ocean meeting point’ south of Iceland where merchant ships would be handed over to the Royal Navy to be escorted the rest of the way to the British Isles.<sup>154</sup>

Churchill believed that it was Roosevelt’s intention to take increasingly provocative mea-

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Papers, 1941, Europe, Volume II, Document 769, June 16, 1941, url: <https://history.state.gov/historicaldocuments/frus1941v02/d769>.

<sup>149</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 294; Kimball: *Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes* (see n. 48), p. 207.

<sup>150</sup>Idem: *Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes* (see n. 48), p. 166.

<sup>151</sup>*Ibid.*, p. 166.

<sup>152</sup>The British Embassy to the Department of State (see n. 148).

<sup>153</sup>Potter: *Sea power: A naval history* (see n. 64), p. 255; Hagan: *This people’s navy: The making of American sea power* (see n. 65), pp. 294–5.

<sup>154</sup>Potter: *Sea power: A naval history* (see n. 64), p. 255.

asures so that the Germans would attack American forces and give the United States justification for entering into the war.<sup>155</sup> While evidence does not exist to support the claim, Churchill told the British War Cabinet that Roosevelt “had said that he would wage war, but not declare it, and that he would become more and more provocative.”<sup>156</sup> Churchill believed, in part, that the American convoy system to escort British merchant ships from the American coast was intended to “force an incident” between the United States and Germany.<sup>157</sup>

On September 4, 1941, the American destroyer *Greer* was en route to Iceland when it was fired upon by a German submarine.<sup>158</sup> The American destroyer had been tracking the submarine for two hours while a British patrol plane attempted to destroy the German boat.<sup>159</sup> The *Greer*, “in waters which the Government of the United States had declared to be waters of self-defense,” returned fire on the submarine with depth charges.<sup>160</sup> Both attacks missed.<sup>161</sup> President Roosevelt used the attack on the *Greer* to request revisions to the Neutrality Acts that would give the United States more latitude to act in the present conflict.<sup>162</sup> In a Fireside Chat delivered on September 11, President Roosevelt told the people of the United States that the attack on the *Greer* was not an isolated event, but indicative of “the Nazi design to abolish the freedom of the seas, and to acquire absolute control and domination of the seas for themselves.”<sup>163</sup> Roosevelt continued,

Under Nazi control of the seas, no merchant ship of the United States or of

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<sup>155</sup>Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes (see n. 48), pp. 229–230.

<sup>156</sup>Ibid., pp. 229–230.

<sup>157</sup>Ibid., pp. 229–230.

<sup>158</sup>Franklin Delano. Roosevelt: Fireside Chat 18: On The Greer Incident, September 11, 1941, url: <https://millercenter.org/the-presidency/presidential-speeches/september-11-1941-fireside-chat-18-greer-incident>; Potter: Sea power: A naval history (see n. 64), p. 255.

<sup>159</sup>Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes (see n. 48), p. 236.

<sup>160</sup>Roosevelt: Fireside Chat 18: On The Greer Incident (see n. 158); Potter: Sea power: A naval history (see n. 64), p. 255.

<sup>161</sup>Idem: Sea power: A naval history (see n. 64), p. 255.

<sup>162</sup>Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes (see n. 48), p. 236.

<sup>163</sup>Roosevelt: Fireside Chat 18: On The Greer Incident (see n. 158).

any other American Republic would be free to carry on any peaceful commerce, except by the condescending grace of this foreign and tyrannical power. The Atlantic Ocean which has been, and which should always be, a free and friendly highway for us would then become a deadly menace to the commerce of the United States, to the coasts of the United States, and even to the inland cities of the United States.<sup>164</sup>

Through their policy of unrestricted submarine warfare, Germany has declared “on paper, that great areas of the seas ... are to be closed, and that no ships may enter them for any purpose, except at peril of being sunk.”<sup>165</sup> President Roosevelt announced that the United States would not cease in its mission to deliver the supplies needed to destroy Hitler.<sup>166</sup> German violence would not deter the United States from continuing to maintain its supply lines to Britain, or to stand up for the freedom of shipping on the high seas.<sup>167</sup>

Generation after generation, America has battled for the general policy of the freedom of the seas. And that policy is a very simple one, but a basic, a fundamental one. It means that no nation has the right to make the broad oceans of the world at great distances from the actual theatre of land war, unsafe for the commerce of others.<sup>168</sup>

However, what Roosevelt neglected to mention the “ancient doctrine” only recently became divorced from impartiality. In the history of the concept of freedom of the seas there had never been a right for neutral powers to ship contraband of war to a belligerent power. The very action that Roosevelt was invoking freedom of the seas discourse to defend had been considered unprotected by the doctrine of neutral rights for centuries prior. No archival sources exist to indicate that Roosevelt consciously misrepresented or reconceptualized the concept of freedom of the seas to further his aim of entering the war on the side of the British.

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<sup>164</sup>Roosevelt: Fireside Chat 18: On The Greer Incident (see n. 158).

<sup>165</sup>Ibid.

<sup>166</sup>Ibid.

<sup>167</sup>Ibid.

<sup>168</sup>Ibid.

However, with impartiality evacuated, new discursive conceptualization distinctly facilitated that end. Following the attack on the *Greer*, Roosevelt ordered all American warships to destroy German submarines on sight.<sup>169</sup>

“No matter what it takes,” Roosevelt stated, “we will keep open the line of legitimate commerce in these defensive waters of ours.”<sup>170</sup> It is up to the navy and air patrol, rather than international agreement, to maintain “the American policy of freedom of the seas.”<sup>171</sup> Practically, Roosevelt elaborated, this means that the United States military will assume the responsibility of protecting all commerce within its demarcated zone of neutrality.<sup>172</sup> A demarcated zone established and protected by American Mahanian sea control, in order to defend sea lines of communication.<sup>173</sup> From this point going forward, Roosevelt stated, if German or Italian ships of war enter the American neutrality zone, they do so at peril of being sunk.<sup>174</sup> The declaration brought U.S. and German ships into direct confrontation in the North Atlantic.

On October 7, 1941, President Roosevelt wrote to Churchill stating his intention to throw off the restrictions imposed by the Neutrality Acts in order to aid the British. Roosevelt stated,

I have determined to send a message to Congress in the immediate future recommending sweeping amendments to our Neutrality Act. I am convinced that this Act is seriously crippling our means of helping you. I want not only to arm all of our ships but I want to get the authority from Congress to send American Flagships directly into British ports.<sup>175</sup>

That same night, October 7, 1941, the American destroyer *Kearny* was torpedoed by a

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<sup>169</sup>Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes (see n. 48), pp. 229–230.

<sup>170</sup>Roosevelt: Fireside Chat 18: On The Greer Incident (see n. 158).

<sup>171</sup>Ibid.

<sup>172</sup>Ibid.

<sup>173</sup>Baer: US Naval Strategy 1890-1945 (see n. 32), p. 20.

<sup>174</sup>Roosevelt: Fireside Chat 18: On The Greer Incident (see n. 158).

<sup>175</sup>Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes (see n. 48), p. 245.

German submarine while escorting a convoy of British merchant ships near Iceland.<sup>176</sup> While the vessel did not sink, 11 Americans were killed in the attack.<sup>177</sup> That same evening ten merchant ships were sunk by German submarines with no submarine casualties in kind.<sup>178</sup>

Roosevelt used the *Kearny* as a rallying call to claim in an October 27, 1941, Navy Day speech that “the shooting has started,” “America has been attacked,” and “history has recorded who fired the first shot.”<sup>179</sup> Roosevelt stated that Hitler’s intent in attacking the *Kearny* was to “frighten the American people off the high seas.”<sup>180</sup> Roosevelt stated,

Naturally we reject that absurd and insulting suggestion. We reject it because of our own self-interest, because of our own self-respect, because, most of all, of our own good faith. Freedom of the seas is now, as it has always been, a fundamental policy of your government and mine.<sup>181</sup>

Roosevelt told the American public that the United States needed to destroy Hitler before Nazi conquest reached the shores of the United States.<sup>182</sup> Roosevelt claimed he possessed a secret map which proved that Germany intended to seize the Panama canal and choke the lifeline of the United States.<sup>183</sup> Roosevelt promised the American public that the United States would never let Nazi designs come to fruition, because if they did, Hitler’s Germany would outlaw all religions in the United States, would ban the symbol of the cross, and would replace the “God of Love and Mercy” with “A God of Blood and Iron.”<sup>184</sup> Roosevelt

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<sup>176</sup>Potter: *Sea power: A naval history* (see n. 64), p. 255.

<sup>177</sup>Idem: *Sea power: A naval history* (see n. 64), p. 255; Kimball: *Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes* (see n. 48), p. 264.

<sup>178</sup>Idem: *Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes* (see n. 48), p. 264.

<sup>179</sup>Franklin Delano. Roosevelt: Franklin D. Roosevelt’s “Navy Day Address” on the Attack on the Destroyer *Kearny*, October 27, 1941, url: <https://www.ibiblio.org/pha/policy/1941/411027a.html>; Kimball: *Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes* (see n. 48), p. 264.

<sup>180</sup>Roosevelt: Franklin D. Roosevelt’s “Navy Day Address” on the Attack on the Destroyer *Kearny* (see n. 179).

<sup>181</sup>Ibid.

<sup>182</sup>Ibid.

<sup>183</sup>Ibid.

<sup>184</sup>Ibid.



called upon Congress to amend the Neutrality Acts so that America could defend itself.<sup>185</sup>

Roosevelt proclaimed,

Our American merchant ships must be armed to defend themselves against the rattlesnakes of the sea.

Our American merchant ships must be free to carry our American goods into the harbors of our friends.

Our American merchant ships must be protected by our American Navy.<sup>186</sup>

Two weeks later, the U.S. destroyer *Reuben James* was attacked and sunk by a German U-boat, killing over one hundred American sailors.<sup>187</sup> On November 13, Congress passed legislation amending the neutrality acts to allow American merchant vessels to be armed and to transit combat zones.<sup>188</sup> Thereby allowing U.S. merchant vessels to deliver goods directly to the ports of Great Britain.<sup>189</sup> The United States Navy deployed vessels to the Denmark Strait to facilitate the blockade of Germany and to interdict German *guerre de course* attempts.<sup>190</sup>

One month later the Neutrality Acts and the American Neutrality Zone were rendered null and void. Following the attack on Pearl Harbor, the United States declared war on Japan on December 8, 1941. When Germany announced a state of war between itself and the United States on December 11, the U.S. responded in kind. The United States was thus stripped of any pretences of neutrality and joined the fight as a belligerent power.

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<sup>185</sup>Roosevelt: Franklin D. Roosevelt's "Navy Day Address" on the Attack on the Destroyer Kearney (see n. 179); Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes (see n. 48), p. 264.

<sup>186</sup>Roosevelt: Franklin D. Roosevelt's "Navy Day Address" on the Attack on the Destroyer Kearney (see n. 179).

<sup>187</sup>Potter: Sea power: A naval history (see n. 64), p. 255; Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes (see n. 48), p. 265.

<sup>188</sup>Milestones in the History of U.S. Foreign Relations: The Neutrality Acts, 1930s (see n. 34); Kimball: Churchill and Roosevelt, Volume 1: The Complete Correspondence-Three Volumes (see n. 48), p. 268.

<sup>189</sup>Milestones in the History of U.S. Foreign Relations: The Neutrality Acts, 1930s (see n. 34).

<sup>190</sup>Hagan: This people's navy: The making of American sea power (see n. 65), p. 295.

# Chapter 8

## The Cold War - Part I

After the Second World War, the *Mare Imperium* discourse of freedom of the seas took root in the United States' containment strategy against the Soviet Union. The logic of securing a maritime sphere of influence, via Mahanian sea control, in which the United States and its allies could enjoy and safeguard the freedom of the seas was universalised. Instead of controlling a limited regional sphere of influence, the United States as the sole naval power endeavored to establish and maintain control over the global high seas so that it maintained the ability to intervene globally on behalf of American interests.

During this time period, the primary site of discursive contestation arose through the United Nations Law of the Sea discussions. The primary challenge to the United States' ability to maintain a global maritime sphere of influence arose in the legal realm as states endeavored to expand their sovereign maritime territory for the purpose of exploiting maritime resources. During the UN Conventions on the Law of the Sea, the United States utilized freedom of the seas discourse to prevent *de jure* sovereign claims over the high seas. Such *de jure* claims would fundamentally erode the extent of maritime territory able to be controlled by the United States via *imperium* and crucially impede the United States' ability to project power through maritime straits and geographic choke points. This chapter illustrates that the primary U.S. foreign policy motivation for employing freedom of the seas discourse during the early Cold War period was to further American national security goals.

The United States emerged from World War II as the strongest naval power in the history

of the world.<sup>1</sup> However, the American Navy was not immune from post-war downsizing, and the need to maintain such a peace-time naval force was immediately called into question.<sup>2</sup> As the Cold War began, the U.S. Navy sought a rationale to justify its continued existence.<sup>3</sup> At the end of the war, no other state in the world could conceivably mount a naval challenge to the United States and the possession of atomic weaponry seemed to render conventional forms of warfare obsolete.<sup>4</sup> On August 17, 1945, just over a week after the bombing of Nagasaki, the House Naval Affairs Committee convened a meeting to discuss the future of the Navy and its force structure now that war had been won.<sup>5</sup> Secretary of the Navy James Forrestal addressed the committee to answer the question, “Why should we maintain any Navy after this war?”<sup>6</sup> To which, Forrestal offered two fundamental reasons. “First,” Forrestal stated, “the outstanding lesson of the past quarter century is that means to wage war must be in the hands of those who hate war.”<sup>7</sup> Second, Forrestal stated, the primary reason why the United States’ enemies lost the last two world wars was because they did not secure control of the seas.<sup>8</sup> Forrestal continued,

In the future, as in the past, the key to victory and to the freedom of this country will be in the control of the seas and of the skies above them. Attacks upon us or attacks by us must cross on, over, or under the sea. This fact is an accident of geography which you can confirm by any map. No enemy can reach us without coming across the sea. Therefore, control of the ocean and of the air over it is the key to our own security. It is also, I might add, the key to our ability to participate as a member of a world organization in the suppression of aggression wherever it may occur.

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<sup>1</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 333.

<sup>2</sup>Baer: *US Naval Strategy 1890-1945* (see n. 32), p. 26.

<sup>3</sup>Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 333.

<sup>4</sup>*Ibid.*, p. 333.

<sup>5</sup>James Forrestal: *Statement of Hon. James Forrestal, Secretary of the Navy*, vol. *Hearings Before the Committee on Naval Affairs of the House of Representatives Sundry Legislation Affecting Naval Establishment, 1945-46*, August 17, 1945, p. 1163.

<sup>6</sup>*Ibid.*, p. 1164.

<sup>7</sup>*Ibid.*, p. 1164.

<sup>8</sup>*Ibid.*, p. 1164.

The control of the sea and of the air above it is the mission of the United States Navy - and the Navy will continue to discharge that mission with whatever weapons are most effective.

I think these two reasons - the importance of the United States remaining strong and the importance of control of the sea - are adequate justification for continuation of a Navy.<sup>9</sup>

The atomic bomb did not change the need to maintain a robust peace-time naval capability with which to control the seas.<sup>10</sup> Forrestal argued that rather than scrapping a portion of the wartime fleet, the U.S. should convert some of its active components in a secondary “ready reserve” capacity and a tertiary “laid-up reserve” capacity.<sup>11</sup> This way the country would be able to draw on them if the need were to arise.

On October 27, 1945, President Truman delivered an address on American foreign policy at a Navy Day Celebration in New York City.<sup>12</sup> The address was broadcast over all radio networks throughout the United States.<sup>13</sup> President Truman assured the country that although the United States was in the process of “demobilizing” the war-time Navy, even after all reductions had been made, “the United States will still be the greatest naval power on earth.”<sup>14</sup> Echoing Forrestal’s address to Congress, President Truman stated,

There has been talk about the atomic bomb scrapping all navies, armies, and air forces. For the present, I think that such talk is 100 percent wrong. Today, control of the seas rests in the fleets of the United States and her allies. There is no substitute for them. We have learned the bitter lesson that the weakness of this great Republic invites men of ill-will to shake the very foundations of civilization all over the world. And we had two concrete lessons in that.

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<sup>9</sup>Forrestal: Statement of Hon. James Forrestal, Secretary of the Navy (see n. 5), p. 1164.

<sup>10</sup>Ibid., p. 1165.

<sup>11</sup>Ibid., p. 1166.

<sup>12</sup>Harry S. Truman: Address on Foreign Policy at the Navy Day Celebration in New York City, vol. Foreign Relations of the United States Diplomatic Papers, 1940, The American Republics, Volume V, October 27, 1945, url: <https://www.trumanlibrary.gov/library/public-papers/178/address-foreign-policy-navy-day-celebration-new-york-city>.

<sup>13</sup>Ibid.

<sup>14</sup>Ibid.

... But the fundamental mission of the Navy has not changed. Control of our sea approaches and of the skies above them is still the key to our freedom and to our ability to help enforce the peace of the world. No enemy will ever strike us directly except across the sea. We cannot reach out to help stop and defeat an aggressor without crossing the sea. Therefore, the Navy, armed with whatever weapons science brings forth, is still dedicated to its historic task: control of the ocean approaches to our country and of the skies above them.<sup>15</sup>

President Truman announced that this preponderant naval force, along with the United States' possession of the atomic bomb, would not be used to jeopardize the security of other nations.<sup>16</sup> Instead, President Truman stated, "the basis of the foreign policy of the people of the United States" is to use its overwhelming military strength "solely to preserve the peace of the world."<sup>17</sup> "For," as Truman stated, "we now know that this is the only sure way to make our own freedom secure."<sup>18</sup> Thus, Truman argued possessing command of the sea was essential for American security and the peace of the world. Two years later, this conception of securing the world to secure the United States would find expression in a new foreign policy doctrine.

On March 12, 1947, President Harry Truman addressed a joint session of Congress announcing the need to aid the Greek Government in its civil war against the Greek Communist Party.<sup>19</sup> In this address, President Truman outlined a set of foreign policy objectives that would come to encapsulate American foreign policy over the next four decades. Rather than avoid foreign entanglements, which had traditionally dominated the peace-time foreign policy of the United States, this new Truman Doctrine aimed to actively intervene around the globe in order to protect the free world against the expansion of "totalitarian regimes,"

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<sup>15</sup>Ibid.

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.

<sup>18</sup>Ibid.

<sup>19</sup>Harry Truman: Truman Doctrine, President Harry S. Truman's Address Before a Joint Session of Congress, March 12, 1947, url: [https://avalon.law.yale.edu/20th\\_century/trudoc.asp](https://avalon.law.yale.edu/20th_century/trudoc.asp).

just as it had done during the Second World War.<sup>20</sup> Truman stated that this shift in foreign policy “is no more than a frank recognition that totalitarian regimes imposed on free peoples, by direct or indirect aggression, undermine the foundations of international peace and hence the security of the United States.”<sup>21</sup> In this speech, which would come to mark the beginning of the Cold War, Truman argued that the United States needed to intervene and render assistance, not only to Greece, but to any democratic country that was resisting Soviet totalitarian expansion.<sup>22</sup> As Truman told Congress, “The free peoples of the world look to us for support in maintaining their freedoms.”<sup>23</sup> President Truman asked Congress to authorize the deployment of American economic and military resources towards ensuring that the liberal democratic states of the ‘free world’ would not fall to Soviet communism.<sup>24</sup> Failure to do so, Truman argued, would jeopardize the peace of the world, and more specifically, the security of the United States.<sup>25</sup>

The Truman Doctrine encapsulated the policy of containment first laid out in George Keenan’s long telegram and later publicized, with the help of Secretary of the Navy Forrestal, in *Foreign Affairs*.<sup>26</sup> The policy of containment aimed to apply “counter-force at a series of constantly shifting geographical and political points,” in order to prevent “Russian expansive tendencies” from encroaching upon and destroying “the free institutions of the western world”.<sup>27</sup> Containment was a “policy of gradual coercion” designed to prevent the

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<sup>20</sup>Truman: Truman Doctrine, President Harry S. Truman’s Address Before a Joint Session of Congress, March 12, 1947 (see n. 19); Milestones in the History of U.S. Foreign Relations: The Truman Doctrine, 1947, url: <https://history.state.gov/milestones/1945-1952/truman-doctrine>.

<sup>21</sup>Truman: Truman Doctrine, President Harry S. Truman’s Address Before a Joint Session of Congress, March 12, 1947 (see n. 19).

<sup>22</sup>Ibid.

<sup>23</sup>Ibid.

<sup>24</sup>Ibid.

<sup>25</sup>Ibid.

<sup>26</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), p. 338.

<sup>27</sup>Kennan George: The Sources of Soviet Conduct, in: *Foreign Affairs* 25.4 (1947), pp. 566–582, here pp. 575–576, 581; Milestones in the History of U.S. Foreign Relations: Kennan and Containment, 1947, url: <https://history.state.gov/milestones/1945-1952/kennan>.

spread of Soviet power and influence around the world.<sup>28</sup> Through the policy of containment, the “fundamental mission” of the U.S. Navy was given purpose.<sup>29</sup> In accordance with the policy of containment, the Navy would ensure the United States’ ability to command and control the sea, to project American power across the world, and intervene as it saw fit to stop the spread of Communism.<sup>30</sup>

In 1946, Vice Admiral Harry W. Hill established and took lead of the National War College, formerly known as the Army-Navy Staff College. The National War College served as the leading educational institute for both the Armed Services and the Department of State following World War II. The National War College was tasked with the formulation of American grand strategy and directing “the utilization of resources necessary to implement that strategy.”<sup>31</sup> According to Vice Admiral Hill, the future of the Navy lay in maintaining a balanced naval force structure that would be able to engage in “power projection and logistical support of American or friendly forces ashore” against a land-centric continental power such as the Soviet Union.<sup>32</sup> Vice Admiral Hill, along with Professor Bernard Brodie, appointed to the National War College by Hill, argued that in the new Cold War era the primary aim of the United States Navy should be to utilize its aircraft carrier, submarine, and surface combat units to control the seas and the skies above them in order to ensure “the freedom of the seas” for the United States<sup>33</sup> “Ensuring the freedom of the seas,” would allow the U.S. to engage in sea control operations in order to “control transportation over the seas during wartime and to project armies and air forces ashore across the seas.”<sup>34</sup> Thus,

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<sup>28</sup>James S. Lay Jr.: A Report to the National Security Council by the Executive Secretary (Lay), vol. Foreign Relations of the United States, 1950, National Security Affairs; Foreign Economic Policy, Volume I, Document 85, April 14, 1950, url: <https://history.state.gov/historicaldocuments/frus1950v01/d85>.

<sup>29</sup>Truman: Address on Foreign Policy at the Navy Day Celebration in New York City (see n. 12).

<sup>30</sup>Robert E Fisher: The US Navy’s Search for a Strategy, 1945-1947, in: Naval War College Review 48.3 (1995), pp. 73–86, here pp. 83–84.

<sup>31</sup>History of the National War College, url: <https://nwc.ndu.edu/History/>.

<sup>32</sup>Fisher: The US Navy’s Search for a Strategy, 1945-1947 (see n. 30), p. 81.

<sup>33</sup>Ibid., pp. 83–84.

<sup>34</sup>Ibid., pp. 83–84.

the Naval institutional aim of maintaining a large standing fleet with which to control the sea aligned with the Truman Administration's doctrine of defending the free world from Soviet expansionism, and found expression within the discourse of freedom of the seas.<sup>35</sup> Since the United States faced no military challenge to its naval preponderance at the outset of the Cold War, the primary challenge to this new naval political-military strategy arose in the international legal realm.

## 8.1 Limiting the Marginal Sea

At the start of the Cold War, the primary site of contestation in the discourse of freedom of the seas arose in the context of fisheries policies. Specifically, the proposal to extend the sovereign territorial waters of states in order to safeguard and capitalize on maritime resources adjacent to their shores. The global discussion over extending territorial waters past the historic limit of three nautical miles was precipitated by two proclamations President Truman issued in September of 1945.<sup>36</sup> The first proclamation claimed "jurisdiction and control" over the natural resources of the continental shelf's sea bed, adjacent to the U.S. coast.<sup>37</sup> The second proclamation established "conservation zones" for fisheries off the coast of the United States.<sup>38</sup> Only United States citizens would be permitted to fish within the zones.<sup>39</sup> Both declarations explicitly stated that "The character as high seas" above the continental shelf and within the conservation zones, would be ensured and "the right to

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<sup>35</sup>Fisher: *The US Navy's Search for a Strategy, 1945-1947* (see n. 30), p. 84.

<sup>36</sup>James Graham Parsons: Memorandum by the Assistant Chief of the Division of British Commonwealth Affairs (Parsons), vol. *Foreign Relations of the United States: Diplomatic Papers, 1945, General: Political and Economic Matters, Volume II, Document 773, April 26, 1945*, url: <https://history.state.gov/historicaldocuments/frus1945v02/d773>; Herman Phleger: Memorandum by the Legal Adviser (Phleger), vol. *Foreign Relations of the United States, 1952-1954, General: Economic and Political Matters, Volume I, Part 2, Document 280, March 19, 1953*, url: <https://history.state.gov/historicaldocuments/frus1952-54v01p2/d280>.

<sup>37</sup>Ann L Hollick: *US Foreign Policy and the Law of the Sea, 1981*, pp. 391-392.

<sup>38</sup>*Ibid.*, p. 393.

<sup>39</sup>*Ibid.*, p. 393.



their free and unimpeded navigation are in no way thus affected.”<sup>40</sup> These proclamations, however, were never put into effect. While primary source documents are not available to show the shift away from the Truman Proclamations of 1945, the U.S. Department of State quickly abandoned the decrees as a matter of policy.<sup>41</sup> However, the proclamations still had far reaching and unintended consequences. The Truman announcements provided the impetus for other maritime states to press for extensions of their sovereign territory to ensure maritime resources as well.<sup>42</sup> Chile, Peru, and Ecuador, for example, pressed for extensions of sovereign territory 200 miles from their coasts.<sup>43</sup>

On May 29, 1950, the Office of the Special Assistant to the Under Secretary for Wildlife and Fisheries released a policy memo outlining the United States’ position on international sovereign maritime territorial claims for the purpose of monopolizing fishery resources.<sup>44</sup> The memo stated that any attempt to increase the amount of sovereign maritime territory a state possesses for the purpose of resource harvesting would fundamentally encroach upon the principle of freedom of the seas and be a detriment to the United States.<sup>45</sup> In effect, the memo spoke against Seldenian attempts to bring additional areas of sea space under its dominion. The memo argued that “the principle of the Freedom of the Seas includes the concepts that the open oceans of the world,” and the air above it, “are free to the peaceful passage of all mankind.”<sup>46</sup> Any attempt to increase the marginal sea, or the coastal sovereign territory, beyond the traditional three nautical miles would, according to the United States, impose “a

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<sup>40</sup>Ibid., pp. 392–293.

<sup>41</sup>Ibid., p. 62.

<sup>42</sup>Phleger: Memorandum by the Legal Adviser (Phleger) (see n. 36).

<sup>43</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), pp. 62, 75–79.

<sup>44</sup>Wilbert M. Chapman: United States Policy on the Question of Access to the Resources of the Sea - Memorandum by Dr. Wilbert M. Chapman, of the Office of the Special Assistant to the Undersecretary for Wildlife and Fisheries, to the Under Secretary of State (Webb), vol. Foreign Relations of the United States, 1950, National Security Affairs; Foreign Economic Policy, Volume I, May 29, 1950, url: [https://history.state.gov/historicaldocuments/frus1950v01/pg\\_888](https://history.state.gov/historicaldocuments/frus1950v01/pg_888), p. 888.

<sup>45</sup>Ibid., p. 888.

<sup>46</sup>Ibid., p. 888.

limitation on the principle of Freedom of the Seas.”<sup>47</sup> Maintaining this conception of freedom of the seas and preventing the proliferation of marginal sea territory, the memo stated, is of utmost importance to the United States now that it “has become the major naval power of the world”.<sup>48</sup> However, the memo stated that these principles, the freedom of the seas and limited marginal seas, had come under fervent attack from the international community as well as domestic lawmakers.<sup>49</sup> Around the world, countries wished to extend their marginal seas in order to take advantage of fisheries resources and to tax foreign operations wishing to fish in its waters.<sup>50</sup> Domestically, members of Congress from the West Coast and Gulf states were pushing for extensions of the U.S.’s territorial seas in order to ensure conservation regulations and safeguard fisheries for their own constituents.<sup>51</sup> Regardless, the memo stated, these policies were against the interest of the United States and its foreign policy.<sup>52</sup>

However, this did not stop domestic lawmakers from striving to take advantage of the growing impetus for territorial redefinition. On February 11, 1952, Representative Samuel A. Yorty of California introduced House Joint Resolution 373 which called for the United States to extend its territorial waters to the greatest extent possible under international law.<sup>53</sup> The International Court of Justice, established following World War II, had just concluded adjudicating a case between Great Britain and Norway regarding British incursions into Norwegian territorial waters for fishing. The court ruled, on December 18, 1951, in favor of Norway’s territorial delineation who had measured its sovereign waters as four miles extending from a “series of straight base lines connecting the outermost points along the coast.”<sup>54</sup> Resolution 373 proposed the United States calculate its territorial waters using the

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<sup>47</sup>Chapman: United States Policy on the Question of Access to the Resources of the Sea (see n. 44), p. 889.

<sup>48</sup>Ibid., p. 890.

<sup>49</sup>Ibid., p. 890.

<sup>50</sup>Ibid., p. 890.

<sup>51</sup>Ibid., p. 890.

<sup>52</sup>Ibid., p. 890.

<sup>53</sup>Kimball: Submerged Lands: The honorable the Secretary of State (see n. 70).

<sup>54</sup>Anglo-Norwegian Fisheries Case and its Implications for Other Nations, September 29, 1952.

same metrics.

Secretary of the Navy, Dan A. Kimball, wrote to the Secretary of State, Dean Acheson, expressing his concerns regarding Resolution 373.<sup>55</sup> Kimball stated,

No benefits would be obtained by House Joint Resolution 373. From a security standpoint there would be no advantage. Should there be sensitive points requiring more expansive areas of the sea for security purposes than are afforded by the system used by the United States for delimiting territorial waters, there are available the devices of defensive sea areas and maritime control areas, which are well recognized in international law, and which the United States would expect to be able to enforce ...

Were the United States to extend its territorial waters as proposed by House Joint Resolution 373, other nations could be expected to assert claims to large water areas off their coasts. Many nations have already asserted these claims and those nations could be expected to treat such action by the United States as a recognition of the validity of their own previously asserted claims. Any action by other nations which would restrict the range of warships and commercial vessels and military and commercial aircraft would be clearly disadvantageous to a great maritime power such as the United States. Any action which tends to restrict free navigation of the high seas by recognizing sovereignty over territorial waters in excess of 3 miles is contrary to United States security interest.<sup>56</sup>

Secretary Acheson sent a message<sup>57</sup> to the Chairman of the House Judiciary Committee, Emanuel Celler, informing him that the Resolution was not in line with President Truman's agenda. The message stated that the legislation would restrict the principle of "freedom of the seas which the United States has traditionally supported."<sup>58</sup> However, like Secretary Kimball, he did not mean the liberal small-navy principle of the right of neutrals to trade

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<sup>55</sup>Kimball: Submerged Lands: The honorable the Secretary of State (see n. 70).

<sup>56</sup>Ibid.

<sup>57</sup>drafted by Assistant Secretary Jack McFall

<sup>58</sup>Jack K. McFall: The Secretary of State to the Chairman of the House Judiciary Committee (Celler), vol. Foreign Relations of the United States, 1952–1954, General: Economic and Political Matters, Volume I, Part 2, Document 271, April 23, 1952, url: <https://history.state.gov/historicaldocuments/frus1952-54v01p2/d271>.

during times of war. Instead, the message argued that since the United States is a “strong maritime power” it is best served by the largest geographic expanse of non-sovereign high seas territory.<sup>59</sup> On May 26, Chairman Celler, with the approval of the Speaker of the House, rescinded Joint House Resolution 373 from consideration.<sup>60</sup>

In 1953, a similar bill was deliberated upon in the Senate.<sup>61</sup> S.J. Res. 13 aimed to extend American territorial claims of the seabed beneath navigable waters in order to exclusively exploit the natural resources of the coasts of the United States.<sup>62</sup> Secretary of State Acheson sent a message<sup>63</sup> to the Chairman of the Senate Committee on Interior and Insular Affairs, Hugh A. Butler, stating that in accordance with the Government’s “policy of freedom of the seas,” the Department of State does not support any act that would infringe upon the high seas by widening the three-mile territorial limit.<sup>64</sup> Secretary Acheson stated,

With respect to claims of states in the seas adjacent to their coasts, the general policy of the United States is to support the principle of freedom of the seas. Such freedom is essential to its national interests. It is a time-honored principle of its concept of defense that the greater the freedom and range of its warships and aircraft, the better protected are its security interests. It is axiomatic of its commercial interests that the maintenance of free lanes and air routes is vital to the preeminence of its shipping tonnage and air transport.<sup>65</sup>

Such a statement not only highlights the Mahanian influence at work on this conceptualization of freedom of the seas, but also demonstrates the ‘false memory’ or presentist representation of the contemporary discourse as “time honored.”<sup>66</sup> Freedom of the seas, ac-

<sup>59</sup>McFall: The Secretary of State to the Chairman of the House Judiciary Committee (Celler) (see n. 58).

<sup>60</sup>Ibid., Footnote 3.

<sup>61</sup>Thruston B. Morton: The Secretary of State to the Chairman of the Senate Committee on Interior and Insular Affairs (Butler), vol. Foreign Relations of the United States, 1952–1954, General: Economic and Political Matters, Volume I, Part 2, Document 278, March 4, 1953, url: <https://history.state.gov/historicaldocuments/frus1952-54v01p2/d278>.

<sup>62</sup>Ibid.

<sup>63</sup>drafted by Thruston B. Morton, Assistant Secretary for Congressional Relations

<sup>64</sup>Morton: The Secretary of State to the Chairman of the Senate Committee on Interior and Insular Affairs (Butler) (see n. 61).

<sup>65</sup>Ibid.

<sup>66</sup>Ibid.

ording to Acheson, was necessary in order to ensure the greatest range for the warships of the United States to fulfil their primary goal of securing control of strategic sea lines of communication and therefore, the safety of the United States. Such control provides secure sea lines of communication over which American commerce can travel freely. As Mahan wrote, “the fundamental truth, warranted by history, [is] that the control of the seas, and especially along the great lines drawn by national interest or national commerce [Sea Lines of Communication], is the chief among the merely material elements in the power and prosperity of nations.”<sup>67</sup> Abandoning the three-mile territorial limit, as Acheson stated, would provide the impetus for other states to make “broader and even extravagant claims over their adjacent seas” and degrade the principle of freedom of the seas on which the United States depends.<sup>68</sup> The bill was dropped in favor of House Resolution 4198, enacted May 22, 1953, which also aimed to establish jurisdiction over seabed resources, but explicitly limited such claims to a distance of three-miles from the American coast.<sup>69</sup>

In 1954, the United States published a Statement of Policy on “Effective Defense of Freedom of the Seas.”<sup>70</sup> The memorandum stated the principle of freedom of the seas was “under serious attack” by states attempting to control their near seas.<sup>71</sup> The memorandum argued that each new extraterritorial claim threatens and diminishes the principle of freedom of the seas as a whole.<sup>72</sup> It is not simply the total area of high seas that is being threatened, the memo argued, but the freedom of American vessels all over the world.<sup>73</sup> Repeating the

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<sup>67</sup>Mahan: The interest of America in sea power, present and future (see n. 14), p. 52.

<sup>68</sup>Morton: The Secretary of State to the Chairman of the Senate Committee on Interior and Insular Affairs (Butler) (see n. 61).

<sup>69</sup>Idem: The Secretary of State to the Chairman of the Senate Committee on Interior and Insular Affairs (Butler) (see n. 61); H.R. 4198 (83rd): An Act to confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, and to provide for the use and control of said lands and ... Vol. 83rd Congress (1953-1954, May 22, 1953, url: <https://www.govtrack.us/congress/bills/83/hr4198/text>).

<sup>70</sup>Phleger: Memorandum by the Legal Adviser (Phleger) to the Secretary of State (see n. 73).

<sup>71</sup>Ibid.

<sup>72</sup>Ibid.

<sup>73</sup>Ibid.

position of Secretary Acheson, the memo stated,

It is the traditional policy of the United States to support the principle of freedom of the seas. Such freedom is essential to its national interests. The effective defense of its [the United States] security, the maintenance of its pre-eminence in commercial shipping and air transport, and the prosperity of its fishing industry would all be hampered by any serious compromise of the principle of freedom of the seas. It is unnecessary to discuss the whole complex of naval and economic warfare to show that the value to the United States of the world's greatest navy is lessened if large areas of high seas are removed from the region of war. It is sufficient for this paper to point out that such areas thus become safe havens in which enemy naval and merchant vessels are immune from destruction or capture and in which suspected neutral merchant vessels are free from belligerent examination.<sup>74</sup>

In other words, the United States was concerned that excessive territorial claims would impose on the United States what the United States, alongside the American Republics, imposed on the belligerent powers at the outset of World War II. The memo noted that the only countries that want to deviate from the previous three-mile territorial limit are small states with no significant naval capability.<sup>75</sup> Thus marking a radical departure from the liberal, small-naval principle of freedom of the seas that aimed to defend the rights of neutrals against the desired belligerent rights of large naval powers. Instead this contemporary conception put forward by the United States aimed to augment the belligerent's ability to "examine" neutral shipping vessels.<sup>76</sup>

The report continued to specify that the countries that support the three-mile limit comprise 80 percent of the world's merchant shipping industries and represent the majority of the naval capability outside the Soviet Union. Small states, the memo claimed, are more interested in claiming coastal resources than maintaining a principle that they do not use.<sup>77</sup> The

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<sup>74</sup>Phleger: Memorandum by the Legal Adviser (Phleger) to the Secretary of State (see n. 73).

<sup>75</sup>Ibid.

<sup>76</sup>Ibid.

<sup>77</sup>Ibid.

memorandum stated that the U.S. faced a problem, however, as “many nations with which we have or want friendly relations or even closely integrated defensive and diplomatic policies,” such as Egypt, Greece, Iceland, Italy, Iran, Norway, Saudi Arabia, Spain, Turkey, and Yugoslavia, favored more liberal maritime territorial delineations than the strict three-mile principle that the United States held.<sup>78</sup> Because of this fact, the United States had prioritized maintaining amicable political relationships with these countries over ardently defending the freedom of the seas.<sup>79</sup> However, the combined claims by these “friendly states” and the Soviet Union had degraded and “reduce[d] the strength of the principle of freedom of the seas to the danger point.”<sup>80</sup> The United States had been unable to shape global consensus and therefore the issue of territorial waters was being investigated by the International Law Commission of the United Nations and would be put before the UN Assembly in 1956.<sup>81</sup> This UN Assembly would pave the way for the First United Nations Conference on the Law of the Sea.

## 8.2 The First UN Conference on the Law of the Sea

The First United Nations Conference on the Law of the Sea was scheduled for February 24, 1958.<sup>82</sup> The conference proposed to settle the international disagreements surrounding maritime territorial claims. Specifically, the extent of coastal state sovereignty over internal waters and territorial seas, and jurisdiction over coastal adjacent fishing zones.<sup>83</sup> Other works have extensively documented the diplomatic proceedings of the United Nations Conventions on the Law of the Sea. This section, and the sections that follow, do not aim to reproduce in

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<sup>78</sup>Ibid.

<sup>79</sup>Ibid.

<sup>80</sup>Ibid.

<sup>81</sup>Ibid.

<sup>82</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 127.

<sup>83</sup>John H. Pender: Paper Prepared in the Office of the Legal Adviser for Special Functional Problems, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 333, February 20, 1958, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d333>.

depth the political-legal deliberations of the conferences and preparatory meetings. Such an accounting would fill, and indeed has filled, many volumes.<sup>84</sup> This section contributes to the project of this work by illustrating that the primary aim of the United States during these conferences was to defend the freedom of the seas by ensuring the largest possible area of the high seas so that the United States Navy could operate and fulfill its role in containment strategy.

In 1958, President Eisenhower delivered a State of the Union, freedom of the seas was again presented as a security rather than economic consideration.<sup>85</sup> Eisenhower stated that the due to changes in the international security landscape, brought on by scientific and technological advancements, the United States needed to accelerate defense preparations in certain key areas.<sup>86</sup> Specifically, anti-submarine capabilities. The Soviet Union pursued a naval strategy centred around coastal defense and *guerre de course*, not unlike early U.S. naval strategy.<sup>87</sup> The Soviet Union did not aspire to establish control of or project power across the high seas. Rather, the Soviet Union developed a naval force structure centred around submarine forces which could destroy enemy commerce, prevent the effective establishment of operational sea control, and secure a nuclear second-strike capability.<sup>88</sup> Thus, the Soviet naval strategy centered on denying the United States *imperium* rather than competing for *imperium* of its own. Between World War II and 1950, the Soviet Union amassed a fleet of 350 submarines; approximately twice as large as the U.S. submarine forces.<sup>89</sup> In President Eisenhower's January 9 address to the nation, he stated that in order to "maintain freedom of the seas," the United States must to accelerate the development of "nuclear submarines

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<sup>84</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37).

<sup>85</sup>Dwight D. Eisenhower: Annual Message to the Congress on the State of the Union. January 9, 1958, url: <https://www.dwightdeisenhower.com/DocumentCenter/View/122/1958-State-of-the-Union-Address-PDF>.

<sup>86</sup>Ibid.

<sup>87</sup>Hagan: This people's navy: The making of American sea power (see n. 65), p. 346.

<sup>88</sup>Ibid., p. 346.

<sup>89</sup>Ibid., p. 346.



and cruisers; improved anti-submarine weapons; missile ships; and the like.”<sup>90</sup> Further, the United States needed to maintain forces that ensure the mobility of American military assets in order to “deal with local conflicts,” or to project power.<sup>91</sup>

In reaction to President Eisenhower’s State of the Union assertion on the necessity to “maintain the freedom of the seas,” a State Department memorandum was circulated on February 3, 1958, to all Assistant Secretaries of States emphasizing that the American delegation to the upcoming conference on the law of the seas must do their “utmost” to safeguard the three mile territorial limit for the national security of the United States.<sup>92</sup> The formal position of the U.S. delegation for the UN Conference on the Law of the Sea, distributed four days before the convention on February 20, stated that, “In view of the need to maintain the freedom of the seas for the nation’s security,” the primary objective for the United States delegation “will be how to maintain the cardinal principle of the freedom of the seas, which this nation has supported since its inception,” an ahistoricization, “in the face of demands of many coastal states for greater areas of sovereignty.”<sup>93</sup> To do this, the United States would strive to protect the traditional three-mile territorial sea from more expansive *de jure* claims of dominion.<sup>94</sup>

As reflected in the United States’ primary objective, the most contentious negotiations during the conference regarded settling the extent of the territorial sea and adjacent contiguous zones.<sup>95</sup> The concept of the territorial sea, or the marginal sea, denotes a band of maritime territory in which a state possesses sovereignty.<sup>96</sup> The contiguous zone, on the

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<sup>90</sup>Eisenhower: Annual Message to the Congress on the State of the Union. (see n. 85).

<sup>91</sup>Ibid.

<sup>92</sup>Robert Daniel Murphy: Memorandum From the Deputy Under Secretary of State for Political Affairs (Murphy) to All Assistant Secretaries of State, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 329, February 3, 1958, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d329>.

<sup>93</sup>Pender: Paper Prepared in the Office of the Legal Adviser for Special Functional Problems (see n. 83).

<sup>94</sup>Ibid.

<sup>95</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 140.

<sup>96</sup>Ibid., p. 140.

other hand, extends beyond the territorial or marginal sea, and is a high-seas region in which states do not possess sovereignty but have the jurisdiction to govern particular activities, such as fishing.<sup>97</sup>

The issue of the territorial sea was of central importance to the United States who feared that territorial sea extensions from three-nautical miles to twelve would close international maritime straits and, according to Ann Hollick, “seriously inhibit the operational flexibility of the U.S. fleet and air force.”<sup>98</sup> Specifically, the United States was concerned that any extension past three-miles would ‘close’ international straits in “the Aegean and Eastern Mediterranean, and in Indonesia, the Philippines, and Japan,” inside newly sovereign territorial waters.<sup>99</sup> Such a condition would significantly hamper the mobility of U.S. naval forces.<sup>100</sup> For example, if the British proposal of six-mile territorial seas were adopted, the Straits of Gibraltar and the “southern entrance” of the Straits of Malacca would become territorial waters under the jurisdiction of a foreign power.<sup>101</sup>

The primary party opposed the the U.S. stance on the three-mile territorial sea was the Soviet Union.<sup>102</sup> The Soviet Union, and its bloc of ten Eastern European satellite states, advocated for states to be able to set their breadth of their own territorial seas up to a maximum distance of twelve-nautical miles.<sup>103</sup> Additionally the Soviet Union asserted a position mandating that all warships wishing to transit the territorial sea of another state

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<sup>97</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 140.

<sup>98</sup>Ibid., pp. 137, 140.

<sup>99</sup>Arleigh Burke: Letter From the Chief of Naval Operations (Burke) to the Secretary of State, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 352, March 27, 1958, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d352>; Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 137.

<sup>100</sup>Burke: Letter From the Chief of Naval Operations (Burke) to the Secretary of State (see n. 99).

<sup>101</sup>Ibid.

<sup>102</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), pp. 135–136.

<sup>103</sup>John H. Pender: Memorandum of a Conversation Between John H. Pender of the Office of the Legal Adviser for Special Functional Problems and the Counselor of the Portuguese Embassy (Abreu), Department of State, Washington, March 26, 1958, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 351, March 26, 1958, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d351>.

receive prior authorization from the host country.<sup>104</sup> The United States believed that the Soviet Union was motivated by a desire to threaten the sea lines of communication between the states of the “free world.”<sup>105</sup> Because the Soviet Union couched their position in terms of self-determination from former colonial powers, they were able to win broad support among the newly independent states in Africa and Asia.<sup>106</sup> Such broad support put the concept of a limited three-mile territorial sea fundamentally at risk.<sup>107</sup>

Against the Soviet voting bloc of newly independent states, the United States aimed to offer all reasonable concessions to preserve a three-mile territorial limit in order retain the ability to project power on behalf of the Truman Doctrine’s containment strategy and ensure “naval mobility in the sensitive areas of the world.”<sup>108</sup> Because the United States acknowledged that compromise would likely be necessary given the “ever-increasing number of states” who wish to secure enlarged fishing zones and expanded territorial waters, the 37 American delegates to the conference were given authorization to concede at most an additional nine-mile contiguous zone, past the three-mile territorial sea, in which states would possess exclusive fishing rights but not sovereignty.<sup>109</sup>

The first United Nations Conference on the Law of the sea began in Geneva on February 24, 1958.<sup>110</sup> On March 4, President Eisenhower wrote to British Prime Minister Macmillan

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<sup>104</sup>Idem: Memorandum of a Conversation Between John H. Pender of the Office of the Legal Adviser for Special Functional Problems and the Counselor of the Portuguese Embassy (Abreu), Department of State, Washington, March 26, 1958 (see n. 103); Hollick: *US Foreign Policy and the Law of the Sea* (see n. 37), pp. 135–136.

<sup>105</sup>Idem: *US Foreign Policy and the Law of the Sea* (see n. 37), p. 137.

<sup>106</sup>Pender: Memorandum of a Conversation Between John H. Pender of the Office of the Legal Adviser for Special Functional Problems and the Counselor of the Portuguese Embassy (Abreu), Department of State, Washington, March 26, 1958 (see n. 103).

<sup>107</sup>Ibid.

<sup>108</sup>Burke: Letter From the Chief of Naval Operations (Burke) to the Secretary of State (see n. 99).

<sup>109</sup>Pender: Paper Prepared in the Office of the Legal Adviser for Special Functional Problems (see n. 83); Editorial Note, vol. *Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 334*, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d334>.

<sup>110</sup>Editorial Note (see n. 109); Hollick: *US Foreign Policy and the Law of the Sea* (see n. 37), p. 127.

regarding the Conference on the Law of the Sea.<sup>111</sup> While both countries desired a three-mile maritime territorial limit President Eisenhower acknowledged that they must make concessions. If not, Eisenhower worried, the conference would vote to implement, by two-thirds majority, territorial seas twelve miles in width, or greater.<sup>112</sup> Eisenhower encouraged Britain to accept a proposal made by the Canadian delegation that would grant states territorial waters three-miles from their coasts and an additional nine-mile contiguous zone in which states would possess exclusive fishing rights.<sup>113</sup> Secretary Acheson had noted that eighty nations stood to gain by increasing maritime territorial limits while only ten “marine powers” stood to gain by maintaining the three-mile limit.<sup>114</sup> The British had been advocating a six-mile territorial limit, with the right of innocent passage guaranteed in the outer three miles.<sup>115</sup> The President stated that the U.S. stance on three-mile territorial limits was “based squarely upon the security interests of the United States and the entire free world” and therefore, any proposed extension could not be accepted.<sup>116</sup> President Eisenhower stated,

The U.S. military authorities feel strongly that they cannot accept any extension of the territorial sea beyond three miles in view of their heavy, world-wide responsibilities for the defense of the free world. This would, for example, afford Soviet submarines, in time of war, an important covered way through neutral waters that they do not now possess. It is the view of the U.S. Delegation to the Conference, shared in Washington, that any retreat from the three-mile limit, such as is involved in the British alternate proposal, will result in Conference approval of a twelve-mile territorial sea with serious damage to our security position vis-à-vis the Sino-Soviet bloc. The stakes are so great that, I suggest, neither of us should permit commercial considerations to control.<sup>117</sup>

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<sup>111</sup>Eisenhower: Message From President Eisenhower to Prime Minister Macmillan (see n. 74).

<sup>112</sup>Ibid.

<sup>113</sup>Ibid.

<sup>114</sup>Fisher Howe: Notes on the Secretary of State’s Staff Meeting, Department of State, Washington, March 19, 1958, 9:15 a.m. Vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 346, March 19, 1958, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d346>.

<sup>115</sup>Eisenhower: Message From President Eisenhower to Prime Minister Macmillan (see n. 74).

<sup>116</sup>Ibid.

<sup>117</sup>Ibid.

Thus, the United States aimed to secure freedom of navigation, and therefore the freedom of the seas, on behalf of security concerns over any consideration of trade. Such navigation was essential in order to allow the United States Navy to project power in order to ‘defend the free world’ in accordance with the containment strategy of the Truman Doctrine. The ensuring the largest area of high seas space for American sea control operations would also prevent the Soviet Union from utilizing maritime spaces outside the United States’ sphere of influence, and therefore slip through its grasp.

Prime Minister Macmillan replied that while he understood the strategic issues at stake, Great Britain could not discount the commercial considerations.<sup>118</sup> The British economy, and the livelihood of its citizens, depended on access to “traditional fishing grounds on the high seas.”<sup>119</sup> For the time being, Macmillan suggested, both states continue to fight for the three-mile territorial limit without qualification.<sup>120</sup> The British delegation later informed the U.S. delegation that while the British admiralty did not believe that extending territorial seas to six-miles would posed a challenge to its naval operations, Great Britain was willing to support the three-mile territorial sea provision because of its importance to U.S. naval forces.<sup>121</sup>

In a March 26, 1958, message to the Portuguese Delegation, U.S. Delegate John Pender wrote,

For military and other reasons, we view the extension of sovereignty beyond three miles with disfavor. The right of innocent passage by merchant vessels could be prohibited by a coastal state up to twelve miles, rather than three, effectively

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<sup>118</sup>Harold Macmillan: Message From Prime Minister Macmillan to President Eisenhower, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 339, March 8, 1958, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d339>.

<sup>119</sup>Ibid.

<sup>120</sup>Ibid.

<sup>121</sup>349. Telegram From the Delegation to the Conference on the Law of the Sea to the Department of State, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 349, March 20, 1958, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d349>.

closing off certain areas, and thus impairing the freedom of the seas. ... And, from a military point of view, the extension of territorial waters could only favor the continental or land based powers (whose communications lines were internal) over the Free World nations whose links are mainly maritime.<sup>122</sup>

Therefore, Pender urged the Portuguese delegation, along with all European states, to accept the Canadian proposal of a three-mile territorial sea and additional nine-mile contiguous zone.<sup>123</sup>

In the end, however, the 1958 conference failed to reach an agreement on where to demarcate territorial waters.<sup>124</sup> While the first United Nations Conference on the Law of the Sea produced a “Convention on the Territorial Sea and the Contiguous Zone,” the conference failed to definitively delineate either of the two concepts.<sup>125</sup> Even within the working group on the issue of territorial sea, the commission was only able to establish that “international law does not permit an extension of the territorial sea beyond twelve miles,” and that “the breadth of the territorial sea should be fixed by an international conference” at a later date.<sup>126</sup> However, the Soviet position that all warships must receive prior approval before transiting territorial seas was shot down.<sup>127</sup> The final Convention on the Territorial Sea and the Contiguous Zone did stipulate that warships had to give notification or receive authorization before transiting territorial waters of another state.<sup>128</sup> Additionally, the final convention included a provision, put forth by the Netherlands, Portugal, and the United Kingdom, all NATO members, that prohibited states from preventing “the innocent passage

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<sup>122</sup>Pender: Memorandum of a Conversation Between John H. Pender of the Office of the Legal Adviser for Special Functional Problems and the Counselor of the Portuguese Embassy (Abreu), Department of State, Washington, March 26, 1958 (see n. 103).

<sup>123</sup>Ibid.

<sup>124</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), pp. 158–159.

<sup>125</sup>Idem: US Foreign Policy and the Law of the Sea (see n. 37), pp. 127–128; Convention on the Territorial Sea and the Contiguous Zone Done at Geneva on 29 April 1958, vol. United Nations, Treaty Series, vol. 516, 1958, url: [https://www.gc.noaa.gov/documents/8\\_1\\_1958\\_territorial\\_sea.pdf](https://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf).

<sup>126</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), pp. 128, 140–141.

<sup>127</sup>Ibid., pp. 143–144.

<sup>128</sup>Convention on the Territorial Sea and the Contiguous Zone Done at Geneva on 29 April 1958 (see n. 125); Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 144.

of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.”<sup>129</sup> Thus, while the first UN Conference on the Law of the Sea failed to definitively protect the three-mile territorial sea limit, the United States, and its NATO allies, were able to stave off any concession that, from the American perspective, would jeopardize the security of ‘the free world.’ To rectify the outstanding issue of territorial sea limits, the 1958 Thirteenth General Assembly of the United Nations resolved to convene a second Conference on the Law of the Sea in March of 1960.<sup>130</sup>

### 8.3 The Second UN Conference on the Law of the Sea

In preparation for the Second UN Conference on the Law of the Sea, a January 27, 1959, State Department memorandum was circulated reaffirming the American stance on the territorial sea issue.<sup>131</sup> The memorandum stated that “The US holds that ... the 3-mile territorial sea is established international law and that unilateral acts of states claiming greater territorial seas are not only not sanctioned by any principle of international law but are, indeed, in conflict with the unanimously accepted principle, freedom of the seas.”<sup>132</sup> Any reduction in the total amount of high seas space, the memo asserted, would reduce the freedom of the seas and imperil the interests of “the Free World.”<sup>133</sup> This is because, the memo stated,

The non-Communist world is an oceanic grouping of states; it depends for its life on control of the seas. The navies of the Free World keep the seas free. To do so they require maximum areas for maneuvers and for dispersion.<sup>134</sup>

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<sup>129</sup>Idem: US Foreign Policy and the Law of the Sea (see n. 37), pp. 143–144; Convention on the Territorial Sea and the Contiguous Zone Done at Geneva on 29 April 1958 (see n. 125), p. 6.

<sup>130</sup>Richards: Background Memorandum on the Law of the Sea (see n. 76); Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 144.

<sup>131</sup>Richards: Background Memorandum on the Law of the Sea (see n. 76).

<sup>132</sup>Ibid.

<sup>133</sup>Ibid.

<sup>134</sup>Ibid.

In other words, any encroachment on the amount of high seas space would reduce the area of oceanic territory that the “free world,” led foremost by the United States’ preponderant naval capability, could control. Such control of the sea keeps the sea ‘free’ for the states of the “free world” by ensuring the ability to access and transit the sea lines of communication that link them. Because of this, control of the seas is a prerequisite for the liberal, democratic, capitalist states to both project power to counter communist expansionism and to ensure secure trade routes in the face of Soviet *guerre de course* strategies.<sup>135</sup>

Interestingly, the January 27, 1959, State Department memo also argued that the three-mile territorial sea must remain intact because expanding territorial seas would “increase correspondingly the risk that the neutrality of the seas of non-belligerents would be violated in the event of a future war.”<sup>136</sup> States may, similar to U.S. action in coordination with the Western Hemispheric republics during the Second World War, declare their territorial waters off-limits to belligerent powers. Belligerent violation of these neutral rights, like violations of neutral trading rights prior to WWII, may cause non-belligerent states to become involved in the conflict. The U.S. argument did not champion neutral rights. Rather, the State Department aimed to reduce neutral rights in order to prevent those rights from being transgressed by belligerents during times of war. As Herman Phleger, legal advisor to the Secretary of State, stated in 1954, “the value to the United States of the world’s greatest navy is lessened if large areas of high seas are removed from the region of war... such areas thus become safe havens in which enemy naval and merchant vessels are immune from destruction or capture and in which suspected neutral merchant vessels are free from belligerent examination.”<sup>137</sup> While the United States wanted to prevent potential future conflicts from drawing in additional belligerents, the argument provided to maintain the three-mile territorial seas is predicated on preventing its conduct of war from being limited.

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<sup>135</sup>Richards: Background Memorandum on the Law of the Sea (see n. 76).

<sup>136</sup>Ibid.

<sup>137</sup>Phleger: Memorandum by the Legal Adviser (Phleger) to the Secretary of State (see n. 73).



The State Department memorandum on the U.S. position towards the Second UN Law of the Sea Conference reiterated that the United States must “be flexible” and compromise in order to prevent a twelve-mile territorial sea from being voted into law, by a two-thirds majority, against the wishes of the United States.<sup>138</sup> On June 27, 1959, the Canadian Government sent a secret proposal to the United States suggesting that the two states, along with the UK mutually advocate a six-nautical mile territorial sea and an additional six-mile contiguous zone.<sup>139</sup> The Acting Secretary of State agreed to formulate a position based on this six plus six formula because he believed that the best chance that the United States had for preventing a twelve-mile territorial sea that would be detrimental to American security was to cooperate with Canada and the United Kingdom.<sup>140</sup> The Joint Chiefs of Staff stated that because any extension of the territorial sea beyond three-mile would be harmful to American security interests, a six-mile territorial sea was the absolute maximum compromise the U.S. should permit.<sup>141</sup> According to Admiral Burke, it “would become increasingly difficult over the years” to prevent encroachment on the high seas by *de jure* territorial claims if the United States did not agree to a multilateral framework fixing maritime boundaries.<sup>142</sup> However, Admiral Burke stated that without such an agreement, the “Navy could keep forcing the issue of the 3-mile limit, recognizing no other breadth, and do its best to hold the

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<sup>138</sup>Richards: Background Memorandum on the Law of the Sea (see n. 76).

<sup>139</sup>377. Memorandum of a Conversation, Department of State, Washington, July 10, 1959, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 377, July 10, 1959, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d377>; Hollick: US Foreign Policy and the Law of the Sea (see n. 37), pp. 156–157.

<sup>140</sup>379. Memorandum of a Conversation, Department of State, Washington, August 26, 1959, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 379, August 26, 1959, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d379>.

<sup>141</sup>Robert Gates: 381. Letter From the Acting Secretary of Defense (Gates) to the Under Secretary of State for Political Affairs (Murphy), vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 381, October 19, 1959, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d381>.

<sup>142</sup>432. Memorandum of a Conversation, Department of State, Washington, June 16, 1960, vol. Foreign Relations of the United States, 1958–1960, United Nations and General International Matters, Volume II, Document 432, June 16, 1960, url: <https://history.state.gov/historicaldocuments/frus1958-60v02/d432>.

line.”<sup>143</sup>

The second United Nations Conference on the Law of the Sea, or UNCLOS II, was held from March 17, to April 26, 1960.<sup>144</sup> The discussion at the conference was restricted to delineating the extents of territorial and contiguous seas.<sup>145</sup> Mired by Cold War tensions, however, the conference failed to definitively solidify the breadth of the territorial sea.<sup>146</sup> The conference was able to establish a twelve-mile non-sovereign contiguous seas wherein states could enforce “customs, fiscal and sanitary” regulations, but sovereign territorial seas were not mentioned in the final treaties produced by the conference.<sup>147</sup> The second failure tabled the hope of coming to an international agreement on territorial and contiguous seas for the next decade.<sup>148</sup>

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<sup>143</sup>432. Memorandum of a Conversation, Department of State, Washington, June 16, 1960 (see n. 142).

<sup>144</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 155.

<sup>145</sup>Ibid., p. 155.

<sup>146</sup>Ibid., p. 158.

<sup>147</sup>Ibid., p. 158.

<sup>148</sup>Ibid., p. 161.

# Chapter 9

## The Cold War - Part II

Due to a lack of consensus at the first and second UNCLOS conventions, unilateral territorial sea claims continued to proliferate. The United States held firm to the belief that such territorial extensions constituted a threat to the freedom of the seas by restricting the U.S. Navy's ability to exert sea control globally. In U.S. foreign policy discourse, any reduction in high seas space on which the United States could exercise its military capability represented a threat to the freedom of the seas. The United States continued to attempt to secure an international agreement to ensure its ability to project power through international straits in a Third UN Convention on the Law of the Sea. The United States made compromises on the extent of contiguous seas for marine resource exploitation in order to ensure that military vessels would be able to transit international straits freely. However, while an agreement was made at the conference on territorial sea delineations, the United States refused to become party to the treaty. Instead, President Reagan announced that the United States would treat the provisions regarding the freedom of the seas as if they were customary international law.

To defend against encroachments on the United States' perceived right to transit military vessels through the high seas unimpeded, during this time period the United States began conducting Freedom of Navigation Operations (FONOPs). The United States uses FONOPs to militarily challenge any maritime territorial claim that it perceived to be in violation of international law. By conducting FONOPs, the United States aimed to protect the freedom of the seas for U.S. Naval vessels so that they may project power on and across the high seas wherever deemed necessary in support of national security objectives.

## 9.1 Forward Defense

By the end of the 1960s the American navy had atrophied from its Post-WWII monopolistic position. Though still quantitatively preponderant, U.S. ship maintenance, overhaul, and construction had been neglected in lieu of spending on the wars in Korea and Vietnam.<sup>1</sup> By comparison, the Soviet Union had dedicated substantial resources towards constructing an ocean going naval fleet.<sup>2</sup> While such blue water naval development by the Soviet Union amounted to a reversion of its traditional coastal defense and *guerre de course* naval policies, by the end of the 1960s the Soviet Union appeared to be a formidable challenger to U.S. naval supremacy.<sup>3</sup>

On July 1, 1970, Elmo Zumwalt became the Chief of Naval Operations under the administration of President Richard Nixon.<sup>4</sup> Zumwalt was tasked with rebuilding the United States Navy to counter the threat of the Soviet Union.<sup>5</sup> Zumwalt emphasized that the U.S. navy had two parallel goals. “The double mission of the U.S. Navy,” Zumwalt stated, was “to keep the seas open for commercial and military traffic of all kinds, which we call ‘sea control,’ and to make it possible to apply military power overseas, which we call ‘projection.’”<sup>6</sup>

At the time, a since declassified paper was released by the Joint Chiefs of Staff outlining American military strategy for fiscal years 1970-1977.<sup>7</sup> The strategic outline stated that the basic military objective for the United States was to “ensure freedom of the sea, air, and space regions for the United States,” and to “deny their use for purposes adverse to US interests.”<sup>8</sup> Thus the Joint Chiefs of Staff echoed the assertion of Mahan that the Navy’s

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<sup>1</sup>Hagan: This people’s navy: The making of American sea power (see n. 65), p. 375.

<sup>2</sup>Ibid., p. 375.

<sup>3</sup>Ibid., p. 375.

<sup>4</sup>Ibid., p. 375.

<sup>5</sup>Ibid., p. 375.

<sup>6</sup>Ibid., p. 376.

<sup>7</sup>Paper Prepared by the Joint Chiefs of Staff: MILITARY STRATEGY FOR FY 1970 THROUGH FY 1977, vol. Foreign Relations of the United States, 1964–1968, Volume X, National Security Policy, Document 188, url: <https://history.state.gov/historicaldocuments/frus1964-68v10/d188>.

<sup>8</sup>Ibid.

primary objective is to “to control the areas of sea communication in order to secure their use to one’s own cargo vessels and transports while denying their use to the enemy.”<sup>9</sup> However, securing the ability to ensure unhindered navigation of “one’s own” military and commercial vessels, which Zumwalt and contemporary naval publications refer to as “sea control,” was represented as obtaining ‘freedom of the seas’.<sup>10</sup> Thus, in American military strategy, freedom of the seas was obtained through sea control, thereby rendering the terms synonymous.

The Joint Chiefs military strategy report stated that technological and scientific developments had increased the interest of the international community in the ocean and highlighted its “strategic importance” for military and economic purposes.<sup>11</sup> The report stated,

Increasing international interest in the ocean gives rise to problems of territorial sovereignty over the contiguous sea areas extending in many cases beyond traditional limits of territorial waters. Conflicting concepts of the extent of territorial waters, with particular regard to territorial seas that do or may comprise international straits, will be a continuing source of serious international friction. US interests require that the principle of freedom of the seas, in the sense of free passage, be preserved. Increasing pressures for extended rights to commercial exploitation should be recognized in US strategy. The United States should seek legal solutions to those pressures, but should recognize that it may have to enforce such solutions once they are reached.<sup>12</sup>

Because of the increased commercial interest in the sea, the United States, according to the Joint Chiefs of Staff, needed to mitigate unilateral claims of sovereignty over the high seas so that it could guarantee free transit on, over, and under the global high seas. Once such a legal regime was agreed upon, the document recognized, the United States would likely need to use its capability to ensure such a regime is followed.

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<sup>9</sup>Potter: *Sea power: A naval history* (see n. 64), p. 162.

<sup>10</sup>Joint Maritime Operations (see n. 24), pp. I-3; Hagan: *This people’s navy: The making of American sea power* (see n. 65), p. 376.

<sup>11</sup>Paper Prepared by the Joint Chiefs of Staff: *MILITARY STRATEGY FOR FY 1970 THROUGH FY 1977* (see n. 7).

<sup>12</sup>*Ibid.*

Obtaining this was necessary, the report stated, because the United States' military strategy in a war against China, or in a war against China and the Soviet Union, would be "to defend as far forward as possible while conducting offensive naval and air operations against the enemy," including operations against mainland China.<sup>13</sup> Because of this, the United States "must hold, as a minimum, the strategic area encompassed by the general line of [2 lines of source text not declassified] In addition, control of the seas must include the Strait of Malacca, South China Sea, Formosa Strait, East China Sea, Japan Sea, Bering Sea, and the Bering Strait. [4-1/2 lines of source text not declassified]".<sup>14</sup> In order to control such waterways, *de jure* claims of sovereignty over the areas must be prevented so that the United States can conduct sea control operations. The prevention of such claims would find expression in a renewed negotiation of the law of the sea.

The Naval Strategy of Forward Defense, predicated on sea control and power projection, was reiterated by Admiral James L. Holloway III, who assumed Admiral Zumwalt's role as Chief of Naval Operations on June 29, 1974.<sup>15</sup> Naval Warfare Publication (NWP) 1, a paper authored by Admiral Holloway on the Strategic Concepts of the United States Navy, stated that "The national military strategy of the United States is a forward strategy," which "utilizes the oceans as barriers for the defense of the country, as military lines of communication with overseas allies, and as avenues of world trade."<sup>16</sup> To ensure that the United States enjoys freedom on the sea, Holloway echoed Mahan's position on the need to develop a naval force capable of driving the enemy from the sea.<sup>17</sup> Holloway stated, the United States Navy "must be able to defeat, in the aggregate, potential threats to continued free use

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<sup>13</sup>Paper Prepared by the Joint Chiefs of Staff: MILITARY STRATEGY FOR FY 1970 THROUGH FY 1977 (see n. 7).

<sup>14</sup>Ibid.

<sup>15</sup>John B Hattendorf: US Naval Strategy in the 1970s: selected documents, 2007, p. 53; Hagan: This people's navy: The making of American sea power (see n. 65), p. 380.

<sup>16</sup>Hattendorf: US Naval Strategy in the 1970s: selected documents (see n. 15), p. 63.

<sup>17</sup>Mahan: The influence of sea power upon history, 1660-1783 (see n. 12); Hattendorf: US Naval Strategy in the 1970s: selected documents (see n. 15), p. 64.

of the high seas by the United States.”<sup>18</sup> He continued, “In its simplest terms, defeating the maritime threat means destruction of hostile aircraft, surface ships, and submarines which threaten the seaborne forces of the United States and its allies.”<sup>19</sup> In order to ensure that the United States may utilize the high seas unimpeded, the U.S. Navy alone must have the ability to “defeat the forces of any state that would seek to deny such use.”<sup>20</sup> Further, the United States must secure the ability maintaining unhindered usage of global sea lines of communication was necessary, Holloway argued, to ensure “communication between the United States and its forward deployed forces, its allies, and those areas of the world essential for the supply of imports.” Any closure of such SLOCs, by force or regulation, would imperil the interests of the United States.<sup>21</sup>

## 9.2 United States Oceans Policy

Following the failure to solidify territorial sea boundaries at the 1958 and 1960 UN Conventions on the Law of the Sea, the United States reverted to its official stance of recognizing territorial seas to a maximum breadth of three-nautical miles.<sup>22</sup> However, because no international agreement existed and technological innovations enabled greater offshore fishing, mining, and hydrocarbon exploitation, the number of states unilaterally claiming extended territorial and contiguous seas proliferated during the 1960s.<sup>23</sup> For example, between 1963 and 1968, Algeria, Burma (now Myanmar), Cyprus, Dahomey (in what is today Benin), Honduras, India, Kuwait, Liberia, North Vietnam, Pakistan, Senegal, Syria, Thailand, and Togo asserted claims to a twelve mile territorial sea.<sup>24</sup> In South America, Argentina, Brazil,

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<sup>18</sup>Idem: US Naval Strategy in the 1970s: selected documents (see n. 15), p. 64.

<sup>19</sup>Ibid., p. 64.

<sup>20</sup>Ibid., p. 64.

<sup>21</sup>Ibid., p. 67.

<sup>22</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 161.

<sup>23</sup>Ibid., p. 162.

<sup>24</sup>Ibid., p. 162.

Ecuador, Panama, and Uruguay all asserted 200 mile sovereign territorial seas.<sup>25</sup> Additionally, Chile, Peru, and Nicaragua claimed 200-mile contiguous seas for the purpose of fishing.<sup>26</sup>

On January 6, 1969, the Deputy Secretary of Defense, and former Secretary of the Navy, Paul Nitze sent a letter to Secretary of State Dean Rusk.<sup>27</sup> Nitze stated that due to “the thrust of international affairs” it was apparent that the United States needed to reevaluate its position on the extent of maritime territorial claims “in the very near future.”<sup>28</sup> To this end, Deputy Secretary Nitze provided Secretary Rusk with the Department of Defense’s position on the matter.<sup>29</sup> Nitze wrote,

The protection of U.S. national security requires that, to the extent it is possible to do so, large areas of sea and air space be preserved free for military uses. In order to maintain the highest possible degree of flexibility for military activities the DOD has traditionally opposed the extension of national sovereignty beyond the three-mile territorial sea and the superjacent air space. However, the U.S. position with respect to maximum freedom to use the sea and air space has been eroded to the point where, at this moment, [1 line not declassified].<sup>30</sup>

Nitze continued stating that because the United States failed to “provide sufficiently visible manifestations of the assertion of our legal rights” following the failures of UNCLOS I and II, infringements on the three-mile limit have accumulated to the point where customary law of the sea had changed “to the detriment of our national security.”<sup>31</sup> The lamentation over the lack of “sufficiently visible manifestations” of America’s perceived legal rights interestingly foreshadows future freedom of navigation operations. Because of the erosion of international customary law, the U.S. Department of Defense advocated that before any international

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<sup>25</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 162.

<sup>26</sup>Ibid., p. 162.

<sup>27</sup>Paul Nitze: Letter From the Deputy Secretary of Defense (Nitze) to Secretary of State Rusk, vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 332, January 6, 1969, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d332>.

<sup>28</sup>Ibid.

<sup>29</sup>Ibid.

<sup>30</sup>Ibid.

<sup>31</sup>Ibid.



agreement be made on fishery zones or jurisdiction of continental shelves for the purpose of mining and hydrocarbon extraction be made, an agreement should first be reached on the extent of sovereign seas and the right to transit on, above, and under international straits.<sup>32</sup> Otherwise, Nitze stated, it would be likely that other states would treat the resource jurisdictional rights as the sovereign territorial boundary.<sup>33</sup> If jurisdictional resource boundaries were settled before the territorial sea and straits matters were resolved, the Defense Department anticipated military operational capability would be hampered further.<sup>34</sup>

In opposition to the expansive 200 mile territorial sea claims, the United States found an unlikely ally in the Soviet Union.<sup>35</sup> The Soviet position had shifted since the first two conferences on the law of the sea.<sup>36</sup> While the Soviet Union had made a twelve mile territorial sea claim themselves, and therefore could not advocate codifying narrower sovereign seas than twelve miles, they had come to support a robust regime of freedom of navigation through international straits.<sup>37</sup> Such a change in posture resulted from the build up of the Soviet Naval fleet and need to utilize international straits to access the sea from ice-free ports.<sup>38</sup> In 1967, the Soviet Union “approached the United States” to determine if the U.S. would support a third law of the sea conference to codify a twelve-nautical mile territorial sea into international law.<sup>39</sup> According to a March 18, 1969, memorandum written by the Deputy Legal Advisor of the Department of State, the U.S. responded to the Soviet Union stating that “our position on 12 miles would depend upon whether we could assure adequate protection

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<sup>32</sup>Ibid.

<sup>33</sup>Ibid.

<sup>34</sup>Ibid.

<sup>35</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 175.

<sup>36</sup>Ibid., p. 175.

<sup>37</sup>Ibid., p. 175.

<sup>38</sup>Ibid., p. 175.

<sup>39</sup>Murray J. Belman: 334. Memorandum From the Deputy Legal Adviser (Belman) to the Under Secretary of State for Political Affairs (Johnson), vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 334, March 18, 1969, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d334>.

of the right of passage through and overflight of international straits.”<sup>40</sup> A separate provision ensuring military navigation through international straits was essential to the Department of Defense as without it, 116 waterways would be subject to coastal state regulations under the doctrine of innocent passage.<sup>41</sup> However, the U.S. Department of Defense staunchly supported the Soviet proposal to revisit the Law of the Sea conference in order to end the proliferation of unilateral territorial claims.<sup>42</sup> This was especially the case, as Secretary of Defense Melvin Laird wrote to President Nixon’s Assistant for National Security Affairs, Henry Kissinger, since “it was our own 1945 Truman Proclamation on the Continental Shelf which has brought about the present dangerously chaotic situation for traditional freedoms of the seas.”<sup>43</sup> Due to this, the United States began to work with the U.S.S.R. to garner international support for fixing a twelve-nautical mile territorial sea and ensuring the right to navigate freely through, and over, international straits in preparation for a Third UN Conference on the Law of the Sea.<sup>44</sup>

There were numerous territorial delineations that would need to be formalized at any future law of the sea conference. In addition to sovereign territorial seas, for example, contiguous seas in which states could enforce customs, fiscal and sanitary regulations but not claim sovereignty, extended exclusive fishing zones, and the extent of seabed jurisdiction for the purpose of mining and hydrocarbon extraction all lacked definition. In President Nixon’s First Annual Report to Congress on U.S. foreign policy, on February 18, 1970, he

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<sup>40</sup>Belman: 334. Memorandum From the Deputy Legal Adviser (Belman) to the Under Secretary of State for Political Affairs (Johnson) (see n. 39).

<sup>41</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), pp. 235–236.

<sup>42</sup>Melvin R. Laird: 343. Memorandum From Secretary of Defense Laird to the President’s Assistant for National Security Affairs (Kissinger), vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 343, July 1, 1969, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d343>.

<sup>43</sup>Ibid.

<sup>44</sup>John Stevenson: 355. Memorandum From the Legal Adviser of the Department of State (Stevenson) to Secretary of State Rogers, vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 355, September 3, 1969, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d355>; Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 234.

stated that while agreement needed to be reached on contiguous seas and seabed jurisdiction, “The most pressing issue regarding the law of the sea is the need to achieve agreement on the breadth of the territorial sea, to head off the threat of escalating national claims over the ocean.”<sup>45</sup> Thus, echoing the Department of Defense’s position that the territorial sea matter take precedence lest the international community treat jurisdictional allocations as sovereign territory. On the same day as Nixon’s address to Congress, John Stevenson, Legal Adviser of the Department of State, specified that the United States was willing to abandon its insistence on a three-nautical mile territorial sea in favor of a twelve mile territorial sea and provision for the freedom of transit through international straits.<sup>46</sup> On February 25, both the U.S. State Department and the Department of Defense clarified that the United States would only accept the twelve-mile territorial sea if freedom of transit through and over international straits could be secured.<sup>47</sup> Until such freedom of transit could be codified into international law, the position of the United States was, according to the Defense and State Departments, that the U.S. was under “no obligation to recognize claims in excess of three miles” and until such time would not recognize twelve-mile claims around the world.<sup>48</sup>

On May 23, 1970, President Nixon announced the official Oceans Policy of the United States.<sup>49</sup> Because of the increased scale of known maritime resource able to be capitalized upon, and the threat of environmental degradation if left unregulated, Nixon stated, the

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<sup>45</sup>Richard Nixon: First Annual Report to the Congress on United States Foreign Policy for the 1970’s. February 18, 1970, url: <https://www.presidency.ucsb.edu/documents/first-annual-report-the-congress-united-states-foreign-policy-for-the-1970s>; Hollick: US Foreign Policy and the Law of the Sea (see n. 37), pp. 234–235.

<sup>46</sup>Idem: US Foreign Policy and the Law of the Sea (see n. 37), p. 235.

<sup>47</sup>Idem: US Foreign Policy and the Law of the Sea (see n. 37), p. 235; Richard T Ackley: The Soviet Navy’s Role in Foreign Policy, in: Naval War College Review 1972, pp. 48–65, 64, note 18.

<sup>48</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 235; Ackley: The Soviet Navy’s Role in Foreign Policy (see n. 47), 64, note 18.

<sup>49</sup>Richard Nixon: 376. Statement Issued by President Nixon: Statement About United States Oceans Policy, vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 376, May 23, 1970, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d376>.

existing law of the sea is insufficient.<sup>50</sup> Nixon proposed that all nations agree to a treaty that would fix a twelve-mile territorial sea limit and ensure freedom of transit through international straits.<sup>51</sup> Additionally, Nixon asked that the international community agree to renounce all seabed resource claims beyond a depth of 200 meters.<sup>52</sup> If the international community could agree on these points and fix them into law, Nixon stated, “we can save over two-thirds of the earth’s surface from national conflict and rivalry, protect it from pollution, and put it to use for the benefit of all.”<sup>53</sup>

However, State Department memorandums distributed to all American diplomatic posts clarifying the U.S. position laid out in Nixon’s speech highlight the U.S. national security interests at the heart of the U.S. interest in the law of the sea.<sup>54</sup> Speaking on the American proposal to limit jurisdictional claims over seabed resources, a State Department memorandum clarified,

... the proposal seeks to limit exclusive sovereign rights on the seabed to that point at which the high seas reach a depth of 200 meters. This has important implications for United States national security. One of the great threats to the United States strategic posture has been the potential limits on military mobility caused by unilateral assertions of jurisdiction by coastal states over large areas: of the high seas, seabed and air space off their coasts. It is hoped that the President’s seabed proposal, by extending the coastal state administrative control under trusteeship arrangements over the exploitation of the resources of the entire continental margin off its coasts will remove part of the incentive for unilateral claims.<sup>55</sup>

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<sup>50</sup>Nixon: 376. Statement Issued by President Nixon: Statement About United States Oceans Policy (see n. 49).

<sup>51</sup>Ibid.

<sup>52</sup>Ibid.

<sup>53</sup>Ibid.

<sup>54</sup>William P. Rogers: 377. Circular Airgram CA-3320 From the Department of State to All Diplomatic Posts, vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 377, June 18, 1970, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d377>.

<sup>55</sup>Ibid.

Such an agreement would enable states to capitalize on coastal resources while mitigating conflict and preventing the degradation of military operational capability. Further, an October 20, 1970, memorandum from the Assistant Legal advisor for Politico-Military and Ocean Affairs, Robert Neuman, stated that the Department of Defense's strategic imperatives in codifying freedom of navigation through international straits in any Law of the Sea convention include ensuring,

- a. Naval access to all marine areas where presence of US warships is likely to be important either in a combat situation, as a deterrent, or for intelligence gathering purposes.
- b. Ability to overfly strategic marine areas for purposes of combat, deterrence or surveillance.
- c. Ability to effect submerged transit of significant international straits with nuclear armed and nuclear powered submarine vessels.
- d. [3 lines not declassified]<sup>56</sup>

While Neuman stressed that the United States' goals of protecting American offshore resources and securing the freedom of navigation were not incompatible, Henry Kissinger advised President Nixon that "our overriding national security interests militate" against any law of the sea position that seeks to privilege "oil and other commercial interests" at the expense of the "the reasonable and necessary rights of movement."<sup>57</sup> Thus, while President Nixon's address on oceans policy called for a legal convention for the purpose of equitably managing the resources of the world, the proposals put forth were predicated on safeguarding

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<sup>56</sup>Robert H. Neuman: 383. Memorandum From the Assistant Legal Adviser for Politico-Military and Ocean Affairs (Neuman) to the Legal Adviser of the Department of State (Stevenson), vol. Foreign Relations of the United States, 1969-1976, Volume E-1, Documents on Global Issues, 1969-1972, Document 383, October 20, 1970, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d383>.

<sup>57</sup>Idem: 383. Memorandum From the Assistant Legal Adviser for Politico-Military and Ocean Affairs (Neuman) to the Legal Adviser of the Department of State (Stevenson) (see n. 56); Henry Kissinger: 373. Memorandum From the President's Assistant for National Security Affairs (Kissinger) to President Nixon, vol. Foreign Relations of the United States, 1969-1976, Volume E-1, Documents on Global Issues, 1969-1972, Document 373, May 8, 1970, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d373>.

American military strategy.

In December of 1970, the Twenty-fifth General Assembly of the United Nations voted to schedule the Third UN Conference on the Law of the Sea to be held in 1973.<sup>58</sup> During this time period, Brazil, who had claimed a territorial sea of 200 nautical miles, issued an announcement that beginning June 1, 1971, the Brazilian Navy would prevent all foreign flagged fishing vessels from operating within its perceived sovereign sea space.<sup>59</sup> In a April 9, 1971, telephone call between Secretary of Defense Melvin Laird and Henry Kissinger regarding Brazil, Secretary Laird further stressed the need to prevent “private interests and fishing interests” from altering the U.S. insistence on the freedom of navigation through international straits.<sup>60</sup> Secretary Laird stated,

We can make some changes in our position, but we have to be careful because this idea that Brazil is going to start taking our boats — we’ve got to hard-line it before we resolve these issues. The right of transit through straits is important, not only to us but to the Soviet Union too, and before informal discussions with anyone get started we have got to have a national policy. I think this is important. I think it is more important than SALT. I know that for everyone SALT takes the front burner, but our ocean policy from a long-term point of view is very important. If we don’t have the capability to operate we might as well not have an Air Force or a Navy.

In other words, ensuring that the United States has the ability to project power and intervene globally as it sees fit is a more vital important national security than reducing the number of strategic nuclear weapons possessed between the U.S. and the Soviet Union. Further, while

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<sup>58</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 196.

<sup>59</sup>Richard Kennedy/Arnold Nachmanoff/Wright Marshall: 394. Memorandum From Richard Kennedy, Arnold Nachmanoff, and Marshall Wright of the National Security Council Staff to the President’s Assistant for National Security Affairs (Kissinger), vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 394, undated, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d394>.

<sup>60</sup>Melvin R. Laird: 388. Transcript of Telephone Conversation Between Secretary of Defense Laird and the President’s Assistant for National Security Affairs (Kissinger), vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 388, April 9, 1971, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d388>.

there is some flexibility in the American negotiating position, the right for military vessels to transit international straits was non-negotiable from a defense perspective. Kissinger agreed.<sup>61</sup> Similarly, a National Security Council memorandum sent to Kissinger regarding the Brazilian territorial sea claim and the U.S. Oceans Policy insisted,

We wish to secure freedom of mobility for U.S. warships and military aircraft. Two hundred mile territorial claims such as those of Brazil, Peru, and Ecuador pose a threat to our global security interests. While these or other nations may at present attempt only to enforce these claims with respect to fisheries or other special interests, they may in the future have the capability and inclination to enforce them with respect to navigation. They may also, by their example, succeed in encouraging other less developed countries to pursue similar claims.<sup>62</sup>

Because of this, in a May 29, 1971, phone conversation, Kissinger explained to President Nixon the Department of Defense's desire "to have a showdown" with Brazil over its 200 mile territorial claim.<sup>63</sup> Kissinger instead recommended that President Nixon inform Brazil that the United States is willing to compromise on fisheries zones so that they do not oppose the United States on securing the freedom of navigation at the upcoming law of the sea conference.<sup>64</sup> To which, President Nixon replied, "I don't give a damn about the fisheries anyway. Let everybody have 200 miles to fish. They're all poverty-stricken down there anyway... Navigation we want. Let them fish if they want. That's my view."<sup>65</sup>

Following this conversation, a summary of National Security Study Memorandum 125, on the U.S. Oceans Policy, was drafted by National Security Council staff member John

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<sup>61</sup>Ibid.

<sup>62</sup>Kennedy/Nachmanoff/Marshall: 394. Memorandum From Richard Kennedy, Arnold Nachmanoff, and Marshall Wright of the National Security Council Staff to the President's Assistant for National Security Affairs (Kissinger) (see n. 59).

<sup>63</sup>Richard Nixon/Henry Kissinger: 395. Conversation Between President Nixon and his Assistant for National Security Affairs (Kissinger), vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 395, May 29, 1971, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d395>.

<sup>64</sup>Ibid.

<sup>65</sup>Ibid.

Negroponte<sup>66</sup> The memorandum reiterated that the United States could not tolerate a codification of a 200 nautical-mile territorial sea, as Brazil, Ecuador, and Peru were claiming, into international law due to national security concerns.<sup>67</sup> The Negroponte memo stated that, “The major U.S. military [less than 1 line not declassified] interest in the seas is a maximum mobility for our operations, free of interference by others.”<sup>68</sup> If a 200 mile territorial sea succeeded, the memo stated, the only areas of the global ocean where the United States Navy could operate with reasonable assurance would be the North Atlantic and the northeastern Pacific.<sup>69</sup> 200 mile territorial seas would force the United States to either secure potentially costly bilateral agreements or force the U.S. Navy to operate in violation of international law.<sup>70</sup> “Should navigation in practice become a matter of coastal state consent, both the U.S. and its rivals might be expected not only to engage in a campaign to secure consent for themselves but to assure that consent is denied or restricted for the other,” the memo stated.<sup>71</sup> Eventually, the memo warned, the United States would face a situation where navigational permission is denied or extorted at too great a cost.<sup>72</sup> While the South American states have informed the United States that they will respect U.S. security interests, the Negroponte memorandum stated, “our security cannot be allowed to depend on the generosity of coastal states.”<sup>73</sup>

On July 12, 1971, the National Security Council’s Senior Review Group gathered in the White House’s Situation Room to discuss what was referred to as “the greatest Law of the Seas crisis in three and a half centuries.”<sup>74</sup> John R. Stevenson, Legal Advisor to the

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<sup>66</sup>John Negroponte: Analytical Summary Prepared by John Negroponte of the National Security Council Staff, vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 400, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d400>.

<sup>67</sup>Ibid.

<sup>68</sup>Ibid.

<sup>69</sup>Ibid.

<sup>70</sup>Ibid.

<sup>71</sup>Ibid.

<sup>72</sup>Ibid.

<sup>73</sup>Ibid.

<sup>74</sup>403. Minutes of a Senior Review Group Meeting, vol. Foreign Relations of the United States, 1969–



Department of State, informed the committee the South American countries have been working to win support for their 200-mile territorial sea at the upcoming Law of the Sea conference.<sup>75</sup> If successful, Stevenson claimed, “25 percent of the oceans will cease to be high seas—and this includes all straits.”<sup>76</sup> Soviet geographers, Stevenson stated, were less optimistic.<sup>77</sup> They asserted that if the 200-mile territorial sea became law 50 percent of the world’s oceans would be removed from the high seas.<sup>78</sup> If this were to become the case, Stevenson stated, the U.S. surface ship, submarine, and aerial capability would be subjected to the control of other states.<sup>79</sup> Admiral Thomas Moorer, Chairman of the Joint Chiefs of Staff and former Chief of Naval Operations, agreed with John Stevenson’s assessment and asserted that at the Third UN Convention on the Law of the Sea, “Our number one objective is to maintain the freedom of the seas — on and over.”<sup>80</sup>

Ten days later, Henry Kissinger sent a message to President Nixon conveying the recommendation of the Senior Review Group.<sup>81</sup> Kissinger stated,

The proposal on territorial seas and international straits is of paramount importance to U.S. security. We have little or no give in regard thereto. Indeed, it was primarily to secure those interests that we got into the whole law of the sea operation.<sup>82</sup>

However, Kissinger stated, the other states participating care little about “freedom of navigation,” striving instead to secure fisheries and seabed resources. Therefore, the United

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1976, Volume E-1, Documents on Global Issues, 1969–1972, Document 403, July 12, 1971, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d403>.

<sup>75</sup>Ibid.

<sup>76</sup>Ibid.

<sup>77</sup>Ibid.

<sup>78</sup>Ibid.

<sup>79</sup>Ibid.

<sup>80</sup>Ibid.

<sup>81</sup>Henry Kissinger: 404. Memorandum From the President’s Assistant for National Security Affairs (Kissinger) to President Nixon, vol. Foreign Relations of the United States, 1969–1976, Volume E-1, Documents on Global Issues, 1969–1972, Document 404, July 22, 1971, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d404>.

<sup>82</sup>Minutes of a Senior Review Group Meeting (see n. 74).

States has some room win favor by offering concessions on “seabeds, fisheries, pollution, and research issues.”<sup>83</sup> The question the United States faces going into the conference is how to secure broad support for the twelve-nautical mile territorial sea and guaranteed rights to transit international straits.<sup>84</sup>

In the run up to UNCLOS III, Spain actively opposed the United States’ goal of securing freedom of navigation through international straits. Spain’s geographic position astride the Strait of Gibraltar would allow it to control the sole waterway linking the Mediterranean and the Atlantic.<sup>85</sup> Spain held that the right of innocent passage did not pertain to overflight or ships that were nuclear powered, carried nuclear weapons, or were deemed potentially hazardous shipping platforms such as giant tankers.<sup>86</sup> Secretary of State William Rogers sent a telegram to the American Embassy in Spain again emphasizing that the United States must ensure that the high seas remain free from sovereign jurisdiction so that the United States can project military forces on and across the sea as it sees fit.<sup>87</sup> Secretary of State Rogers stated that the United States’ global security commitments and expansive sea lines of communication between them make American military mobility essential.<sup>88</sup> Secretary Rogers continued,

Our mobility currently depends upon freedom to navigate on and under the high seas and through certain international straits and freedom to fly over the high seas and certain international straits. Regulatory authority regarding these activities over which the U.S. does not have effective control - whether exercised

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<sup>83</sup>Minutes of a Senior Review Group Meeting (see n. 74).

<sup>84</sup>Ibid.

<sup>85</sup>Henry Kissinger: 410. Memorandum From Acting Secretary of State Johnson to President Nixon, vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 410, October 8, 1971, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d410>.

<sup>86</sup>Ibid.

<sup>87</sup>William P. Rogers: 414. Telegram 194015 From the Department of State to the Embassy in Spain, vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 414, October 22, 1971, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d414>.

<sup>88</sup>Ibid.

by a coastal State or an international agency - degrades our mobility.<sup>89</sup>

In other words, the United States must maintain *de facto* control over its freedom to navigate on the high seas and through international straits by preventing those areas of sea space from being subjected to *de jure* regulation by coastal states and international actors.

On May 25, 1972, National Security Council Staff members Denis Clift and Melvin Levine sent a message to Henry Kissinger conveying the Joint Chiefs of Staff's perspective of U.S. interests at the upcoming Law of the Sea Conference.<sup>90</sup> The Joint Chiefs of Staff also stated,

... mobility is fundamental to the US policy of forward strategy, and that US strategy is designed to take full advantage of the historical freedom of movement on, under and over the world's seas. Extension of territorial seas to 12 miles without free transit through straits would subject the "choke points" — e.g., the Strait of Gibraltar—of the oceans to unilateral restrictions that could severely restrict US mobility vital to the employment of many US strategic and general purpose forces... They also argue that it would be unwise to enter into bilateral arrangements, in lieu of multilateral agreement on freedom of transit, in that it would place US interests at the mercy of another sovereign state.

Therefore, the United States' national security depended on having the ability to project power on and over the global high seas to engage in sea control operations to implement its forward defense strategy. This issue was of such fundamental importance that the United States needed to secure global freedom of navigation, or freedom of the seas, and could not entrust oceanic stewardship to another state.

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<sup>89</sup>Ibid.

<sup>90</sup>Denis Clift/Melvin Levine: 429. Memorandum From Denis Clift and Melvin Levine of the National Security Council Staff to the President's Assistant for National Security Affairs (Kissinger), vol. Foreign Relations of the United States, 1969–1976, Volume E–1, Documents on Global Issues, 1969–1972, Document 429, May 25, 1972, url: <https://history.state.gov/historicaldocuments/frus1969-76ve01/d429>.

## 9.3 The Third UN Conference on the Law of the Sea

The Third UN Convention on the Law of the Sea (UNCLOS III) began in 1974 and would consume 77 weeks of negotiations over the course of the next seven years.<sup>91</sup> Broadly speaking, UNCLOS III can be defined by two distinct phases.<sup>92</sup> The first phase from 1974 through 1976 addressed a wide range of law of the sea topics including the issues of territorial delimitation and the status of international straits.<sup>93</sup> After 1976, however, the focus of the conference shifted almost exclusively to the issue of seabed mining.<sup>94</sup>

### 9.3.1 The Caracas Session

The first substantive session of the UNCLOS III began in Caracas, Venezuela, on June 20, 1974.<sup>95</sup> A primary point of discussion at the Caracas Session was the extent of the territorial sea and freedom of navigation rights through international straits. While the majority of states at the conference agreed on the twelve-mile territorial sea, the straits issue proved more controversial. States abutting international straits, such as Spain, Cyprus, Greece, Indonesia, Morocco, and Yemen, insisted that the right of innocent passage should hold through their territorial waters instead of freedom of navigation, or free transit.<sup>96</sup> Innocent passage is defined as “uninterrupted transit which does not prejudice the peace, good order, or security of the coastal state.”<sup>97</sup> Abiding by the doctrine of innocent passage would allow the coastal states to apply more stringent regulations on transit.<sup>98</sup> For example, under an innocent passage straits regime, coastal states would be allowed to bar “tankers, nuclear

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<sup>91</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 284.

<sup>92</sup>Ibid., p. 287.

<sup>93</sup>Ibid., p. 287.

<sup>94</sup>Ibid., p. 287.

<sup>95</sup>Ibid., p. 288.

<sup>96</sup>Ibid., pp. 293–294.

<sup>97</sup>William E. Colby: 11. Analytical Study OPR–3 Prepared by the Central Intelligence Agency, vol. Foreign Relations of the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 11, April 1974, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d11>.

<sup>98</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), pp. 293–294.

powered ships, and ships carrying nuclear weapons.”<sup>99</sup> An analytical study prepared by the U.S. Central Intelligence Agency in preparation for the Caracas session stated that

Free transit would mean that the coastal state could establish traffic corridors but that in all other respects vessels and aircraft in transit would enjoy the same freedoms as they have on the high seas. Most states want to concede only the more limited right of innocent passage which would, among other strictures, require submarines to surface. ... Innocent passage would also restrict rights to use the airspace above the straits. The military value of unobstructed overflight rights was underlined during the 1973 Middle East war when the US airlift to Israel depended upon routes over the Gibraltar strait for access to the Mediterranean.<sup>100</sup>

During the Yom Kippur War of October 1973, NATO allies denied the United States “refueling and overflight rights” because they did not support the conflict.<sup>101</sup> Specifically, overflight rights above the Strait of Gibraltar were denied which was essential to supporting Israel.<sup>102</sup> From this, the United States Department of Defense concluded that it could not rely on the generosity of other states for the ability to project American military force.<sup>103</sup> The United States needed to ensure that freedom of navigation, or freedom of the seas, was universally guaranteed and applied to surface vessels as well as aviation platforms.<sup>104</sup> Because of this, the CIA report stated, the United States could not tolerate mere rights of innocent passage.<sup>105</sup>

At a meeting with the Principals of the UNCLOS III negotiations on June 17, 1974, John Moore, Councilor of International Law for the Department of State and the Chairman of the National Security Council Interagency Taskforce on the Law of the Sea, stated that for the United States, the question of sovereign territorial seas and the rights of passage through

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<sup>99</sup>Ibid., pp. 293–294.

<sup>100</sup>Colby: 11. Analytical Study OPR–3 Prepared by the Central Intelligence Agency (see n. 97).

<sup>101</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 273.

<sup>102</sup>Ibid., p. 273.

<sup>103</sup>Ibid., p. 273.

<sup>104</sup>Ibid., p. 273.

<sup>105</sup>Colby: 11. Analytical Study OPR–3 Prepared by the Central Intelligence Agency (see n. 97).

straits are “the most important issues in the negotiation.”<sup>106</sup> Moore reiterated the position advocated in the CIA preparatory report, arguing that that free transit for submerged and unannounced submarines in international straits was essential to the United States’ nuclear deterrent capability as well as its anti-submarine warfare capability.<sup>107</sup> Additionally, Moore stated,

We are also very concerned in straits with overflight, in terms of particularly the Strait of Gibraltar. I think if there is any lesson that we have learned in the Law of the Sea as a result of the October War, it is that one needs overflight through the Strait of Gibraltar. ... And we feel that it is something that should be preserved as part of a general high seas freedom that we now exercise in those areas.<sup>108</sup>

Thus, Moore argued, for U.S. national security interests freedom of the seas, meaning the prevention of *de jure* administrative control, must be preserved in international straits. Ensuring such freedom of the seas is necessary to enable the United States to deploy its military capability on, under, and over the global ocean space to intervene as it sees fit. The focus of securing freedom of the seas for American national security interests was reiterated by President Ford on June 24, 1974.<sup>109</sup> In National Security Decision Memorandum 260, President Ford reaffirmed “the importance attached to gaining international acceptance of provisions accommodating U.S. national security interests on freedom of navigation, unimpeded transit through and over international straits and preservation of other reasonable uses of the high seas.”<sup>110</sup>

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<sup>106</sup>John Norton Moore: 13. Minutes of the Acting Secretary of State’s Analytical Staff Meeting, vol. Foreign Relations of the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 13, June 17, 1974, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d13>.

<sup>107</sup>Ibid.

<sup>108</sup>Ibid.

<sup>109</sup>Henry Kissinger: 14. National Security Decision Memorandum 260, vol. Foreign Relations of the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 14, June 24, 1974, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d14>.

<sup>110</sup>Ibid.

On August 29, 1974, the Caracas session of UNCLOS three concluded.<sup>111</sup> During the ten weeks of meetings, the majority of states represented at UNCLOS II save the “straits states,” approved of the American position of free transit through international straits as opposed to mere innocent passage.<sup>112</sup> The matter of territorial seas and international straits was picked up again in earnest in Geneva from March 17 to May 10, 1975.<sup>113</sup>

### 9.3.2 The Geneva Session

At the Geneva session of UNCLOS III, a straits regime was presented that persisted throughout the remainder of the conference.<sup>114</sup> Maritime states, specifically the United States, conceded to generous territorial delineations for archipelagic states in exchange for secured assurances of freedom of navigation.<sup>115</sup> Just prior to the Geneva session, on March 14, 1975, Henry Kissinger wrote to President Ford stating that it has been the American position since the beginning of the Law of the Sea negotiations that “retention of the maximum degree of freedom of navigation, including unimpeded transit through, over and under straits used for international navigation” is crucial for the “protection of our national security interests” and therefore “is a fundamental U.S. objective in the Conference.”<sup>116</sup> Kissinger conveyed that this position was also shared by the Deputy Secretary of Defense and the Joint Chiefs of Staff.<sup>117</sup> “In my opinion,” Kissinger stated, “the importance of our national security objectives re-

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<sup>111</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 299.

<sup>112</sup>Robert S. Ingersoll: Memorandum NSC-U/DM-109D From the Chairman of the National Security Council Under Secretaries Committee (Ingersoll) to President Ford, vol. Foreign Relations of the United States, 1969–1976, Volume E-3, Documents on Global Issues, 1973–1976, Document 16, February 6, 1975, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d16>.

<sup>113</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 299.

<sup>114</sup>Ibid., p. 305.

<sup>115</sup>Ibid., p. 305.

<sup>116</sup>Henry Kissinger: 17. Memorandum From the President’s Assistant for National Security Affairs (Kissinger) to President Ford, vol. Foreign Relations of the United States, 1969–1976, Volume E-3, Documents on Global Issues, 1973–1976, Document 17, March 14, 1975, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d17>.

<sup>117</sup>Ibid.

mains unaltered.”<sup>118</sup> Kissinger recommended that the U.S. delegates be permitted to make concessions in order to gain “international acceptance of provisions accommodating U.S. national security interests on freedom of navigation unimpeded transit through, over and under international straits and preservation of other reasonable uses of the seas.”<sup>119</sup> At the Geneva session the United States agreed to allow archipelagic states to draw their territorial baselines between their “outermost islands and drying reefs.”<sup>120</sup> Within that delineation, the archipelagic states would possess sovereignty.<sup>121</sup> Additionally, the archipelagic states would be granted an additional 200-nautical mile exclusive economic zone.<sup>122</sup> In exchange, however, freedom of navigation for all ships would be formally ensured within sovereign archipelagic waters and through international straits.<sup>123</sup> Ships transiting such waters would only have to abide by internationally agreed upon regulations for safety and pollution prevention, including utilizing specified sea-lanes for maritime traffic coordination.<sup>124</sup>

However, while the U.S. delegation was working to prevent unilateral territorial claims over the world’s high seas, domestic lawmakers were working towards a contrary aim.<sup>125</sup> Legislation had entered Congress at the start of 1975 that would unilaterally declare an American contiguous fisheries zone extending 200-nautical miles from shore.<sup>126</sup> While the U.S. position supported a 200-mile exclusive economic zone, the United States foreign policy aim was to mitigate individual claims by codifying an internationally agreed upon, standardized, law of the sea. In a November 19, 1975, conversation with President Ford, Republican Representatives of California, Bob Wilson and Pete McCloskey, advocated against the fish-

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<sup>118</sup>Kissinger: 17. Memorandum From the President’s Assistant for National Security Affairs (Kissinger) to President Ford (see n. 116).

<sup>119</sup>Ibid.

<sup>120</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 305.

<sup>121</sup>Ibid., p. 305.

<sup>122</sup>Ibid., p. 305.

<sup>123</sup>Ibid., p. 305.

<sup>124</sup>Ibid., p. 305.

<sup>125</sup>Ingersoll: Memorandum NSC–U/DM–109D From the Chairman of the National Security Council Under Secretaries Committee (Ingersoll) to President Ford (see n. 112).

<sup>126</sup>Ibid.



eries extension.<sup>127</sup> Representative Wilson stated that although the bill had passed in the House of Representatives, “The security interests involved in this bill have not been stressed enough.”<sup>128</sup> Wilson told President Ford, “Unilateral moves could close 36 percent of the seas to the movement of the Navy.”<sup>129</sup> Wilson continued, “If we go unilateral, there’ll be no LOS treaty. If we, the biggest nation in the LOS, move unilaterally, we abandon all this.”<sup>130</sup>

On April 6, 1976, Henry Kissinger also cautioned President Ford.<sup>131</sup> Kissinger stated, that the resolution to extend American fisheries had passed both in the House and in the Senate and that President Ford himself had indicated that he would sign it into law.<sup>132</sup> Kissinger explicitly told President Ford, “As your foreign policy adviser, I have no choice but to recommend that you veto this legislation.”<sup>133</sup> Despite the warnings, on April 13, 1976, President Ford signed the 200-nautical mile “fisheries conservation and management zone” into law.<sup>134</sup> While the U.S. Department of State and Department of Defense opposed the legislation, According to Ann Hollick, President Ford was motivated by “election-year politics.”<sup>135</sup>

### 9.3.3 The New York Sessions

Additional session of UNCLOS III was scheduled to convene in New York City, from March 14 - May 7 and again from August 2 - September 17, 1976.<sup>136</sup> Prior to the first New York

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<sup>127</sup>23. Memorandum of Conversation, vol. Foreign Relations of the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 23, November 19, 1975, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d23>.

<sup>128</sup>Ibid.

<sup>129</sup>Ibid.

<sup>130</sup>Ibid.

<sup>131</sup>Henry Kissinger: 26. Memorandum From Secretary of State Kissinger to President Ford, vol. Foreign Relations of the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 26, April 6, 1976, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d26>.

<sup>132</sup>Ibid.

<sup>133</sup>Ibid.

<sup>134</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 314.

<sup>135</sup>Ibid., p. 314.

<sup>136</sup>Ibid., p. 313.

session President Ford's Assistant for National Security Affairs, Brent Scowcroft, sent President Ford a memorandum outlining the U.S. objectives at the upcoming sessions.<sup>137</sup> Scowcroft reiterated that the fundamental objective at the Law of the Sea Conference is the "Protection of our national security interests — in particular, retention of the maximum degree of freedom of navigation, including unimpeded transit through, under and over straits used for international navigation."<sup>138</sup> Universally ensuring the ability to freely transit the global ocean space to project power and intervene where the U.S. sees fit can only be accomplished, Scowcroft stated, by a "comprehensive multilateral treaty on the oceans."<sup>139</sup> A multilateral treaty which, Scowcroft stated, the United States was undermining in its pivot towards unilateralism.<sup>140</sup> Because of this, Scowcroft insisted that enactment of the 200-nautical mile fisheries legislation be delayed until after the New York session, which Scowcroft stated would be "central to the success or failure of the Law of the Sea Conference."<sup>141</sup> Scowcroft's advice was heeded and the legislation was scheduled to take effect the following year, on March 1, 1977.<sup>142</sup>

However, even with the delayed implementation date, the New York sessions were considered abject failures by the United States delegation. In addition to the unilateral turn in American policy making, President Ford appointed new leadership to the UNCLOS delegation. Leadership with considerably less experience.<sup>143</sup> Such was the state of affairs that on August 24, 1976, Brent Scowcroft lamented, "I've seen conferences screwed up before, but this is the worst in the annals of diplomacy."<sup>144</sup> By the end of the summer, the United States

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<sup>137</sup>Brent Scowcroft: 24. Memorandum From the President's Assistant for National Security Affairs (Scowcroft) to President Ford, vol. Foreign Relations of the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 24, March 1, 1976, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d24>.

<sup>138</sup>Ibid.

<sup>139</sup>Ibid.

<sup>140</sup>Ibid.

<sup>141</sup>Ibid.

<sup>142</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 314.

<sup>143</sup>Ibid., p. 314.

<sup>144</sup>Brent Scowcroft: 39. Memorandum for the Record: Meeting on Law of the Sea, vol. Foreign Relations of

had failed to make any progress on outstanding law of the seas issues.<sup>145</sup> Because of the conference failures, National Security Council Staff member Denis Clift told Brent Scowcroft, it is even less likely that Congress will further delay its unilateral fishery claims in favor of a multilateral agreement.<sup>146</sup> By the end of the fourth session of UNCLOS III, the conference had tentatively agreed to a draft treaty that would codify a 12-mile territorial sea, freedom of navigation through international straits and archipelagic waters, and a 200-nautical mile exclusive economic zone where in the coastal state would have jurisdiction over resources but not navigation rights.<sup>147</sup> The New York Sessions in the summer of 1976 were the last sessions where the issue of freedom of navigation was considered.<sup>148</sup> After 1976 the UNCLOS negotiations transitioned almost exclusively towards the issue of undersea mining.<sup>149</sup> An issue who's consideration falls outside the scope of this study.

At President Ford's final State of the Union Address in 1977, he cautioned that the United States cannot solely rely on strategic nuclear weaponry for its safety.<sup>150</sup> The United States "must have superior naval and marine forces to maintain freedom of the seas" as well as robust air and land capabilities.<sup>151</sup> Because of this, President Ford announced that he had directed a "five-year naval building program" that would prove indispensable to American security.<sup>152</sup>

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the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 39, August 24, 1976, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d39>.

<sup>145</sup>Denis Clift: 51. Memorandum From Denis Clift of the National Security Council Staff to the President's Assistant for National Security Affairs (Scowcroft), vol. Foreign Relations of the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 51, October 16, 1976, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d51>.

<sup>146</sup>Ibid.

<sup>147</sup>54. Briefing Paper Prepared in the Bureau of Oceans and International Environmental and Scientific Affairs at the Department of State, vol. Foreign Relations of the United States, 1969–1976, Volume E–3, Documents on Global Issues, 1973–1976, Document 54, undated, url: <https://history.state.gov/historicaldocuments/frus1969-76ve03/d54>.

<sup>148</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 287.

<sup>149</sup>Ibid., p. 287.

<sup>150</sup>Gerald Ford: Editorial Note, vol. Foreign Relations of the United States, 1969–1976, Volume XXXV, National Security Policy, 1973–1976, Document 132, January 12, 1977, url: <https://history.state.gov/historicaldocuments/frus1969-76v35/d132>.

<sup>151</sup>Ibid.

<sup>152</sup>Ibid.

Earlier that year, in anticipation of a National Security Council Meeting to discuss future naval force requirements, George Vest, Director of the Bureau of Politico-Military Affairs, sent a memorandum to brief the Acting Secretary of State, Charles W. Robinson.<sup>153</sup> The National Security Council discussion planned to center around the decision whether or not to build an additional aircraft carrier to augment the U.S. Navy's sea control mission.<sup>154</sup> Director Vest stated,

The basic strategic issue is how can the US structure its Navy during the balance of the 20th Century in order to maintain the “*freedom of the seas*”, *the term now favored by the Secretary of Defense as a short-hand description of our maritime interests. This translates into a naval force capable of establishing control of crucial sea lanes of communication, as well as maintaining a measure of additional flexibility for the projection of power in crises.* [Emphasis added]

This passage uniquely demonstrates the *Mare Imperium* discursive conceptualization of freedom of the seas as mechanism for attaining sea control.

## 9.4 Carter, Reagan, and the Introduction of Freedom of Navigation Operations

Jimmy Carter assumed the role of President of the United States on January 20, 1977. Shortly after, the Carter Administration solicited a review of U.S. policy concerning the ongoing Law of the Sea negotiations.<sup>155</sup> The request was answered in the form of a 1977 National Intelligence Estimate report which concluded that while the Law of the Sea treaty would be useful in preventing unilateral *de jure* claims over the world's high seas, it would

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<sup>153</sup>Vest: Briefing Memorandum From the Director of the Bureau of Politico-Military Affairs (Vest) to the Acting Secretary of State (Robinson) (see n. 81).

<sup>154</sup>Ibid.

<sup>155</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 360; Presidential Review Memorandum/ NSC-18, February 2, 1977, url: <https://www.jimmycarterlibrary.gov/assets/documents/memorandums/prm18.pdf>.

not alone be sufficient to protect American navigational freedoms.<sup>156</sup>

On August 10, 1979, a New York Times article was published leaking the Carter Administration's plans to contest expansive maritime claims.<sup>157</sup> The New York Times article announced to the American public that "The Carter Administration has ordered the Navy and Air Force to undertake 'a policy of deliberately sending ships and planes into or over the disputed waters of nations that claim a territorial limit of more than the three miles'."<sup>158</sup> This done, according to the article, to "reaffirm" the American position that transit should be unregulated beyond three-nautical miles.<sup>159</sup> Because no international law of the sea convention had been signed to extend territorial waters to twelve-nautical miles, the United States held firm on its position that sovereignty ended after three miles.<sup>160</sup> Although, the U.S. did recognize the 200-mile Exclusive Economic Zone by unilateral legislation.<sup>161</sup> The 1979 article continued stating that the decision had been made as a result of a study undertaken by the Carter Administration.<sup>162</sup> The National Security Council recommended that as opposed to "simply protesting diplomatically," the United States needed to "show the flag to demonstrate the American claims" and prevent creeping territorial expansionism.<sup>163</sup> The National Security Council stated that, going forward, it should be American maritime policy to,

1. Protest all territorial sea claims in excess of twelve nautical miles and some greater than three, especially those overlapping an international navigation strait.

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<sup>156</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 362; George V Galdorisi/George Galdorisi/Kevin R Vienna: Beyond the law of the sea: new directions for US oceans policy, 1997, p. 82.

<sup>157</sup>U.S. Will Challenge Coastal Sea Claims That Exceed 3 Miles, in: New York Times, Aug. 1979, url: <https://www.nytimes.com/1979/08/10/archives/us-will-challenge-coastal-sea-claims-that-exceed-3-miles-navy-and.html?searchResultPosition=1>; Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 371.

<sup>158</sup>U.S. Will Challenge Coastal Sea Claims That Exceed 3 Miles (see n. 157).

<sup>159</sup>Ibid.

<sup>160</sup>Hollick: US Foreign Policy and the Law of the Sea (see n. 37), p. 371.

<sup>161</sup>Ibid., p. 371.

<sup>162</sup>U.S. Will Challenge Coastal Sea Claims That Exceed 3 Miles (see n. 157).

<sup>163</sup>U.S. Will Challenge Coastal Sea Claims That Exceed 3 Miles (see n. 157); William J Aceves: Diplomacy at Sea: US Freedom of Navigation Operations in the Black Sea, in: Naval War College Review 46.2 (1993), pp. 59–79, here p. 60.

2. Protest all claims inhibiting navigation over waters that the United States viewed as a high seas corridor.
3. Protest all claims requiring advance notification for warships or restricting warship passage in any way.
4. Protest rules for “innocent passage” through the territorial sea which were substantially different from established provisions.
5. Protest assertions of jurisdiction over navigation and overflight beyond the territorial sea.<sup>164</sup>

In July of 1979, the Joint Chiefs of Staff instructed the U.S. Navy and Air Force to “move anywhere they wanted up to three miles from coast,” specifically within the waters claimed by “countries as Argentina, Burma and Libya, all of which have 12-mile limits for navigational purposes.”<sup>165</sup> Additionally Naval and Air Force commands were advised not to provide any notification before entering the claimed sea space to highlight the fact that the United States regards the area as high seas.<sup>166</sup> Unless the international community as a whole agreed to permit free, non-regulated, passage of warships through international straits, the United States would militarily contest any maritime claim beyond three miles.<sup>167</sup> The American maritime policy of protesting perceived illegitimate claims of jurisdiction over the global high seas became known as the Freedom of Navigation Program.

In January 1981, Ronald Reagan assumed the office of the President of the United States. On April 30, 1982 the UNLOS treaty was formally adopted by 130 members of the United Nations.<sup>168</sup> While on holiday in July of the same year, President Reagan announced that the United States would not become a signatory of the treaty.<sup>169</sup> The following year, on March 10, 1983, President Reagan delivered a speech on United States Oceans policy explaining

<sup>164</sup>Aceves: *Diplomacy at Sea: US Freedom of Navigation Operations in the Black Sea* (see n. 163), p. 60.

<sup>165</sup>U.S. Will Challenge Coastal Sea Claims That Exceed 3 Miles (see n. 157).

<sup>166</sup>Ibid.

<sup>167</sup>Ibid.

<sup>168</sup>U.S. Will Not Sign Sea Law Treaty, in: *New York Times*, July 1982, url: <https://www.nytimes.com/1982/07/10/world/us-will-not-sign-sea-law-treaty.html>.

<sup>169</sup>Ibid.

the rationale for refusing to sign the law of the sea convention and to outline American maritime policy going forward.<sup>170</sup> President Reagan stated, that the Convention's provisions on deep seabed mining ran contrary to the interests of the United States and "industrialized nations."<sup>171</sup> However, President Reagan announced that the United States would abide by the regulations surrounding the "traditional uses of the ocean - such as navigation and overflight."<sup>172</sup> In this regard, President Reagan stated that the United States would respect the territorial rights of other states, as delineated in the convention, as long as other states afforded the U.S. the same rights.<sup>173</sup> This included recognizing 200 nautical mile Exclusive Economic Zones, 24 mile Contiguous Zone, and a 12 nautical mile swath of territorial waters. President Reagan announced the continuation of President Carter's freedom of navigation program, famously stating,

the United States will exercise and assert its 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. The United States will not, however, 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.<sup>174</sup>

This proclamation would serve as the bedrock for freedom of navigation operations going forward. Indeed, at the time of writing, this 1983 statement by President Reagan continues to serve as the justification for contesting what the United States perceives to be illegitimate territorial claims over the world's high seas.

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<sup>170</sup>Statement on United States Oceans Policy: Ronald Reagan Presidential Library - National Archives and Records Administration, Mar. 1983, url: <https://www.reaganlibrary.gov/research/speeches/31083c>.

<sup>171</sup>Ibid.

<sup>172</sup>Ibid.

<sup>173</sup>Ibid.

<sup>174</sup>Ibid.

# Chapter 10

## Contemporary Discourse

The contemporary U.S. foreign policy *Mare Imperium* discourse of freedom of the seas perpetuates the equivalency between free seas and sea control. While robust archival evidence is not available for this contemporary time period, an examination of open source political-military statements shows that the discourse has continued to be deployed to safeguard American power projection capabilities and to secure control over a global maritime sphere of influence. During the post-Cold War period, freedom of the seas discourse continues to be used to justify maintaining a global presence of U.S. naval assets in order to protect the world's commercial linkages, or global sea lines of communication. In this time period, any force that threatened the American ability to forward deploy and intervene across the global high seas is seen by the United States as a threat to the freedom of the seas. In this context, the Chinese development of an Anti-Access/Area Denial strategy and force structure, designed to keep opposing forces out of China's near seas, has become perceived by the United States as an existential threat to the so-called freedom of the seas.

### 10.1 From Forward Defense to Forward Presence

In the wake of the Soviet Union's dissolution, the United States underwent a "fundamental shift in national security policy."<sup>1</sup> With the perceived threat from the Soviet Union gone,

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<sup>1</sup>From the Sea: Working Papers and Drafts, 1992, Historical Preface to Archival Collection, 1992, url: <https://www.history.navy.mil/content/history/nhnc/research/archives/research-guides-and-finding-aids/from-the-sea.html>.



the United States took stock of an international landscape no longer defined by the Cold War and fixated on great power conflict.<sup>2</sup> As opposed to the Cold War containment strategy of forward defense, the United States military adopted a ‘peacetime’ posture referred to as forward presence. In reality forward presence did not differ from forward defense, both concepts were predicated on continuous global deployment and power projection capabilities predicated on securing control of the sea. However, with the fall of the Soviet Union there was no threat to defend against so forward defense was re-branded as forward presence.

On August 2, 1990, President George H.W. Bush delivered a speech at the Aspen Institute in Colorado outlining a U.S. foreign policy for the “new era” it was facing.<sup>3</sup> President Bush remarked that, with the democratization of Eastern Europe and the withdrawal of Soviet military forces from Central and Eastern Europe, the potential for a Soviet invasion of Western Europe was at its lowest point since the end of the Second World War.<sup>4</sup> Because of this, President Bush stated, the U.S. needed to change its military strategy and force structure in order to address the reality of threats facing the United States.<sup>5</sup> President Bush stated, “In a world less driven by an immediate threat to Europe and the danger of global war, in a world where the size of our forces will increasingly be shaped by the needs of regional contingencies and peacetime presence, we know that our forces can be smaller.”<sup>6</sup> With the end of the Cold War in sight, the Bush Administration forecasted that the U.S. could secure its interests while reducing the military by 25%.<sup>7</sup> This reduced military would focus less on preparing for global great power conflict and devote more resources towards peacetime engagement and intervention in peripheral conflicts around the globe.<sup>8</sup> The key

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<sup>2</sup>Ibid.

<sup>3</sup>George H.W. Bush: Remarks at the Aspen Institute Symposium in Aspen, Colorado, August 2, 1990, url: <https://bush41library.tamu.edu/archives/public-papers/2128>.

<sup>4</sup>Ibid.

<sup>5</sup>Ibid.

<sup>6</sup>Ibid.

<sup>7</sup>Ibid.

<sup>8</sup>Ibid.

and “indispensable element of our strategy” going forward, Bush stated, remained in the United States’ ability to maintain a global forward presence.<sup>9</sup> President Bush stated,

the U.S. may be called on to respond to a variety of challenges from various points on the compass. In an era when threats may emerge with little or no warning, our ability to defend our interests will depend on our speed and our agility. And we will need forces that give us a global reach. No amount of political change will alter the geographic fact that we are separated from many of our most important allies and interests by thousands of miles of water.<sup>10</sup>

This was punctuated by the announcement by President Bush on the same day, that Iraq had invaded Kuwait. Therefore, even with the Cold War era coming to a close and American security policy shifting from preparing for global conflict to preparing for regional crises, President Bush signaled that the core security interests of the United States would remain inexorably tied to American ability to intervene globally on behalf of its national interests wherever it deemed necessary.<sup>11</sup>

The shift in American security policy presented by President Bush at the Aspen Institute was reiterated by Secretary of Defense Dick Cheney in his Annual Report to the President and Congress, delivered January 1991.<sup>12</sup> Secretary Cheney reaffirmed that, since the Warsaw Pact posed no significant military threat, American military strategy would be predicated on responding to unforeseen regional threats around the world.<sup>13</sup> This was particularly the case, Secretary Cheney stated, with regards to “Europe, Southwest Asia, and East Asia.”<sup>14</sup> During peacetime, while potential regional threats remain unknowable, the primary goal of the U.S. armed forces would be to ensure “that our forces can provide needed levels

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<sup>9</sup>Bush: Remarks at the Aspen Institute Symposium in Aspen, Colorado (see n. 3).

<sup>10</sup>Ibid.

<sup>11</sup>Ibid.

<sup>12</sup>Dick Cheney: Annual Report of the Secretary of Defense to the President and the Congress, January 1991, url: [https://history.defense.gov/Portals/70/Documents/annual\\_reports/1991\\_DoD\\_AR.pdf?ver=2014-06-24-151830-167](https://history.defense.gov/Portals/70/Documents/annual_reports/1991_DoD_AR.pdf?ver=2014-06-24-151830-167).

<sup>13</sup>Ibid.

<sup>14</sup>Ibid.

of forward presence to influence favorably the emerging security environment.”<sup>15</sup> Secretary Cheney stated that this new post-Cold War era defense posture would require “robust naval forces that stress mobility” since the U.S. no longer had the luxury of fixed Eurocentric defense planing.<sup>16</sup> Mobility of American military forces would need to be ensured in order to project power globally at a moments notice to reinforce forward deployed forces.<sup>17</sup> Peacetime forward presence would play a key role in “detering aggression, preserving regional stability, and protecting U.S. interests.”<sup>18</sup> A forward military presence in peacetime would provide, Cheney stated, a physical demonstration of the United States’ commitment to respond to crises and to control their outcomes.<sup>19</sup> In order to levy this forward presence, the United States sought to retain the ability to sail and fly its military vessels across the global high seas and through international straits, as had been championed during the UNCLOS negotiations.

Following his August 2, 1990, speech at the Aspen Institute, President Bush signed National Security Directive (NDS) 49 outlining the continuation of the Freedom of Navigation Program to safeguard the mobility of American military forces at sea. NDS 49 stated that the United States recognizes the provisions outlined in UNCLOS regarding “maritime navigation and overflight freedoms” to be customary international law, as President Reagan proclaimed in his March 10, 1983, Oceans Policy statement.<sup>20</sup> The directive stated that, since 1979, the United States has conducted freedom of navigation operations in order to “preserve the global mobility of U.S. forces.”<sup>21</sup> By refusing to acknowledge what the U.S. perceives as maritime territorial claims made in excess of UNCLOS allocations, NDS 49 stated that freedom of navigation operations “protect U.S. navigation, overflight, and re-

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<sup>15</sup>Ibid.

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.

<sup>18</sup>Ibid.

<sup>19</sup>Ibid.

<sup>20</sup>National Security Directive 49 - Freedom of Navigation Program, October 12, 1990, url: <https://fas.org/irp/offdocs/nsd/nsd49.pdf>.

<sup>21</sup>Ibid.

lated interests on, under, and over the seas”.<sup>22</sup> The United States would continue to refuse any curtailment, either *de jure* or *de facto*, of American navigational or overflight abilities so that the U.S. military can project power globally and intervene as it sees fit.

In September of 1992, a landmark publication was released, titled ... *From the Sea*, detailing the role that the United States Navy would play in America’s new foreign policy.<sup>23</sup> *From the Sea - Preparing the Naval Service for the 21st Century* argued that the United States once again enjoyed the undisputed command of the sea it briefly held at the close of the Second World War.<sup>24</sup> Because of this the publication outlined a naval force structure that would shift focus from winning command of the sea towards positioning the fleet to take advantage of the unfettered American stewardship of the global high seas. The publication stated,

Our ability to command the seas in areas where we anticipate future operations allows us to resize our naval forces and to concentrate more on capabilities required in the complex operating environment of the “littoral” or coastlines of the earth. With the demise of the Soviet Union, the free nations of the world claim preeminent control of the seas and ensure freedom of commercial maritime passage. As a result, our national maritime policies can afford to de-emphasize efforts in some naval warfare areas.<sup>25</sup>

Specifically, this translated into a fleet better positioned to project power across a commanded sea into distant “littoral” theaters as opposed to a fleet geared towards Mahanian “open-ocean warfighting”.<sup>26</sup>

In the new post-Cold War era, the publication stated, the United States Navy needed to focus on “traditional expeditionary roles.”<sup>27</sup> Expeditionary forces are designed “to respond,

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<sup>22</sup>National Security Directive 49 - Freedom of Navigation Program (see n. 20).

<sup>23</sup>Sean O’Keefe: ...From the Sea - Preparing the Naval Service for the 21ST Century - A New Direction for the Naval Service, September 1992, url: <https://www.navy.mil/navydata/policy/fromsea/fromsea.txt>.

<sup>24</sup>Ibid.

<sup>25</sup>Ibid.

<sup>26</sup>Ibid.

<sup>27</sup>Ibid.

on short notice, to crises in distant lands.”<sup>28</sup> Such expeditionary forces are able to do this because, the doctrinal publication stated, American forces are “Unrestricted by the need for transit or overflight approval from foreign governments in order to enter the scene of action.”<sup>29</sup> The report continued stating,

The international respect for freedom of the seas guarantees legal access up to territorial waters of all coastal countries of the world. This affords Naval Forces the unique capability to provide peaceful presence in ambiguous situations before a crisis erupts.<sup>30</sup>

Therefore, as in the past, the post-Cold War military posture depended on freedom of the seas discourse preempting claims of dominion over the world’s ocean space in order to secure the ability to dominate via *imperium*. By ensuring the global high seas belonged to no one, the United States secured the ability to use its preponderant maritime capability to project power intervene “for the national interest” up to the near shore territorial seas of coastal states.<sup>31</sup> Maintaining such forward control is important, the publication asserted, in order to ‘show the flag’ and “demonstrate U.S. power and resolve.”<sup>32</sup> By “Operating forward,” *From the Sea* stated, “Naval Forces demonstrate United States commitment overseas and promote American interests.”<sup>33</sup> Without this forward commitment, it warned, American interests would be perceived as vulnerable and “the seeds of conflict” would “continue to sprout.”<sup>34</sup>

On January 20, 1993, Bill Clinton was inaugurated as the 43rd President of the United States. Later that year, Secretary of Defense, Les Aspin, delivered an address at Georgetown University to announce that the vision for American national security in the post-Cold War era that, then Governor Clinton had proclaimed on the campaign trail in 1991, had been

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<sup>28</sup>Ibid.

<sup>29</sup>Ibid.

<sup>30</sup>Ibid.

<sup>31</sup>Steinberg: The social construction of the ocean (see n. 53), pp. 66–67.

<sup>32</sup>O’Keefe: ...From the Sea - Preparing the Naval Service for the 21ST Century - A New Direction for the Naval Service (see n. 23).

<sup>33</sup>Ibid.

<sup>34</sup>Ibid.

successfully implemented.<sup>35</sup> Previously, in December of 1991, Arkansas Governor, and then Presidential hopeful, Bill Clinton had proposed a “new covenant for American security” to define American foreign policy in the wake of the Cold War.<sup>36</sup> Although the Clinton administration presented its foreign policy as visionary, in actuality it represented a continuation of the Bush administration’s foreign policy, with an additional emphasis on commercial considerations. For example, the primary component of the ‘new covenant’ was to restructure the military to meet the emerging regional security needs of the United States now that the threat of great power conflict had receded. Secretary Aspin told the audience in 1993 that this restructuring had been accomplished.<sup>37</sup>

Just as President Bush had argued at the Aspen Institute, Clinton argued that the United States needed to pair down and refocus the United States military to effectively address a threat landscape no longer dominated by the Soviet Union.<sup>38</sup> Additionally, like the emphasis placed on expeditionary forces in *From the Sea*, the Clinton administration had stressed the need to orient the military towards “rapid deployment” so that the United States would be “capable of projecting power quickly when and where it’s needed.”<sup>39</sup> Secretary Aspin spoke in 1993 stating that the U.S. Naval force, committed to forward deployment and power projection, would continue to be centered around the aircraft carrier battle group.<sup>40</sup> Aspin stated, because the Soviet Navy no longer posed a threat, the Cold War mission of the United States Navy, “to keep the Soviets from restricting our freedom of the seas” was no longer necessary.<sup>41</sup> Secretary Aspin continued,

With out the Soviet Navy, no one challenges us for control of the seas. Now

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<sup>35</sup>Les Aspin: Aspin Details Bottom-Up Review Results, No 406-93, September 2, 1993, url: <https://clinton.presidentiallibraries.us/items/show/48488>.

<sup>36</sup>Bill Clinton: Clinton Foreign Policy Speech, December 12, 1991, url: <https://www.c-span.org/video/?33576-1/clinton-foreign-policy-speech>.

<sup>37</sup>Aspin: Aspin Details Bottom-Up Review Results (see n. 35), p. 7.

<sup>38</sup>Clinton: Clinton Foreign Policy Speech (see n. 36).

<sup>39</sup>Ibid.

<sup>40</sup>Aspin: Aspin Details Bottom-Up Review Results (see n. 35), p. 7.

<sup>41</sup>Ibid., p. 7.

our naval forces must focus on projecting conventional power ashore in regional conflicts, particularly during the critical opening phase of a major conflict. In addition, they must “show the flag,” that is, help maintain a significant U.S. presence overseas to uphold our international commitments. In this context, aircraft carriers are the centerpiece of our naval forces<sup>42</sup>

Unfortunately, archival records are not available to trace the decision making process or advocacy from the Naval institution that made this carrier centric post-Cold War foreign policy a reality. However, Aspin’s remarks indicate that the United States strategically shifted from securing American freedom of the sea through command of the sea, to taking advantage of ubiquitous stewardship over the commanded sea, in a way that prioritized the big-navy carrier groups that had become the focal point of the U.S. navy since the Second World War.

However, the Clinton administration did add one new focus onto President Bush’s foreign policy, the need to address economic security as a core national security issue.<sup>43</sup> In his 1991 campaign speech Clinton asserted, “We must understand, finally, as never before that our national security is largely economic.”<sup>44</sup> Clinton stated that leading the world economically was one of the “major strategic challenges” facing the United States.<sup>45</sup> Clinton emphasised the importance of global commercial pathways, emphasizing the fact that, in 1991, 10% of the U.S. economy came from exports.<sup>46</sup> Because of this, Clinton stated, “the global economy must be at the heart of our national security policy.”<sup>47</sup> Speaking in 1993, Les Aspin stated, “Given the world situation today, and given the situation in the United States, the most important thing we can do for our security is to strengthen the economy.”<sup>48</sup> Secretary Aspin continued stating that the short term security interests of the United States were met by a

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<sup>42</sup>Ibid., p. 7.

<sup>43</sup>Clinton: Clinton Foreign Policy Speech (see n. 36).

<sup>44</sup>Ibid.

<sup>45</sup>Ibid.

<sup>46</sup>Ibid.

<sup>47</sup>Ibid.

<sup>48</sup>Aspin: Aspin Details Bottom-Up Review Results (see n. 35), p. 6.

strong military force, which the United States possessed.<sup>49</sup> However, the long term strategic security of the United States lay in remaining a global superpower which, Defense Secretary Aspin stated, necessarily depended on “economic might”.<sup>50</sup>

On March 28, 1994, Navy Doctrine Publication 1 (NDP 1) was released by the Department of the Navy codifying the role the U.S. Navy would play in advancing America’s military and economic security in the post-Cold War era.<sup>51</sup> NDP 1 directly reflects the *Mare Imperium* discourse of freedom of the seas. The doctrinal publication embodied the notion that freedom of the seas depends on American control of the seas. It stated,

Clearly, the uses of military force are being redirected toward regional contingencies and political persuasion, moving away from the prospect of all-or-nothing global war with another superpower. Nevertheless, ... our Naval Services’ fundamental missions have not changed. Our nation’s continued existence is tied to the seas, and our freedom to use those seas is guaranteed by our naval forces.<sup>52</sup>

NDP 1 continued, stating that while the United States is “the most powerful nation on earth,” it fundamentally depends on “transoceanic links” to secure its military and commercial interests.<sup>53</sup> The Department of the Navy publication emphasised that while the United States was also one of the great commercial powers of the world, its economic strength was dependent on “the continued flow of raw materials and finished products to and from our country.”<sup>54</sup> Therefore, “ensuring that the world’s sea lanes remain open is not only vital to our own economic survival; it is a global necessity.”<sup>55</sup> The United States took it upon itself, as the world’s preponderant naval power, to ensure that the sea-lanes of the world remained open.

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<sup>49</sup>Aspin: Aspin Details Bottom-Up Review Results (see n. 35), p. 6.

<sup>50</sup>Ibid., p. 6.

<sup>51</sup>Navy Doctrine Publication 1: Naval Warfare, March 28, 1994, url: <http://www.iwar.org.uk/military/resources/aspc/pubs/ndp1.pdf>.

<sup>52</sup>Ibid., p. iv.

<sup>53</sup>Ibid., pp. ii–iii.

<sup>54</sup>Ibid., p. 3.

<sup>55</sup>Ibid., p. 3.



To protect the world's sea lines of communication, NDP 1 stated that the United States must control the world's sea lines of communication.<sup>56</sup> NDP 1 announced that it was the doctrine of the United States Navy to maintain a global maritime forward presence in order to undertake sea control operations in critical waterways should regional crises arise.<sup>57</sup> Navy Doctrine Publication 1 stated,

Maintaining control of the seas permits us to exercise our mobility in positioning naval forces to meet the crisis of the moment, then moving on to other potential crisis locations. Naval mobility ensures that an adversary cannot take offensive action with any confidence that the expanse of the oceans will protect him from the long reach of U.S. retaliation.<sup>58</sup>

NDP 1 continued stating,

Control of the sea is fundamental to accomplishing our naval roles. It supports directly our ability to project power ashore by encompassing control of the entire maritime area: subsurface, surface, and airspace, in both the open oceans and the littoral regions of the world. Control of the sea allows us to:

- Protect sea lines of communication.
- Deny the enemy commercial and military use of the seas.
- Establish an area of operations for power projection ashore and support of amphibious operations.
- Protect naval logistic support to forward deployed battle forces.<sup>59</sup>

According to the Naval publication, establishing control of the sea enables “friendly freedom of action” and denies the same freedom to the enemy.<sup>60</sup> It allow the United States to project power over its commanded sea and therefore serves as the “unchanged” bedrock of American

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<sup>56</sup>Ibid., p. 12.

<sup>57</sup>Ibid., p. 10.

<sup>58</sup>Ibid., p. 12.

<sup>59</sup>Ibid., p. 26.

<sup>60</sup>Navy Doctrine Publication 1: Naval Warfare (see n. 51), p. 72; Potter: Sea power: A naval history (see n. 64), p. 162.

naval doctrine.<sup>61</sup> Forward deployed forces also enabled the United States Navy to contest what it perceived to be violations of the *Mare Imperium* conception of freedom of the seas.

The following year, on January 23, 1995, the Clinton administration published Presidential Decision Directive (PDD) 32 regarding Freedom of Navigation Operations.<sup>62</sup> This PDD-32 “superseded” and served as an update to National Security Directive (NDS)-49 on Freedom of Navigation Operations put out by the Bush administration in 1990.<sup>63</sup> Clinton’s directive reiterated that the United States perceives the provisions regarding “navigation and overflight rights and freedoms” delineated in the 1982 UNCLOS III treaty to constitute “customary rules of international law.”<sup>64</sup> PDD-32 stated that it is the policy of the United States to assert its navigational rights around the world in order to safeguard “the global mobility of U.S. forces” against the unilateral maritime claims of coastal states, and to ensure that “U.S. naval ships and military aircraft... operate freely worldwide.”<sup>65</sup> PDD-32 repeated verbatim Reagan’s 1983 pronouncement that “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 traditional uses of the high seas.”<sup>66</sup>

In March 1997, the U.S. Navy released a revised operational concept that built off of the Bush administration’s ... *From the Sea* publication.<sup>67</sup> The Clinton Administration’s naval operational concept, *Forward... From the Sea* shared with its predecessor an emphasis on taking advantage of a globally commanded sea space to establish a forward presence to in order to intervene on behalf of American interests whenever deemed necessary.<sup>68</sup> *Forward...*

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<sup>61</sup>Navy Doctrine Publication 1: Naval Warfare (see n. 51), pp. iv, 72.

<sup>62</sup>Bill Clinton: Presidential Decision Directive/ NSC-32, January 23, 1995, url: <https://fas.org/irp/offdocs/pdd/pdd-32.pdf>.

<sup>63</sup>Ibid.

<sup>64</sup>Ibid.

<sup>65</sup>Ibid.

<sup>66</sup>Ibid.

<sup>67</sup>Jay L Johnson: *Forward... From the Sea - The Navy Operational Concept*, March 1997, url: <https://www.navy.mil/navydata/policy/fromsea/ffseanoc.html>.

<sup>68</sup>Ibid.

*From the Sea* stated, “We conduct forward naval operations both to ensure unimpeded use of the seas and to project American influence and power into the littoral areas of the world.”<sup>69</sup> Maintaining a constant forward presence allows the United States to conduct sea control operations at the very outset of a crisis and enable further American reinforcements to the theater.<sup>70</sup> The operational concept argued that maintaining a sustained global presence was more “cost-effective” than trying to project power from the continental United States should the need arise.<sup>71</sup> *Forward... From the Sea* stated,

Our ability to dominate the littorals, including the undersea environment, allows us to operate with impunity in the face of enemy area denial threats while taking initial action to defeat those threats and prepare the battlespace for follow-on forces. By defeating enemy area denial threats and keeping vital sea and air lanes open, we ensure an uninterrupted flow of reinforcements into the theater.<sup>72</sup>

Further, the publication argued, the global presence of forward deployed naval forces able to engage in sea control operations would “ensure freedom of navigation on international trade routes and support U.S. efforts to bring excessive maritime claims into compliance with the international law of the sea.”<sup>73</sup> Thus, the naval operational concept demonstrated the mutually constitutive relationship whereby the discourse of freedom of the seas, enshrined in the international legal convention UNCLOS, enables the forward deployment of U.S. military assets which seek to control the sea to protect the freedom of the seas which enables the U.S. Navy to forward deploy and accomplish its operational objectives on behalf of American national security interests.

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<sup>69</sup>Ibid.

<sup>70</sup>Ibid.

<sup>71</sup>Ibid.

<sup>72</sup>Ibid.

<sup>73</sup>Ibid.

## 10.2 *Mare Imperium* Continued, the W. Bush Administration

In January of 2001, George W. Bush assumed the office of the President of the United States. During the Bush Administration the Department of Defense continued to stress the need to maintain the United States' freedom of action. The Freedom of Navigation program started under the Carter Administration continued throughout the early 2000s without any notable deviation in scope. President Bush appointed Donald Rumsfeld to the position of Secretary of Defense, a position that Rumsfeld held during the Ford administration. Recall that during the Ford Administration, according to George S. Vest, Secretary Rumsfeld favored using the term freedom of the seas "as a short-hand description of our maritime interests," meaning ensuring control over "crucial sea lanes of communication" and ensuring "a measure of additional flexibility for the projection of power in crises."<sup>74</sup>

The 2005 National Defense Strategy, released under the purview of Secretary of Defense Donald Rumsfeld, carried on the national security emphasis on forward defense.<sup>75</sup> The 2005 National Defense Strategy incorporated the forward presence discourse with the emphasis on global economic security that the previous administration championed. The primary objectives of the 2005 strategy were underpinned by a *Mare Imperium* discourse of freedom of the seas that sought to ensure the freedom of action and navigation across a global high seas sphere of influence. The National Defense Strategy stated that the second most important strategic objective for the United States, behind securing the homeland U.S. from direct attack, was to "Secure strategic access and retain global freedom of action."<sup>76</sup> The National Defense Strategy promised that the U.S. Department of Defense "will promote the

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<sup>74</sup>Vest: Briefing Memorandum From the Director of the Bureau of Politico-Military Affairs (Vest) to the Acting Secretary of State (Robinson) (see n. 81).

<sup>75</sup>Donald Rumsfeld: The National Defense Strategy of the United States of America, March, 2005, url: <https://archive.defense.gov/news/Mar2005/d20050318nds1.pdf>.

<sup>76</sup>Ibid., p. iv.

security, prosperity, and freedom of action of the United States and its partners by securing access to key regions, lines of communications, and the global commons.”<sup>77</sup> Ensuring such access for the United States military would, the report stated, promote America’s “security and prosperity,” ensure the safety of U.S. allies, protect the global economic system, and “ensure freedom of action.”<sup>78</sup> Being able to maintain forward deployed forces ensure the ability to “bring forces to bear in a crisis” as the United States saw fit.<sup>79</sup> Thus, ensuring ubiquitous access for U.S. military forces enables a sustained forward presence, which in turn, the report indicates, allows the United States to leverage its military strength to ensure continued access. As Rumsfeld’s report stated, “the United States cannot influence that which it cannot reach.”<sup>80</sup>

Similarly, the 2005 National Strategy for Maritime Security emphasized that freedom of the seas constituted one of the foundational principles for American maritime security strategy.<sup>81</sup> The report stated,

freedom of the seas is a top national priority and the right of vessels to travel freely in international waters, engage in innocent and transit passage, and have access to ports is an essential element of national security. The free, continuing, unthreatened intercourse of nations is an essential global freedom and helps ensure the smooth operation of the world’s economy.<sup>82</sup>

The National Strategy for Maritime Security continued stating that it was imperative that the United States secure the world’s sea lines of communication to defend the “uninterrupted flow of shipping.”<sup>83</sup> The report stated that the advent of just-in-time logistical networks had made the global economy disproportionately susceptible to disruptions to shipping.

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<sup>77</sup>Ibid., p. iv.

<sup>78</sup>Ibid., p. 6.

<sup>79</sup>Ibid., p. 18.

<sup>80</sup>Ibid., p. 6.

<sup>81</sup>The National Strategy for Maritime Security, September 20, 2005, url: <https://georgewbush-whitehouse.archives.gov/homeland/maritime-security.html>.

<sup>82</sup>Ibid.

<sup>83</sup>Ibid.

Such disruptions, the report stated, could threaten the stability of the American and global economy.<sup>84</sup> Because of this, the freedom of the seas was placed at the heart of the United States' National Strategy for Maritime Security.<sup>85</sup>

Three years later, the 2008 National Defense Strategy further espoused the idea that freedom of the seas, defined as global maritime access, was essential to American national security and global wealth.<sup>86</sup> Like previous reports, the 2008 National Defense Strategy stated that freedom of the seas was crucial because it allowed American naval forces the “freedom of action” to intervene wherever in the world it saw fit.<sup>87</sup> It stated, “The United States requires freedom of action in the global commons and strategic access to important regions of the world to meet our national security needs.”<sup>88</sup> The report admitted that the United States had been unilaterally upholding this principle, providing ‘freedom of the seas’ by securing command over a global high seas sphere of influence, since the end of the Second World War. However, the report also stressed that this was undertaken for the benefit of the international community as a whole. The Defense Department report extolled, “For more than sixty years, the United States has secured the global commons for the benefit of all.”<sup>89</sup> The report cautioned, however, that the freedom of the seas, or more accurately American stewardship over the global high seas, was being threatened by new adversarial “anti-access technologies and tactics.”<sup>90</sup>

According to the Congressional Research Service, the post-Cold War American “unipolar moment” began to wane between 2006 and 2008 with a resurgence of great power competition between the United States, Russia, and China.<sup>91</sup> While confronting non-state actors still

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<sup>84</sup>The National Strategy for Maritime Security (see n. 81).

<sup>85</sup>Ibid.

<sup>86</sup>Robert Gates: The National Defense Strategy of the United States of America, June, 2008, url: <https://archive.defense.gov/pubs/2008NationalDefenseStrategy.pdf>.

<sup>87</sup>Ibid., p. 16.

<sup>88</sup>Ibid., p. 16.

<sup>89</sup>Ibid., p. 16.

<sup>90</sup>Ibid., p. 16.

<sup>91</sup>Renewed Great Power Competition: Implications for Defense—Issues for Congress, R43838, May 29,

remained a priority for the United States in the wake of September 11, Department of Defense discussions began shifting back towards countering state capabilities, such as “anti-access technologies and tactics.”<sup>92</sup>

### 10.3 Anti-Access/ Area Denial and Freedom of the Seas

In the naval context, anti-access technologies and tactics, often paired with its sister concept area-denial, are designed to prevent successful sea control operations. Anti-Access aims to deny an adversary from “entering an operational area.”<sup>93</sup> Area Denial, on the other hand, aims to restrict the ability of an adversary to operate within an operational area they have already accessed.<sup>94</sup> Anti-Access/Area Denial (A2/AD) works to directly counter sea control operations which, as was discussed in Chapter 3, aims to allow naval forces enter an operational theater and levy overwhelming material capability, typically by denying adversarial access or operational usage of the space itself, in order to ensure that friendly naval forces have the freedom of action necessary to accomplish operational objectives.<sup>95</sup> Conversely, as Vice Admiral Thomas A. Rowden, Commander of the U.S. Pacific Fleet Naval Surface Force, stated, sea control is absent when an enemy degrades the ability to use or deny areas of sea space to such a degree that operational objectives cannot be accomplished.<sup>96</sup> At this point in time, long range cruise missiles and anti-ship ballistic missiles were becoming increasingly fielded as an asymmetric alternative to a standing navy oriented towards coastal defense. Anti-Access/Area Denial strategies utilizing such technology, thus aimed to counter the United States’ ability to intervene globally. Because of this, Anti-Access/Area Denial,

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2020, p. 1.

<sup>92</sup>Renewed Great Power Competition: Implications for Defense—Issues for Congress (see n. 91), p. 2; Gates: The National Defense Strategy of the United States of America (see n. 86), p. 16.

<sup>93</sup>Martin Dempsey: Joint Operational Access Concept (JOAC), January 17, 2012, url: [https://archive.defense.gov/pubs/pdfs/JOAC\\_Jan202012\\_Signed.pdf](https://archive.defense.gov/pubs/pdfs/JOAC_Jan202012_Signed.pdf), p. i.

<sup>94</sup>Ibid., p. i.

<sup>95</sup>Joint Maritime Operations (see n. 24), pp. I–3.

<sup>96</sup>Field: The Influence of Sea Power on Modern Strategy (see n. 43), p. 21.

a counter-sea control strategy, became portrayed as a fundamental threat to the freedom of the seas.

When the Obama administration began, on January 20, 2009, U.S. foreign policy fixated on the threat that China's military development posed to American access of the global high seas. Because of this, the *Mare Imperium* discourse was deployed through out the Obama administration to assert the United States' continued commitment to unhindered movement of military forces across the global commons and to protest erosion of the United States' undisputed command of the sea. The Obama administration perpetuated the concern expressed at the end of the George W. Bush administration that the proliferation of Anti-Access/Area Denial (A2-AD) technologies and strategies posed an unacceptable threat to U.S. freedom of movement.

Over the first decade of the 21st century, China substantively developed and modernized its armed forces.<sup>97</sup> China had developed a naval fleet capable of blue-water operations, as well as amassing an arsenal of precision anti-ship cruise missiles and air defense capabilities designed to “restrict the access and deny the freedom of movement to US forward forces” operating within the first and second island chains.<sup>98</sup> In 2010, Admiral Robert Willard, then serving head of U.S. Pacific Command, stated that aspects of China's military development appeared to be explicitly designed to restrict American freedom of action in the Pacific theater.<sup>99</sup>

The 2012 National Defense Strategy emphasised that the China's “emergence as a regional power” had the potential to jeopardize American security and economic interests by

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<sup>97</sup>James E Fanell: Asia Rising: China's Global Naval Strategy and Expanding Force Structure, in: Naval War College Review 72.1 (2019), p. 4, here p. 18.

<sup>98</sup>James Johnson: Washington's perceptions and misperceptions of Beijing's anti-access area-denial (A2-AD)'strategy': implications for military escalation control and strategic stability, in: The Pacific Review 30.3 (2017), pp. 271–288, here p. 274; Fanell: Asia Rising: China's Global Naval Strategy and Expanding Force Structure (see n. 97), p. 18.

<sup>99</sup>Johnson: Washington's perceptions and misperceptions of Beijing's anti-access area-denial (A2-AD)'strategy': implications for military escalation control and strategic stability (see n. 98), p. 277.



threatening the freedom of the seas. It stated that, in the face of China's rise, the United States needed to "ensure that we maintain regional access and the ability to operate freely in keeping with our treaty obligations and with international law."<sup>100</sup> The NDS stated,

To enable economic growth and commerce, America, working in conjunction with allies and partners around the world, will seek to protect freedom of access throughout the global commons a those areas beyond national jurisdiction that constitute the vital connective tissue of the international system. Global security and prosperity are increasingly dependent on the free flow of goods shipped by air or sea. State and non-state actors pose potential threats to access in the global commons, whether through opposition to existing norms or other anti-access approaches.<sup>101</sup>

The Department of Defense's 2012 NDS continued, stating that the United States needed to maintain the ability to control the sea in the face of mounting counter-sea control challenges, namely from actors such as China, in order to retain the "freedom of access through the global commons," or the freedom of the seas. It stated

In order to credibly deter potential adversaries and to prevent them from achieving their objectives, the United States must maintain its ability to project power in areas in which our access and freedom to operate are challenged... States such as China and Iran will continue to pursue asymmetric means to counter our power projection capabilities... Accordingly, the U.S. military will invest as required to ensure its ability to operate effectively in anti-access and area denial (A2/AD) environments.<sup>102</sup>

Therefore, the U.S. Department of Defense positioned Chinese A2/AD capabilities, or counter-sea control capabilities, as a direct threat that the American military needed to counter, in order to protect the *Mare Imperium* conception of freedom of the seas.

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<sup>100</sup>Sustaining U.S. Global Leadership: Priorities for 21st Century Defense, January, 2012, url: [https://nssarchive.us/wp-content/uploads/2020/04/defense\\_strategic\\_guidance.pdf](https://nssarchive.us/wp-content/uploads/2020/04/defense_strategic_guidance.pdf), p. 2.

<sup>101</sup>Ibid.

<sup>102</sup>Ibid., p. 4.

Two years later, the 2014 Quadrennial Defense Review continued to advance the position that the United States Department of Defense needed to “rebalance” in order to effectively meet future conflicts involving “technologically advanced anti-access and area-denial (A2/AD) capabilities.”<sup>103</sup> The report specifically warned that China will continue to “counter U.S. strengths” using A2/AD capabilities, such as precision ballistic and cruise missiles, designed to “restrict access and freedom of maneuver in waters and airspace beyond territorial limits.”<sup>104</sup> Again, linking the expansion of Chinese regulation of access over the global high seas as opposed to restricting such jurisdiction, either *de facto* or *de jure*, to the narrow territorial bands settled upon at the UNCLOS conventions. The 2014 Defense Department review justified American resistance to Chinese counter-sea control strategies for econo-strategic reasons, stating, “Our economic strength is closely tied to a stable international order, underwritten by the U.S. military’s role and that of our allies and partners in ensuring freedom of access and the free flow of commerce globally.”<sup>105</sup> Therefore, the report stated that it was essential to maintain a global military “posture and presence” in the face of mounting Chinese A2-AD capabilities.

This *Mare Imperium* conception of freedom of the seas fits with the 2016 United States Naval Surface Force Strategy, published in the final days of the Obama administration, titled *Return to Sea Control*. The title of this Surface Warfare Strategy is a misnomer because the United States has never deviated from a naval strategy of sea control since its adoption at beginning of the twentieth century. However, the publication signalled a return to contested maritime environment whereby the United States must act to obtain sea control as opposed an American controlled sea being the standard operating condition.<sup>106</sup> The Naval publication was released as a response to the proliferation of A2-AD capabilities by “global competitors”

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<sup>103</sup>Quadrennial Defense Review 2014, March 14, 2014, url: <https://history.defense.gov/Portals/70/Documents/quadrennial/QDR2014.pdf?ver=2014-08-24-144246-293>, p. vii.

<sup>104</sup>Ibid., pp. 6–7.

<sup>105</sup>Ibid., p. 9.

<sup>106</sup>Forces: Surface Force Strategy: Return to Sea Control (see n. 24).

and their attempts to “disrupt freedom of maneuver on the seas” for the United States.<sup>107</sup> According to the Surface Force Strategy, such capabilities are designed to impose increased risk to U.S. forces in order to hamper the American ability to maintain a global forward presence.<sup>108</sup> Impeding the U.S. forward presence was perceived as intolerable because, as the Naval Surface Force Strategy stated,

The objective of the Surface Force Strategy is to achieve and sustain sea control at the time and place of our choosing to protect the homeland from afar, build and maintain global security, project the national power of the United States, and win decisively. It is essential to our Nation's security and prosperity that we maintain the ability to maneuver globally on the seas and to prevent others from using the sea against the interests of the United States and our allies.<sup>109</sup>

The strategy report summed up the *Mare Imperium* conception of freedom of the seas stating, “America is a maritime nation, and our prosperity is directly linked to the freedom of the seas provided by the U.S. Navy.”<sup>110</sup>

## 10.4 The Trump Administration's 'Free and Open Indo-Pacific'

To bring this history of the present back to the present, this section will briefly discuss freedom of the seas discourse in the Donald Trump administration presented in Chapter 1. The Trump administration continued to utilize freedom of the seas to prevent states, namely China, from curtailing the ability of the United States to forward deploy and project power on and across the United States' perceived high seas sphere of influence. On November 10, 2017, Donald Trump outlined his administration's political-military strategy for a “free and open

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<sup>107</sup>Ibid., p. 6.

<sup>108</sup>Ibid., p. 6.

<sup>109</sup>Ibid.

<sup>110</sup>Ibid.

Indo-Pacific.”<sup>111</sup> The Trump administration stated that the “vision for a free and open Indo-Pacific” is centered around ensuring the “freedom of the seas and airways” and protecting shipping lanes in the Pacific and Indian oceans.<sup>112</sup> Ensuring navigation and overflight in the region is necessary, according to the 2017 Department of State white paper, *A Free and Open Indo-Pacific: Advancing a Shared Vision*, in order to maintain a forward American presence in the region to deter China from imposing a “repressive vision” of international order.<sup>113</sup> According to the U.S. Department of State and Department of Defense, American naval presence in the Western Pacific, and the ability to deploy additional forces to the theater on and over the sea, is necessary in order to maintain the ‘rules-based international order’ and the continuation of global trade through the region.<sup>114</sup> As stated in Chapter 1, the Department of Defense asserts that the attempts by China “to exert de facto control” over the South China Sea threatens the “free flow of trade” and the stability that enables commerce in the region.<sup>115</sup> Therefore, the principle of freedom of the seas enables U.S. presence in the region which, according to the 2019 Indo-Pacific Strategy Report, “secures the vital sea lanes of the Indo-Pacific that underpin global commerce and prosperity.”<sup>116</sup> The 2019 Indo-Pacific Security Strategy goes on to emphasize that, “Freedom of the seas is essential to ensuring the global mobility of U.S. forces in the event of a crisis and the worldwide security of civilian shipping on a daily basis.”<sup>117</sup> Therefore, the present freedom of the seas discourse represented by the Trump administration directly embodies the *Mare Imperium* conceptualization of the discourse designed to ensure the ability to intervene within a global high seas sphere of influence wherever deemed fit. The present freedom of the seas discourse holds at its core

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<sup>111</sup>Trump: Remarks by President Trump at APEC CEO Summit, Da Nang, Vietnam (see n. 84).

<sup>112</sup>Idem: Remarks by President Trump at APEC CEO Summit, Da Nang, Vietnam (see n. 84); Garamone: U.S., Allies Aim to Maintain Free, Open Indo-Pacific Region (see n. 86).

<sup>113</sup>A Free and Open Indo-Pacific, Advancing a Shared Vision (see n. 7), p. 5.

<sup>114</sup>The Asia-Pacific Maritime Security Strategy (see n. 1); The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1).

<sup>115</sup>The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 8.

<sup>116</sup>Ibid., p. 2.

<sup>117</sup>Ibid., p. 43.

the notion that the sea fundamentally must be controlled by the United States military lest it be consumed by a new "repressive" order. Therefore, in U.S. foreign policy, freedom of the seas and American global command of the seas are discursively synonymous.

# Chapter 11

## Conclusion

This dissertation has provided an empirical contribution to critical security studies literature, or more specifically the critical strategic studies literature, pertaining to the United State's contemporary political-military strategy in the Sino-U.S. South China Sea dispute. This work has called into question the notion of 'freedom of the seas' at the heart of U.S. foreign policy in the South China Sea region. To do so, it conducted a genealogy of freedom of the seas discourse in U.S. foreign policy to explore how the meaning of freedom of the seas has evolved over the course of American diplomatic history. By writing a history of the present American understanding of freedom of the seas, this project has addressed two primary research questions. First, how has the American conception of freedom of the seas evolved over time to become problematic with Chinese maritime assertions in the South China Sea? Second, how can the two fundamental precepts of American naval strategy, the defense of the freedom of the seas and pursuit of control of the seas be reconciled?<sup>1</sup> Because genealogy is an explicitly political project that seeks to utilize history to intervene in the present, in answering these research questions this dissertation set out to accomplish two respective goals. It has shown that freedom of the seas discourse is neither an enduring concept that must continue to be monumentalized, nor is it an altruistic principle upheld for the good of the international community.

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<sup>1</sup>Forces: Surface Force Strategy: Return to Sea Control (see n. 24); Joint Maritime Operations (see n. 24), p. x.

## 11.1 De-monumentalizing the Discourse

The first goal aimed to introduce contingency into the contemporary understanding of freedom of the seas discourse in U.S. foreign policy. By tracing the descent the discourse in American foreign policy, this dissertation has aimed to uncover forgotten representations and conclusively demonstrate that the *Mare Imperium* conception of freedom of the seas is not an enduring historical principle. It has shown that the *Mare Imperium* discourse has not been consistently championed over the duration of United States history, as it is often represented in contemporary governmental publications.<sup>2</sup> Instead, this work has shown that the contemporary discourse emerged after the Second World War and is intimately entwined with the United States' material naval preponderance.

Prior to World War II, American freedom of the seas discourse carried the meaning of the right of neutral states to trade on the high seas during times of war. Freedom of the seas, as codified in international law, reflected Hugo Grotius made in his treatise on maritime law which stated that every nation had the right “to travel to every other nation and to trade with it,” regardless of who claimed jurisdiction over the maritime space.<sup>3</sup> During times of peace, unimpeded trade was ubiquitous. The only peacetime interruption came from pirates, who were quickly declared enemies of humanity and driven from the sea. Thus, the only threat to free trade came during times of war when belligerent powers sought to prevent material aid from reaching their enemies. The discourse surrounding freedom of the seas centered on the rights of neutral states to continue to trade unimpeded, with other neutral states as well as the belligerent powers, under the condition that neutral countries

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<sup>2</sup>The Asia-Pacific Maritime Security Strategy (see n. 1), p. 1; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2017 (see n. 1), p. 2; Department of Defense Report to Congress: Annual Freedom of Navigation Report, Fiscal Year 2018 (see n. 1), p. 2; The Department of Defense Indo-Pacific Strategy Report, Fiscal Year 2017 (see n. 1), p. 43; U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress (see n. 1), p. 4.

<sup>3</sup>Grotius: Hugo Grotius *Mare Liberum* 1609-2009: Original Latin Text and English Translation (see n. 21), p. 25.

did not supply the belligerents with materials of war. In early U.S. history, freedom of the seas discourse was used to justify maintaining a small standing navy and concomitant naval doctrines of coastal defense and commerce raiding. Freedom of the seas was typically championed by small-naval states, like the early U.S., which sought to protect its commerce at sea via international agreement rather than military force. This *Mare Liberum* conception perpetuated through U.S. foreign policy from the country's founding until the start of the Second World War.

From 1776 until 1856 the discourse of freedom of the seas centered around the rights neutral, and impartial, countries had to continue to trade on the high seas during times of war. Because there was no internationally agreed upon basket of neutral rights at sea, the discourse was employed by small-navy trading states to continue their commerce unimpeded by stronger naval belligerents. During this time period, the United States sought to secure freedom of the seas for its own merchantmen through bilateral agreements that were often transgressed. The fledgling country also used these bilateral agreements of neutral rights to secure recognition of American sovereignty and independence. However, the United States was also quick to forsake the pursuit of neutral rights in lieu of other foreign policy goals of the time.

In 1856, the Treaty of Paris codified an internationally accepted group of neutral and belligerent rights, enshrining the principle of freedom of the seas into international law for the first time. The United States, however, refused to ratify the foundational treaty regarding neutral rights, The 1856 Treaty of Paris contained a provision banning the use of privateers, which the United States' naval doctrine of the day depended on heavily. In the mid-nineteenth century, the United States was fundamentally opposed to maintaining a robust standing navy for fear it would impose an unrealistic tax-burden at best and drag the nation into European wars at worst. Instead, the United States adopted a naval doctrine of coastal defense and commerce raiding. Coastal defense prioritized coastal fortifications



and land-based armament, as well as small near-shore vessels, designed to prevent hostile parties from making land at strategic coastal points.<sup>4</sup> The United States' commerce raiding, or *guerre de course* strategy on the other hand, depended on issuing letters of marque to American privateers to go and harass the maritime logistics chains of enemy states.<sup>5</sup> United States foreign policy at the time believed that abandoning the right to issue letters of marque would force the U.S. to develop a strong standing navy to ward off hostile actors. Instead, the United States advocated a new conception of freedom of the seas that would not only protect the goods of neutral and impartial states, but would instead protect all private property from being seized at sea. When the United States became engulfed in civil war, however, the U.S. begrudgingly agreed to abide by the precepts of the Treaty of Paris.

Towards the end of the 1800s the United States Navy underwent radical doctrinal and technological changes. The United States abandoned the doctrines of commerce raiding and coastal defense and moved towards a vision of sea power most prominently articulated by Alfred Thayer Mahan. Mahan's doctrine of sea control centered on maintaining a large steamship navy capable of securing strategic sea lines of communication for the United States. Key figures, such as Theodore Roosevelt, championed the large-navy doctrine of sea control which became institutionalized in U.S. military strategy following its successes in the Spanish American War. However, despite radical technological and doctrinal change, the United States refused to deviate from conceptualizing freedom of the seas as the immunity of all private property on the high sea from seizure. President Roosevelt stuck by this discursive conceptualization even when Mahan personally insisted that the United States abandon the goal now that the U.S. could be counted among the respectable naval fleets of the world. The dogged refusal to deviate from the immunity principle in the face of material change separates this genealogical discourse analysis from purely material, realist, account of U.S.

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<sup>4</sup>Hagan: *This people's navy: The making of American sea power* (see n. 65), pp. 68–69.

<sup>5</sup>Idem: *This people's navy: The making of American sea power* (see n. 65), pp. 68–69; Sprout/Sprout: *Rise of American Naval Power* (see n. 66), pp. 80, 92–93.

foreign policy.

During the First World War, the United States again abandoned the immunity principle of freedom of the seas and sought an agreement with the belligerent states in accordance with the less expansive neutral rights doctrine of the 1856 Treaty of Paris. The United States utilized the discourse of freedom of the seas in protesting depredations of American commerce, first from British blockades and later from Germany's unrestricted submarine warfare campaign. Ultimately it was the violation of the United States' right as a neutral state to continue to trade during times of war that brought the U.S. into the First World War. Even after the war had ended freedom of the seas discourse remained fixated on neutral trading rights. For example, in 1919, President Woodrow Wilson stated that "freedom of the seas means the definition of the right of neutrals to use the seas when other nations are at war."<sup>6</sup>

It was not until the Second World War that the discourse of freedom of the seas fundamentally shifted in U.S. foreign policy. With the threat of unrestricted submarine warfare looming over the world's oceans, the United States abandoned any claim to neutral trading rights that previously encapsulated freedom of the seas. Instead, the United States self-imposed restrictions on American commerce before it could be restricted by belligerent powers and drag America into a second World War. While conflict was engulfing Europe, the United States spearheaded the creation of a Western hemispheric American Neutrality Zone. The American Neutrality Zone was designed as a territorialized bulwark preventing the expansion of hostilities to the Western hemisphere. Within the zone, the United States Navy, nominally assisted by the navies of the American republics, would patrol to foremost ensure the security of the Western hemisphere and secondarily to protect the inter-hemispheric trade of the American states. Because of this, freedom of the seas became territorially bound and upheld by military force in American foreign policy discourse. Further, during the Sec-

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<sup>6</sup>Wilson: An After-Dinner Speech in San Diego (see n. 3).

ond World War, impartiality was evacuated from the American discourse of freedom of the seas. After the fall of France to Nazi Germany, the United States reasserted “the ancient American doctrine of freedom of the seas” in order to ship materiel of war to Great Britain.<sup>7</sup> Before World War II, it was ubiquitously understood that the neutral trading rights which encompassed the principle of freedom of the seas did not apply to materiel of war, which was classified as contraband. Further, during the Second World War, the concept of freedom of the seas was used for the first time to describe preventing totalitarian states from gaining control of the seas. During this time period freedom of the seas became synonymous with control of the seas by Western liberal democratic states.

At the start of the Cold War, the conceptualization that freedom of the sea was obtained by controlling the sea, a kind of universalized American neutrality zone that prevented “totalitarian regimes” from gaining control of crucial sea lines of communication, solidified in American foreign policy discourse.<sup>8</sup> To justify maintaining a robust navy in the aftermath of the Second World War, the United States Navy positioned peace time sea control and forward defense as an indispensable component of the Truman Doctrine’s Containment Strategy against the Soviet Union. At the start of the Cold War the Soviet Union did not possess a naval force capable of challenging American forward defense containment strategies. Because of this, the primary threat to the United States’ ability to accomplish its sea control mission came in the international legal realm as states sought to expand their sovereign maritime territorial jurisdiction for the purpose of fisheries resources. Freedom of the seas discourse was utilized in U.S. foreign policy to curtail these *de jure* claims over the high seas. While the international community tried to settle the issue of maritime territorial delineations in two UN Conventions on the Law of the Sea during this period, no substantive progress was

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<sup>7</sup>Roosevelt: Fireside Chat 17: On An Unlimited National Emergency (see n. 135).

<sup>8</sup>Truman: Truman Doctrine, President Harry S. Truman’s Address Before a Joint Session of Congress, March 12, 1947 (see n. 19); Milestones in the History of U.S. Foreign Relations: The Truman Doctrine, 1947 (see n. 20).

made.

The utilization of freedom of the seas discourse to push back against regulation of the high seas in U.S. foreign policy to ensure unfettered American military mobility continued through the end of the Cold War. At the bequest of the Soviet Union, the United States participated in the Third UN Convention of the Law of the Sea in order to codify freedom of the seas protections for military and commercial vessels traveling through international straits. To achieve this end, the United States made compromises on the extent of Exclusive Economic Zones, or contiguous seas, and even the on the extent of the territorial sea so long as straits rights were ensured. While multilateral negotiations were unfolding, the United States unilaterally claimed an extended economic zone and crippled its negotiating ability at the conference. When the conference finally concluded, the Reagan administration refused to become a signatory to the treaty. The Reagan administration did state, however, that the United States recognizes the provisions regarding freedom of navigation to be accepted tenants of customary international law. While promising to abide by the territorial delineations and navigational regulations laid out in UNCLOS III, Reagan reaffirmed the Freedom of Navigation Operations program that was instituted under the Carter administration. To protect navigational rights for commercial and military vessels alike, the United States pledged to militarily contest claims of over the high seas that it perceived to be illegitimate.

Following the collapse of the Soviet Union freedom of the seas discourse remained squarely centered around protecting the navigational abilities of the United States Navy. After the Cold War, freedom of the seas continued to be utilised to preempt foreign actors who might seek to curtail American navigational rights. Such navigational rights were seen as an essential component of the United States' ability to project power around the world and intervene in crises wherever they may arise. The United States maintained that American forward deployment and power projection capabilities were essential to defend the world's commercial

linkages. From the Cold War to the present, the practice of Freedom of Navigation Operations continued and became increasingly oriented towards Chinese extraterritorial claims and Anti-Access/Area Denial capabilities. The Trump administration's 'free and open Indo-Pacific' strategy perpetuated the usage of freedom of the seas in order to ensure that the United States maintains the ability to project power in the event of a crisis and to forward deploy maritime forces. The Trump administration's free and open Indo-Pacific strategy holds at its core the notion that the sea fundamentally must be controlled by the United States military lest it be consumed by a new "repressive" order. Therefore, in U.S. foreign policy, freedom of the seas and American global command of the seas are discursively synonymous.

By tracing the intellectual history of freedom of the seas discourse in U.S. foreign policy, this dissertation had subverted the monumentalized representation of freedom of the seas as an historic and enduring principle, consistently championed by the U.S. over the course of its history. This work has instead shown that freedom of the seas discourse, in its present form, recently emerged during the Cold War and became entrenched in American political-military strategy because it privileged position it lent to American sea control and power projection capabilities. Because freedom of the seas is not an enduring or natural phenomenon, but rather is the product of specific and recent historical accidents, it is not necessary to continue perpetuating the discourse if it no longer benefits the United States to do so. This dissertation has shown that freedom of the seas is not an end unto itself but has always been a means by which the United States has pursued its national interests.

## 11.2 Problematizing the Discourse

The second goal of this genealogical history has been to show that the contemporary discourse of freedom of the seas is not an altruistic or natural good protected on behalf of the

international community. Instead, the discourse works to facilitate the United States' control over the global ocean space. By exposing freedom of the seas discourse as a mechanism of sea control, this project has sought to highlight the fact that in an era of maritime great power competition, strategies predicted on such a discourse are “more dangerous than would otherwise appear.”<sup>9</sup> By conducting a genealogical history of freedom of the seas discourse, this dissertation has aimed to intervene in the present by showing that American political-military strategy in the South China Sea can change and should change. That it is both possible to reconceptualize American naval strategic thinking and that such reconceptualization is necessary in the contemporary Sino-American South China Sea dispute.

The United States uses the contemporary discourse of freedom of the seas to preempt *de jure* sovereign claims over the global high seas so that it can act as the exclusive steward of a global maritime sphere of influence. Rather than dominating the world's oceans via dominion, or *dominium*, the United States uses freedom of the seas to dominate via *imperium*. *Imperium* differs from dominion as it indicates stewardship or the right to command a sphere of influence, rather than ownership or sovereignty.<sup>10</sup> Within the sphere of influence, the steward exercising *imperium* has the ability to “temporarily appropriate, manage, and even transform the stewarded space in order to ensure that it continues to serve specified social ends,” and intervene “over others who might wish to use the stewarded region in a contrary manner.”<sup>11</sup>

This dissertation only discusses the form of control exerted over the maritime space to show how the contemporary discourse of freedom of the seas functions in U.S. foreign policy as a mechanism of sea control. Rather than simply being an altruistic liberal principle upheld for the common good, freedom of the seas works to safeguard a global maritime

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<sup>9</sup>Garland: What is a “history of the present”? On Foucault's genealogies and their critical preconditions (see n. 2), p. 372.

<sup>10</sup>Steinberg: The social construction of the ocean (see n. 53), pp. 64–65.

<sup>11</sup>Idem: Lines of division, lines of connection: Stewardship in the world ocean (see n. 52), pp. 257–258.

sphere of influence in which the United States, assumed to be the globally preeminent naval power, can intervene on behalf of its national interests. This project has depended heavily on the work of Philip Steinberg who discusses how oceanic representations impact the form of control able to be exerted at sea. However, this work has not engaged with the Critical Geopolitical project that Steinberg pursues, rather, it utilizes Steinberg's work to illustrate how contemporary freedom of the seas discourse facilitates sea control. Steinberg discusses how the Mahanian competition between naval powers for control over strategic sea lines of communication in the mercantilist era embodied the pursuit and exercise of *imperium*.<sup>12</sup>

The Mahanian doctrine of command of the sea, which the United States adopted at the turn of the twentieth century, describes a condition where a naval power has obtained a preponderance of material force so that it is able to deny enemy access to a maritime area.<sup>13</sup> Mahan stated that command of the sea comes through “that overbearing power on the sea which drives the enemy's flag from it, or allows it to appear only as a fugitive; and which, by controlling the great common, closes the highways by which commerce moves to and from the enemy's shores.”<sup>14</sup> The primary mission of the naval apparatus during war is ‘to control the areas of sea communication in order to secure their use to one's own cargo vessels and transports while denying their use to the enemy.’<sup>15</sup> These areas of sea communication are the commonly traveled maritime trade routes.<sup>16</sup> The success of a great power, Mahan argued, lie in being able to keep trade routes open to national commerce while being able to deny the same trade capability to the enemy.<sup>17</sup>

Contemporary United States naval doctrine still abides by the same Mahanian precepts. Contemporary American naval doctrine differentiates between the concepts of command of

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<sup>12</sup>Idem: The social construction of the ocean (see n. 53), pp. 150–154.

<sup>13</sup>Posen: Command of the commons: the military foundation of US hegemony (see n. 11), pp. 11–12, 21.

<sup>14</sup>Mahan: The influence of sea power upon history, 1660-1783 (see n. 12); Rubel: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 22.

<sup>15</sup>Potter: Sea power: A naval history (see n. 64), p. 162.

<sup>16</sup>Mahan: The interest of America in sea power, present and future (see n. 14), pp. 41–42.

<sup>17</sup>Ibid., p. 52.

the sea and sea control, though the terms are sometimes conflated. Command of the sea represents the pursuit and possession of such a degree of material preponderance in a given area whereby the maritime territory is brought into the naval power's sphere of influence.<sup>18</sup> Command of the sea thus echoes the central Mahanian concept of "that overbearing power on the sea."<sup>19</sup> Command of the sea means that the dominant naval power possesses the ability to credibly deny the commanded territory's use to other powers as it sees fit.<sup>20</sup> However, such command does not prevent actors from using the maritime space during times of peace so long as it is utilized in a manner acceptable to the preponderant naval steward.<sup>21</sup> Thus, command of the sea represents a strategic condition of material superiority and latent ability to exercise power in a maritime region.<sup>22</sup> Sea control, on the other hand, represents the manifestation of naval capabilities in a given space and towards a specified end.<sup>23</sup> Sea control operations are conducted to secure a "working control" of the sea in a particular area for a finite period of time.<sup>24</sup> Contemporary sea control is obtained when a state is able "to use or deny the sea lines of communication" to a sufficient degree to accomplish operational objectives and deny the operational objectives of an adversary.<sup>25</sup> Therefore, in contemporary American naval doctrine, command of the sea constitutes a maritime sphere of influence in which latent *imperium* is held and the preponderant naval power acts as *de facto* steward of the maritime space. Sea control, on the other hand, represents the actualization of *imperium* which is exerted to intervene within the maritime sphere of influence on behalf of the national interest, however defined.

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<sup>18</sup>Rubel: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 22.

<sup>19</sup>Mahan: The influence of sea power upon history, 1660-1783 (see n. 12).

<sup>20</sup>Posen: Command of the commons: the military foundation of US hegemony (see n. 11), p. 8.

<sup>21</sup>Ibid., p. 8.

<sup>22</sup>Rubel: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 22.

<sup>23</sup>Ibid., p. 22.

<sup>24</sup>Field: The Influence of Sea Power on Modern Strategy (see n. 43), p. 20; Turner: Missions of the US Navy (see n. 43), p. 7; Rubel: Command of the sea: an old concept resurfaces in a new form (see n. 12), p. 22.

<sup>25</sup>Field: The Influence of Sea Power on Modern Strategy (see n. 43), p. 21; Rowden: Sea Control First (see n. 33).



Following the Second World War, the discourse of freedom of the seas shifted in U.S. foreign policy from a conceptualization centered around securing neutral trading rights during times of war to a conception designed to preempt *de jure* claims of dominion over the high seas. Preempting *de jure* claims over the high seas ensured that the U.S. military, as the unrivaled naval power, retained the ability to project power, forward deploy, and exercise its command via sea control operations on and across the global high seas sphere of influence. Because the United States navy cannot levy its capability to subjugate the global ocean in its entirety, freedom of the seas discourse secures the ability to dominate via *imperium* by preempting claims of dominion over the world's ocean space. This contemporary *Mare Imperium* discourse of freedom of the seas is problematic in the current era of maritime great power competition, however, because the maritime sphere of influence which the discourse aims to secure is predicated on universal command of the sea and unrivaled naval preponderance. This dissertation does not take a normative stance on a global American maritime stewardship or the 19th century thinking that underwrites it. This dissertation does seek to exposing the fact that freedom of the seas is not an altruistic principle but is rather a mechanism of Mahanian sea control that remains fundamentally dependent on a material preponderance that is waning in the Western Pacific. Because of this, this dissertation argues that predicating American political-military strategy on a discourse that facilitates command of the sea, without having the preponderant naval capability that affords such command, is inherently dangerous in an era of maritime great power competition.

For the first time since the end of the Second World War the United States is being confronted by a maritime power with explicit sea control ambitions.<sup>26</sup> China had developed its naval forces, land-based anti-access/area denial capabilities, and a network of artificial island outposts across the South China Sea in order to bring its near seas under Chinese control

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<sup>26</sup>Erickson/Goldstein: Gunboats for China's new "grand canals"? Probing the Intersection of Beijing's Naval and Oil Security Policies (see n. 13), pp. 49–50; Scobell: The South China Sea and US-China Rivalry (see n. 69), p. 209.

and to prevent foreign powers, namely the United States, from securing control over its near seas.<sup>27</sup> China has done this successfully as indicated by Admiral Philip Davidson's claim that "China is now capable of controlling the South China Sea in all scenarios short of war with the United States."<sup>28</sup> China's ability to control the sea, or establish stewardship over its near seas, albeit contested stewardship, indicates that the United States has conclusively lost the global high seas sphere of influence that the universalized discourse of freedom of the seas works to facilitate. In the Western Pacific, the United States lacks the overwhelming military force necessary to credibly deny China use of the space. The erosion of the United States' desired global maritime sphere of influence on and across which it can freely project power and intervene for the national interest is only exacerbated as Chinese military capabilities in the region gain in relation to U.S. capabilities. By 2030, China is forecasted to possess a technologically equivalent and substantially larger blue-water naval fleet than the United States.<sup>29</sup> At its core, Mahanian sea control is a large-naval military doctrine predicated on the establishment of material preponderance. Because of this, as the United States declines in relative military capability it becomes less able to back up its freedom of the seas doctrine which itself assumes global naval dominance. To reiterate, this dissertation asserts that the danger lies, not in the material disparity between the U.S. and China, but the U.S.' insistence on employing a political military strategy predicated on material preponderance without the capability to back up its actions. Because of this, American actions in the Western Pacific, such as freedom of navigation operations, are as antagonistic as they are impotent.

The Sino-American South China Sea confrontation is not a Manichean contest between 'freedom' of the seas and its antithesis. Rather, it is a competition for sea control between

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<sup>27</sup>Erickson/Goldstein: Gunboats for China's new "grand canals"? Probing the Intersection of Beijing's Naval and Oil Security Policies (see n. 13), pp. 49–50; Scobell: The South China Sea and US-China Rivalry (see n. 69), p. 209.

<sup>28</sup>Advance Policy Questions for Admiral Philip Davidson, USN Expected Nominee for Commander, U.S. Pacific Command (see n. 89), p. 18.

<sup>29</sup>Fanell: China's Global Naval Strategy and Expanding Force Structure (see n. 16), p. 13.

powers with overlapping territorial ambitions. Since China's maritime territorial claims in the South China Sea, and the United States' ambitions to maintain universal stewardship over the world's high seas are both dependent overlapping spheres of influence based on Mahanian sea control, there is an inherent risk of military confrontation. Because freedom of the seas discourse universalises the sea control ambitions of the United States, there is no elasticity with which to peacefully accommodate a new naval great power's sphere of influence. The *Mare Imperium* discourse of freedom of the seas treats threats to the American ability to project power in facilitation of its sea control ambitions as a threat to the freedom of the sea itself. As stated prior, at best, policy makers are aware of the deception involved in portraying control as freedom in American political-military strategy. At worst, however, decision makers have bought into the naturalized conception of freedom of the seas as the altruistic defense of global access and are therefore careening towards confrontation without understanding why.

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