

Chapter 6

The U.S. Freedom of Navigation Program: South China Sea Focus

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Following the conclusion of the Second World War, a growing number of coastal states enacted unilateral measures to extend their national jurisdiction beyond traditionally recognized limits. These measures, singly and in combination, posed a serious challenge to traditional high seas freedoms, as well as to U.S. interests in protecting commercial and military navigation, overflight and related national security and other interests in and over the oceans.¹ Accordingly, in 1979, President Jimmy Carter tasked the Law of the Sea Contingency Planning Group on Navigation to develop a policy “regarding the protection of navigation, overflight and related national security interests in the oceans in the event...” the international community failed “to conclude a widely accepted Law of the Sea (LOS) Treaty that the U.S. can ratify or during the period until such a treaty enters into force for the United States.”² The planning group concluded its work in February 1979 recommending a two-pronged approach—diplomatic and operational—to challenging excessive maritime claims:

The U.S. should protest claims of other states that are inconsistent with international law and U.S. policy, with particular reference to extended territorial sea claims as well as the regime therein; assertions of jurisdiction over navigation, overflight, and related matters on the high seas beyond the territorial sea; assertions of archipelago status; and assertions of certain baseline and historic bay/water claims.... The U.S. should exercise its rights in the face of the illegal

¹ Some of the national security and commercial interests identified by the working group, which remain valid today, include: (1) requirements for naval and air support and resupply of U.S. ground forces; (2) unimpeded deployment of U.S. general purpose forces; (3) ensuring U.S. naval and air forces maintain the unhampered right to operate in the world’s oceans; (4) ensuring that U.S. military forces are familiar with various areas for purposes of contingency planning and as a stabilizing deterrent; (5) gathering intelligence throughout the world by the use of naval vessels, aircraft and ocean devices; (6) keeping worldwide sea lines of communication open to protect and foster trade; (7) protect the economic interests of consumers, shippers and carriers; and (8) fostering the maintenance of a civil aviation regime that facilitates efficient and economic air transport. National Security Council Memorandum, Subj: Navigation and Overflight Policy (C), Feb. 1, 1979, declassified Oct. 31, 2013.

² *Ibid.*

claims...to the extent practicable and should avoid actions which may be viewed as acquiescence in such illegal claims.³

The working group also recommended that “the U.S. should promote the view that there is freedom of navigation and overflight at least for purposes of transit...through straits used for international navigation, but without endorsing territorial sea claims in excess of three miles.”⁴ Additionally, the Departments of State and Defense were tasked with maintaining a current compilation of illegal claims made by coastal states and the dates and nature of U.S. protests and operational assertions.

In July 1982, President Ronald Reagan announced that the United States would not sign the United Nations Convention on the Law of the Sea (UNCLOS) because the Convention’s deep seabed mining provisions were “contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.”⁵ Nonetheless, President Reagan stated that the United States would “accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight,” and that the United States would “recognize the rights of other states in the waters off their coasts,” as reflected in UNCLOS, so long as the rights and freedoms of the United States and other nations under international law were recognized by such states.⁶ The President also announced that, consistent with the U.S. Freedom of Navigation (FON) Program, the United States would “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 UNCLOS, but it would not “acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.”⁷

For next four decades, the FON Program has served as the cornerstone of U.S. oceans policy, demonstrating America’s commitment to maintaining freedom of seas consistent with international law and U.S. national security and commercial interests. Each successive administration since Jimmy Carter has directed the U.S. Government to preserve freedom of the seas and demonstrate non-acquiescence to unlawful maritime claims asserted by coastal states. The program is comprehensive and global in scope and

³ *Ibid.*

⁴ *Ibid.*

⁵ Statement on United States Oceans Policy, Mar. 10, 1983.

⁶ *Ibid.*

⁷ *Ibid.*

is administered without regard to the identity of the coastal state asserting the unlawful claim. It is therefore not uncommon for U.S. forces to challenge the unlawful claims of not only potential adversaries and competitors but also allies and partners. All operational assertions are deliberately planned, legally reviewed, approved by higher authority, and conducted in a safe and professional manner, consistent with international law.

Over the past several years, China has engaged in a series of provocative actions in the South China Sea that have heightened tensions and raised regional concerns over Beijing's self-proclaimed "peaceful" intentions. Chinese maritime law enforcement vessels have bullied and intimidated rival claimants.⁸ People's Liberation Army (PLA) aircraft and naval vessels have engaged in unsafe and unprofessional air⁹ and maritime

⁸ There have been 46 major incidents between China and the other claimants in the South China Sea between 2010 and 2016. Of those incidents, Chinese maritime law enforcement vessels have been involved in 72 percent of the incidents. *South China Sea Incidents Survey (2010-2016)*, ChinaPower, Center for Strategic & International Studies, <http://chinapower.csis.org/maritime-forces-destabilizing-asia/>.

⁹ For example, on August 21, 2014, a PLA Air Force *Shenyang* J-11 fighter conducted an unsafe and unprofessional intercept of a U.S. P-8 *Poseidon* patrol aircraft that was conducting a routine operation in international airspace approximately 135 east of Hainan Island. The Chinese jet came within 20 feet of the P-8 and performed a barrel roll over the U.S. aircraft. Craig Whitlock, *Pentagon: China tried to block U.S. military jet in dangerous mid-air intercept*, The Washington Post, Aug. 22, 2014, https://www.washingtonpost.com/world/national-security/pentagon-china-tried-to-block-us-military-jet-in-dangerous-mid-air-intercept/2014/08/22/533d24e8-2a1b-11e4-958c-268a320a60ce_story.html?utm_term=.e0a9c35e8301; Similarly, on May 17, 2016, two PLA Air Force *Shenyang* J-11 fighter jets carried out an unsafe intercept of a U.S. EP-3 reconnaissance aircraft, coming within 50 feet of the U.S. aircraft. The EP-3 was conducting a routine patrol over the South China Sea in international airspace at the time of the incident and was forced to change altitude to avoid a collision. China denied that its aircraft operated unsafely. Sam LeGrone, *China Contests Pentagon Account of 'Unsafe' Intercept of U.S. Navy Surveillance Plane by PLA Fighters*, U.S. Naval Institute, May 19, 2016, <https://news.usni.org/2016/05/19/china-contests-pentagon-account-unsafe-intercept-u-s-navy-surveillance-plane-pla-fighters>; Likewise, on February 8, 2017, a PLA Air Force *Shaanxi* KJ-200 Airborne Early Warning and Control aircraft conducted an unsafe intercept of a U.S. Navy P-3C reconnaissance aircraft that was operating lawfully in international airspace in the vicinity of Scarborough Shoal. The KJ-200 came within 1,000 feet of the Navy aircraft, as the U.S. plane was conducting a routine mission in international airspace about 140 miles off the Philippine coast. *US, China military planes come inadvertently close over South China Sea*, Reuters, Feb. 10, 2017, <http://www.cnbc.com/2017/02/10/us-china-military-planes-come-inadvertently-close-over-south-china-sea.html>. Chinese unsafe intercepts are not limited to the South China Sea. For instance, on June 7, 2016, a Chinese *Chengdu* J-10 fighter aircraft conducted an unsafe intercept of a U.S. Air Force RC-135 reconnaissance aircraft that was conducting a routine operation in international airspace over the East China Sea, flying within 50-100 feet of the U.S. plane at a high rate of speed. Barbara Starr, *U.S.: Chinese jet makes 'unsafe' intercept of Air Force plane*, CNN, June 8, 2016, <http://www.cnn.com/2016/06/07/politics/us-china-planes-unsafe-intercept/>.

behavior¹⁰ in violation of the International Civil Aviation Organization (ICAO) Rules of the Air¹¹ and the International Maritime Organization (IMO) Collision Regulations (COLREGS).¹² China has also embarked on a massive land reclamation program to expand disputed features and construct artificial islands in the Spratly Islands,¹³ and there is growing evidence that China is militarizing these features.¹⁴ Finally, in July 2016,

¹⁰ On December 16, 2016, a PLA Navy *Dalang-III* class submarine rescue ship interfered with the recovery of two unmanned underwater vehicles by the USNS *Bowditch* (T-AGS-62) by illegally seizing one of the drones about 50 miles northwest of Subic Bay, Philippines. The U.S. Government formally protested the illegal seizure and the drone was returned to U.S. control on December 20th. Missy Ryan & Dan Lamothe, *Pentagon: Chinese naval ship seized an unmanned U.S. underwater vehicle in South China Sea*, The Washington Post, Dec. 17, 2016, https://www.washingtonpost.com/news/checkpoint/wp/2016/12/16/defense-official-chinese-naval-ship-seized-an-unmanned-u-s-ocean-glider/?utm_term=.3d3989e8bcaa; Chris Buckley, *Chinese Navy Returns Seized Underwater Drone to U.S.*, The New York Times, Dec. 20, 2016, <https://www.nytimes.com/2016/12/20/world/asia/china-returns-us-drone.html>; James Kraska & Raul Pedrozo, *China's Capture of U.S. Underwater Drone Violates Law of the Sea*, Lawfare, Dec. 16, 2016, <https://www.lawfareblog.com/chinas-capture-us-underwater-drone-violates-law-sea>.

¹¹ Rules of the Air, Convention on International Civil Aviation, Annex 2 (10th ed. July 2005).

¹² Convention on International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, *entered into force* July 15, 1977, 28 UST 3459, TIAS 8587, 1050 UNTS 17.

¹³ Although land reclamation is not new in the South China Sea, Chinese activities significantly outweigh other efforts in “size, pace, and nature.” Between December 2013 and June 2015, China has reclaimed more than 2,900 acres of land on seven of its eight outposts in the Spratlys. In comparison, between 2009 and 2014, Vietnam reclaimed 80 acres; Malaysia reclaimed 70 acres during the 1980s; the Philippines reclaimed 14 acres during the 1970s and 1980s; and since 2013, Taiwan reclaimed 8 acres. In other words, “China has...reclaimed 17 times more land in 20 months than the other claimants combined over the past 40 years, accounting for approximately 95 percent of all reclaimed land in the Spratly Islands.” U.S. Dept of Defense, *The Asia-Pacific Maritime Security Strategy: Achieving U.S. National Security Objectives in a Changing Environment* (2015), pp. 15-16.

¹⁴ China now has operational runways on Fiery Cross, Subi and Mischief Reefs, and is constructing reinforced hangars at all three airfields that can accommodate up to 24 fighter aircraft, including advanced *Shenyang* J-11s and *Sukhoi* Su-30s, and three to four larger planes, such as Xian H-6 bombers, Xian H-6U and Ilyushin Il-78 refueling tankers, Shaanxi Y-8 Ilyushin Il-76 and Xian Y-20 transports, and *Shaanxi* KJ-200 Airborne Warning and Control System aircraft. Asia Maritime Transparency Initiative, *Build It and They Will Come*, Aug. 1, 2016. In addition to the infrastructure built to support air operations, new satellite imagery shows that China has also constructed structures containing anti-aircraft guns and close-in weapons systems (CIWS), as well as a series of reinforced launch sites for surface-to-air missiles on these islets. The structures are big enough to house HQ-9 Long-Range Air Defense Missile Systems. Thomas Gibbons-Neff, *New satellite images show reinforced Chinese surface-to-air missile sites near disputed islands*, The Washington Post, Feb. 23, 2017, https://www.washingtonpost.com/news/checkpoint/wp/2017/02/23/new-satellite-images-show-reinforced-chinese-surface-to-air-missile-sites-near-disputed-islands/?utm_term=.b9041848e8d5; see also David Brunnstrom, *China Able To Deploy Warplanes on Artificial Islands Any Time: U.S. Think Tank*, Reuters, Mar. 17, 2017, <http://www.reuters.com/article/us-southchinesea-china-spratlys-idUSKBN16Z005>. Other nations with airstrips in the Spratlys potentially capable of accommodating military aircraft include Vietnam (550 meters on Spratly Island-1976), the Philippines (1,000 meters on Thitu

China refused to comply with the unanimous decision of an Arbitral Tribunal that, *inter alia*, invalidated most of Beijing's activities and claims in the South China Sea, including the infamous nine-dash line.¹⁵ China's irresponsible and unexplained actions hinder regional efforts to manage and resolve the South China Sea territorial and maritime disputes peacefully.¹⁶ As a result, over the past several years, the Departments of State and Defense have sought to reinvigorate the FON Program to ensure China's unlawful maritime claims are regularly and consistently challenged by U.S. naval and air forces.

The Asia-Pacific region is replete with unlawful maritime claims, to include overreaching by all of the South China Sea claimants (except Brunei). U.S. Pacific Command (PACOM) is therefore tasked with maintaining "a robust shaping presence in and around the South China Sea, with activities ranging from training and exercises with

Island-1978), Malaysia (1368 meters on Swallow Reef-1983), and Taiwan (1,195 meters on Itu Aba-2008). Asia Maritime Transparency Initiative, *Airpower in the South China Sea*, Airpower Projection, July 29, 2015. Chinese Premier Li Keqiang has denied that China is militarizing its South China Sea, stating that its "facilities...are primarily for civilian purposes and, even if there is a certain amount of defense equipment or facilities, it is for maintaining the freedom of navigation and overflight...." *China is not militarizing South China Sea, Premier Li says*, Reuters, Mar. 23, 2017, <http://www.reuters.com/article/us-southchinasea-china-idUSKBN16V04A>.

¹⁵ The Arbitral Tribunal, constituted under UNCLOS Annex VII, issued a unanimous decision on July 12, 2016, that invalidates China's infamous nine-dash line, as well as its claimed historic rights to the resources of the South China Sea. The Tribunal additionally ruled that China's large-scale reclamation activities and construction of artificial islands in the South China Sea, as well as its unfettered and ecologically destructive fishing practices, violates China's obligations to preserve and protect the marine environment. UNCLOS Article 192 obligates states to protect and preserve the marine environment, and Article 194 requires states to take measures consistent with UNCLOS that are necessary to prevent, reduce and control pollution of the marine environment from any source, as well as measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment. The Tribunal also clarified the status of a number of low-tide elevations (LTE) that form part of the Philippine exclusive economic zone (EEZ) and continental shelf—Mischief Reef, Second Thomas Shoal, and Reed Bank—thereby confirming Philippine sovereign rights over the resources in these waters, and accordingly found that China had interfered with Philippine sovereign resource rights with respect to its EEZ and continental shelf. The Tribunal also determined that Chinese law enforcement vessels obstructing Philippine access to Scarborough Shoal had violated China's obligations under the COLREGS and UNCLOS Article 94 to ensure safety at sea by its flag vessels. In the *Matter of the South China Sea Arbitration (Phil.-China)*, PCA Case No. 2013-19, Award, July 12, 2016 [hereinafter *Phil-China Award*]. Following the public release of the Award, China vehemently denounced the Tribunal's decision, indicating that China would "never accept any claim or action based on...[the] Award." Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, July 7, 2016, Xinhuanet.com, http://news.xinhuanet.com/english/2016-07/12/c_135507744.htm.

¹⁶ U.S. Dept of Defense, *The Asia-Pacific Maritime Security Strategy: Achieving U.S. National Security Objectives in a Changing Environment (2015)* [hereinafter *Asia-Pacific Maritime Security Strategy*], p. 14.

allies and partners to port calls to...[FON] Operations and other routine operations.”¹⁷ These activities are crucial to U.S. efforts “to dissuade conflict or coercion, preserve... freedom of the seas and...access to the region, encourage peaceful resolution of maritime disputes and adherence to the rule of law, and...strengthen our relationships with partners and allies.”¹⁸ As part of a “robust shaping presence,” PACOM naval and air assets conduct FON operations to challenge unlawful maritime claims that purport to restrict freedom of the seas and the ability of the United States and its friends and allies to conduct routine military operations in and over the world’s oceans. Unlawful claims of 22 nations were operationally challenged in fiscal year 2016—12 of those nations were in the PACOM area of responsibility.¹⁹ USPACOM also pursues “a robust slate of training exercises and engagements with...[U.S.] allies and partners...” in the region designed to enhance “bilateral and multilateral maritime security cooperation, build the necessary interoperability to execute multilateral operations, and promote regional trust and transparency.”²⁰

There has been a noticeable increase in traditional FON operations in the South China Sea since 2015, ostensibly intended to challenge China’s unlawful claims. Although the increased optempo is a welcome change to the Obama administration’s heretofore vacillation to challenge Chinese maritime claims, most of the FON operations in recent memory have been plagued with confusing and inconsistent messaging that have left the United States in a somewhat worse position than it would have been had it not conducted the operations.²¹

After months of indecisiveness by administration officials and dire predictions by self-proclaimed China pundits that Beijing would react firmly to any U.S. FON assertion in the South China Sea, the USS *Lassen* (DDG 82) conducted a transit within 12 nautical miles (nm) of the artificial islands constructed by China on Subi and Mischief Reefs on October 27, 2015, without incident. The *Lassen* was shadowed by a PLAN destroyer and frigate, but neither Chinese warship engaged in aggressive or unprofessional maneuvers to dissuade the U.S. destroyer from completing its mission. Nonetheless, upon completion, China protested the transit, warning that it would take “all necessary measures” to defend

¹⁷ *Ibid.*, p. 23.

¹⁸ *Ibid.*

¹⁹ U.S. Dep’t of Defense, Freedom of Navigation: FY2016 Operational Assertions, <http://policy.defense.gov/OUSDP-Offices/FON/>.

²⁰ Asia-Pacific Maritime Security Strategy, note 15 *supra*, p. 24.

²¹ Raul Pedrozo & James Kraska, *Cant Anybody Play This Game? US FON Operations and Law of the Sea*, Lawfare, Nov. 17, 2015, <https://www.lawfareblog.com/cant-anybody-play-game-us-fon-operations-and-law-sea>.

its sovereignty and security interests in the South China Sea.²²

From an operational perspective, the FON was flawlessly executed by the Navy. However, diplomatically, the administration squandered the operation's legal impact with poor messaging both before and after the operation. First, statements that the *Lassen* would conduct a FON challenge in the vicinity of Subi and Mischief Reefs were leaked to the press prior to the operation. As a result, China was given de facto prior notice that a U.S. warship would be challenging its claims in the South China Sea. Prior notice is not only counterintuitive for force protection, but also runs afoul of U.S. ocean policy that advance notification will not be given to coastal states when U.S. ships and aircraft exercise internationally recognized navigational rights and freedoms.²³ By leaking the information in advance of the operation, the administration undermined the U.S. legal position, compromised the security of the mission, and increased the operational risk for the force.

Second, initial reports by Navy officials characterized the *Lassen* transit as “innocent passage,”²⁴ with one Defense official confirming that the U.S. destroyer had turned off its fire control radars during the transit.²⁵ Subi and Mischief Reef are both low-tide elevations (LTE).²⁶ A low-tide elevation that is situated more than 12-nm from the mainland or an island is not entitled to claim a territorial sea of its own.²⁷ Therefore, the artificial islands constructed by China on Subi and Mischief Reefs are not entitled to claim any maritime zones; at best, China may only establish a 500-meter safety zone around these features.²⁸ By indicating that *Lassen* has transited in “innocent passage,” U.S. officials implicitly recognized the LTEs as “rocks” entitled to a 12-nm territorial sea.²⁹

²² Raul Pedrozo, *Freedom of navigation exercises essential to preserve rights*, The Straits Times, Oct. 30, 2015, <http://www.straitstimes.com/opinion/freedom-of-navigation-exercises-essential-to-preserve-rights>.

²³ *Ibid.*

²⁴ Christopher Cavas, *Navy Chiefs Talk, New Details On Destroyer's Passage*, Defense News, Oct. 31, 2015, <http://www.defensenews.com/story/defense/2015/10/31/navy-china-richardson-wu-destroyer-lassen-south-china-sea-innocent-passage/74881704/>.

²⁵ Kristina Wong, *US flies B-52 bombers near disputed islands claimed by China*, The Hill, Nov. 12, 2015, <http://thehill.com/policy/defense/259958-us-flies-b-52-bombers-near-islands-claimed-by-china>.

²⁶ The Tribunal determined that Subi Reef, Hughes Reef, Mischief Reef, and Second Thomas Shoal are LTEs that are not entitled to claim maritime zones. Phil-China Award, note 15 *supra*.

²⁷ UNCLOS, Art. 13.2.

²⁸ The coastal state may, where necessary, establish reasonable safety zones around such artificial islands... in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands.... 5. The breadth of the safety zones shall...not exceed a distance of 500 metres around them.... UNCLOS, Art. 60.4.

²⁹ R. Pedrozo, note 22 *supra*.

Finally, no nation, including the United States, recognizes China's sovereignty claims over the South China Sea land features. Maritime zones may only be established under international law by the state exercising sovereignty over land territory. Since sovereignty over the South China Sea features is not settled, no nation may purport to establish maritime zones from these features until the sovereignty issue is resolved. By challenging China's maritime claims around Subi and Mischief Reefs, the United States tacitly acknowledged Chinese sovereignty over these disputed features.³⁰

In a statement released immediately following the operation, Senate Armed Services Committee Chairman Senator John McCain expressed his dismay at how the "Administration's apparent confusion and indecision [regarding South China Sea FON operations] has played out before the world over the last several months."³¹ He also urged that, given China's "increasingly routine challenges to the freedom of the seas throughout the Asia-Pacific region, it is more important than ever that the United States fly, sail, and operate wherever international law allows. And the South China Sea must be no exception."³² McCain further advised the administration that future FON operations

should not be sporadic spectacles to behold, but ordinary and consistent demonstrations of our Nation's commitment to uphold the freedom of the seas. Demonstrating this unwavering commitment will require regular air and naval patrols in the weeks and months ahead and the robust forward presence in the Pacific required to sustain them.³³

The administration did not take McCain's suggestions to heart. Two weeks later, U.S. defense officials committed a similar blunder when they attempted to describe the flight path of two Guam-based B-52 strategic bombers that were on a routine patrol over the South China Sea on 8-9 November 2015. A Pentagon spokesman indicated that the planes had not come within 12-nm of Subi Reef, but had remained in international airspace during the operation—"we conduct B-52 flights in international airspace in

³⁰ *Ibid.*; Pedrozo & Kraska, note 21 *supra*.

³¹ Statement by Senator John McCain on U.S. Navy Destroyer Sailing within 12 Nautical Miles of China's Manmade Islands in South China Sea, Oct. 27, 2015, <https://www.mccain.senate.gov/public/index.cfm/2015/10/statement-by-senator-john-mccain-on-u-s-navy-destroyer-sailing-within-12-nautical-miles-of-china-s-manmade-islands-in-south-china-sea>.

³² *Ibid.*

³³ *Ibid.*

that part of the world all the time.”³⁴ A few days earlier, however, another DoD official stated that the bombers had come within 12-nm of the reef, prompting Chinese ground controllers to warn the U.S. aircraft to “get away from our islands.”³⁵ Pentagon spokesman Commander Bill Urban confirmed that the B-52s were warned off by Chinese air traffic controllers, but “both aircraft continued their mission without incident, and at all times operated fully in accordance with international law.”³⁶ U.S. officials, however, bypassed the opportunity to explain that Subi Reef is a LTE, is not entitled to claim national airspace, and that the U.S. bombers had the legal right to overfly the artificial island without notice to or consent of any claimant.

China protested a similar mission, accusing the United States of a “serious military provocation,” after a B-52 bomber came within two nautical miles of Cuarteron Reef on December 10, 2015.³⁷ DoD officials later confirmed the operation was not a FON, but that the B-52 had inadvertently flown within two nautical miles of the reef as the result of bad weather.³⁸ Cuarteron Reef is considered a “rock,”³⁹ and would therefore be entitled to a 12-nm territorial sea and 12-nm national airspace if Chinese sovereignty over the feature was recognized by the international community. To date, however, such recognition has not been forthcoming. By indicating that the close approach of the B-52 was unintentional, the United States tacitly recognized Chinese sovereignty over the reef.

Perplexed by the administration’s mixed messaging, Senator McCain sent a letter to Secretary of Defense Ash Carter on November 9, 2015, urging the Secretary to “publicly clarify, to the greatest extent possible, the legal intent behind...[the *Lassen*] operation and any future operations of a similar nature.”⁴⁰ Senator McCain further cautioned that “given the sensitive political dynamics and detailed legal implications of our actions, it is vital that there be no misunderstanding about our objectives in either the Asia-Pacific

³⁴ Yeganeh Torbati & David Alexander, *U.S. bombers flew near China-built islands in South China Sea: Pentagon*, Reuters, Nov. 15, 2015, <http://www.reuters.com/article/us-southchinasea-usa-idUSKCN0T12G720151113>.

³⁵ K. Wong, note 25 *supra*.

³⁶ *Ibid.*

³⁷ *China accuses US of B-52 ‘provocation’ over Spratly Islands*, BBC News, Dec. 29, 2015, <http://www.bbc.com/news/world-asia-china-35140802>.

³⁸ *US says B-52 bombers didn’t intend to fly over China’s man-made island*, FoxNews.com, Dec. 20, 2015, <http://www.foxnews.com/politics/2015/12/20/us-says-b-52-bombers-didnt-intend-to-fly-over-chinas-man-made-island.html>.

³⁹ Phil-China Award, note 15 *supra*.

⁴⁰ Senator John McCain letter to Secretary of Defense Ash Carter, Nov. 9, 2015, <https://news.usni.org/wp-content/uploads/2015/11/11.9.15-McCain-to-Carter-Freedom-of-Navigation-in-SCS.pdf#viewer.action=download>.

region or within the international community.”⁴¹ McCain therefore asked the Secretary to elaborate on five points:

- What excessive claim was the *Lassen* operation intended to challenge;
- Did the ship operate in innocent passage;
- If not, what actions were taken within 12-nm of the artificial island to demonstrate that the ship was not engaged in innocent passage;
- Did the United States pre-notify China of the mission; and
- Were the excessive claims of any other nation challenged as part of the operation?⁴²

Seven weeks later, the Secretary finally responded to McCain’s request for information. The DoD response highlighted that FON operations “are conducted in full accordance with international law...[and] are one aspect of our broader strategy to support an open and inclusive international security architecture founded on international law and standards.”⁴³ With regard to the *Lassen* FON assertion, Secretary Carter indicated that the *Lassen* had transited within 12-nm of five features in the Spratlys—Subi Reef, Northeast Cay, Southwest Cay, South Reef and Sandy Cay—which are claimed by China, Taiwan, Vietnam, and the Philippines. Carter also confirmed that no claimant had been provided prior notice of the operation, “which is consistent with our normal processes and with international law.”⁴⁴ He further articulated that the operation was intended to challenge

attempts by claimants to restrict navigation rights and freedoms around features they claim, including policies by some claimants requiring prior permission or notification of transits within territorial seas. Such restrictions contravene the rights and freedoms afforded all countries under international law as reflected in the Law of the Sea (LOS) Convention, and the FONOP demonstrated that we will continue to fly, sail, and operate wherever international law allows.⁴⁵

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Secretary of Defense Ash Carter letter to Senator John McCain, Dec. 21, 2015, [hereinafter Carter Letter] <https://news.usni.org/2016/01/05/document-secdef-carter-letter-to-mccain-on-south-china-sea-freedom-of-navigation-operation>.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

Regarding Subi Reef, Secretary Carter explained that none of the claimants have clarified whether they claim a territorial sea around the feature. Nonetheless, the Secretary stated that the United States believes that before China converted Subi Reef into an artificial island, it was a LTE and could therefore not generate its own territorial sea. However, because Subi Reef may be situated within 12-nm of Sandy Cay (which is entitled to claim a territorial sea because it is a rock),⁴⁶ the LTE “could be used as the baseline for measuring Sandy Cay’s territorial sea.”⁴⁷ Given this factual uncertainty, Carter asserted that the Navy conducted the FON operation “in a manner that is lawful under all possible scenarios to preserve U.S. options should the factual ambiguities be resolved, disputes settled, and clarity on maritime claims reached.”⁴⁸ He additionally emphasized that

the specific excessive maritime claims challenged in this case are less important than the need to demonstrate that countries cannot restrict navigational rights and freedoms around islands and reclaimed features contrary to international law as reflected in the LOS Convention. We will continue to demonstrate as much by exercising the rights, freedoms and lawful uses of the seas all around the world, and the South China Sea will be no exception.⁴⁹

While interesting, the administration’s legal argument is too clever by half. There are three reasons why the Secretary’s explanation misses the mark. First, UNCLOS Article 13 specifically states that only LTEs within 12-nm of a “mainland or island” can be used to bump out the territorial sea as though it were a rock. However, Sandy Cay is neither a mainland nor an island—it is an uninhabited rock, so it may not be used by Subi Reef to generate a territorial sea. To suggest that an “island” is merely a form of “rock” confuses the meaning of Article 121 of the Convention. “Islands” are entitled to claim the full suite of maritime zones—territorial sea, contiguous zone, EEZ, and continental shelf.⁵⁰ “Rocks” that “cannot sustain human habitation or economic life of their own,” on the other hand, are not entitled to an EEZ or continental shelf.⁵¹ The text of Article 121.3

⁴⁶ Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. UNCLOS, Article 13.1.

⁴⁷ Carter Letter, note 43 *supra*.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ UNCLOS, Article 121.2.

⁵¹ UNCLOS, Article 121.3.

does not imply that islands are simply a type of rock—they are not. Such a conclusion would defy the “negotiating history of the Convention that sought to distinguish rocks from islands, as well as common sense that would have the two distinct words imbued with two discrete meanings.”⁵² Additionally, the territory of one state cannot be used to generate maritime zones for the territory of another state. If you accept the argument that all islands are just rocks, the only way Subi Reef can be used to bump out the territorial sea of Sandy Cay is if the same state exercises sovereignty to both features. By making this argument, the United States has, in effect, ceded sovereignty of both features to China.

Second, UNCLOS Article 3 provides that states may “establish” a territorial sea – it is not automatic. International law requires affirmative action by the sovereign state. Yet, none of the South China Sea claimants, including China, have established territorial seas around their claimed features in the Spratlys. Since China has not claimed a territorial sea around Subi or any of its other claimed features, China’s prior notice requirement does not apply and there is no excessive claim to challenge. Consequently, whether *Lassen* transited within or stayed beyond 12-nm of Subi is legally irrelevant.

Third, before a feature can generate a territorial sea it must be under the sovereignty of a coastal state. The competing territorial claims in the South China Sea have not been recognized by any nation, including the United States. As a result, even if China were to declare a territorial sea around any of its claimed features, the declaration would be legally null and void. America’s purported recognition of Chinese sovereignty over these disputed features by challenging provisions of Chinese law that China has not affirmatively imposed over its claimed possessions undermines the U.S. legal position and is an incomprehensible, self-inflicted wound.

The United States stepped up its FON operations in the South China Sea in 2016, conducting three assertions in the region. This number is significant given that the United States only conducted seven such operations in the South China Sea between 2011 and 2015.⁵³ While it is encouraging to see the United States increase the number of FON challenges in the region, all of the operations suffer from the same fallacy—they challenge claims that do not legally exist and tacitly recognize Chinese sovereignty over the disputed features in the South China Sea. U.S. forces should be exercising high seas freedoms when transiting near any disputed feature in the South China Sea.

In January 2016, the USS *Curtis Wilbur* (DDG 54) conducted a FON operation

⁵² Pedrozo & Kraska, note 21 *supra*.

⁵³ Carter Letter, note 43 *supra*.

within 12-nm of Triton Island in the Paracel Islands chain. The assertion was designed to challenge China's 1992 law that requires warships to provide prior notice before transiting the territorial sea of China in innocent passage. China condemned the transit as a violation of Chinese law, calling the operation "unprofessional and irresponsible," as well as destabilizing for the "region's peace and stability."⁵⁴

Four months later, the USS *William P. Lawrence* (DDG 110) conducted a similar transit within 12-nm of Fiery Cross Reef in the Spratly archipelago, thus challenging China's, Taiwan's and Vietnam's prior notification requirement for warship engaged in innocent passage.⁵⁵

The Department of Defense conducted a routine freedom of navigation operation in the South China Sea on the morning of May 10..., in the vicinity of Fiery Cross Reef..., to uphold the rights and freedoms of all states under international law and to challenge excessive maritime claims of some claimants in the South China Sea.

During this operation, USS *William P. Lawrence* (DDG 110) exercised the right of innocent passage while transiting inside 12 nautical miles of Fiery Cross Reef, a high-tide feature that is occupied by China, but also claimed by the Philippines, Taiwan, and Vietnam. This operation challenged attempts by China, Taiwan, and Vietnam to restrict navigation rights around the features they claim, specifically that these three claimants purport to require prior permission or notification of transits through the territorial sea, contrary to international law. ... These excessive maritime claims are inconsistent with international law as reflected in the Law of the Sea Convention in that they purport to restrict the navigation rights that the United States and all states are entitled to exercise. No claimants were notified prior to the transit, which is consistent with our normal process and international law.⁵⁶

⁵⁴ Sam LaGrone, *China Upset Over Unprofessional U.S. South China Sea Freedom of Navigation Operation*, USNI News, Feb. 1, 2016, <https://news.usni.org/2016/01/31/china-upset-over-unprofessional-u-s-south-china-sea-freedom-of-navigation-operation>.

⁵⁵ Sam LaGrone, *U.S. Destroyer Passes Near Chinese Artificial Island in South China Sea Freedom of Navigation Operation*, USNI News, May 10, 2016, <https://news.usni.org/2016/05/10/u-s-destroyer-passes-near-chinese-artificial-island-in-south-china-sea-freedom-of-navigation-operation>.

⁵⁶ *Ibid.*

Moreover, during the weeks leading up to the operation, the USS *John C. Stennis* Carrier Strike Group (CSG) conducted presence operations in the South China Sea and U.S. Air Force A-10 Thunderbolts operating out of the Philippines flew maritime patrols near Scarborough Shoal.⁵⁷ China accused the United States of threatening “China’s sovereignty and security interests,” endangering the “staff and facilities on the reef,” and damaging “regional peace and stability.”⁵⁸

Several months after the *Lawrence* FON, PLAN Admiral Sun Jianguo, Deputy Chief of China’s Joint Staff, stated that freedom of navigation has never been affected in the South China Sea. However, he indicated that China is opposed to “so-called military freedom of navigation, which brings with it a military threat and which challenges and disrespects the international law of the sea.”⁵⁹ Admiral Sun further warned that “this kind of military freedom of navigation is damaging to freedom of navigation in the South China Sea, and it could even play out in a disastrous way.” The Admiral’s untenable position that military ships and aircraft do not enjoy freedoms of navigation and overflight in the South China Sea was met with a candid U.S. response—U.S. forces will continue to operate in the Western Pacific, including the South China Sea, in accordance with international law. A few months later, in October, the USS *Decatur* (DDG 73) conducted a FON operation that challenged China’s excessive straight baseline claims in the Paracels near Triton and Woody Islands.⁶⁰

In a welcome development for the new Trump Administration, Japanese Defense Minister Tomomi Inada stated during a joint press briefing with Secretary of Defense James Mattis that confirmed

China’s activities in the...South China Seas are a security concern for the Asia-Pacific region. This concern has been shared between...[the United States and Japan,]...that freedom of navigation operations and other actions by the U.S. forces in the South China Sea contribute to maintaining maritime order based on the rule of law, and that...[Japan] support[s] these efforts,...[and that Japan

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Erik Slavin, *Chinese admiral contests freedom of navigation in South China Sea*, Stars & Stripes, July 19, 2016, <https://www.stripes.com/news/chinese-admiral-contests-freedom-of-navigation-in-south-china-sea-1.419813#.WN7VdfnyvIU>.

⁶⁰ Sam LaGrone, *U.S. Warship Conducts South China Sea Freedom of Navigation Operation*, USNI News, Oct. 22, 2016, <https://news.usni.org/2016/10/21/u-s-warship-conducts-south-china-sea-freedom-navigation-operation>.

supports U.S. capacity-building initiatives and]...will enhance engagement in the South China Sea.⁶¹

Two weeks later, ships from CSG 1, including the USS *Carl Vinson* (CVN 70) and its embarked carrier air wing (CVW 2), and the USS *Wayne E. Meyer* (DDG 108) began routine operations in the South China Sea.⁶² As expected, China reacted negatively to the deployment, indicating that

China always respects the freedom of navigation and overflight all countries enjoy under international law. But we are consistently opposed to relevant countries threatening and damaging the sovereignty and security of littoral countries under the flag of freedom of navigation and overflight. We hope relevant countries can do more to safeguard regional peace and stability.⁶³

Subsequently, in March 2017, Japan announced that the helicopter carrier JS *Izumo* (DDH 183) will sail to the South China Sea in May for a 3-month deployment. The 27,000-ton warship has both anti-submarine and amphibious capabilities.⁶⁴ Heretofore, efforts by the United States to convince regional partners like Australia, India, Japan and the Philippines to conduct joint patrols in the South China Sea have fallen on deaf ears. For the United States, the Japanese deployment is an interesting and welcome development for continued peace and stability in Southeast Asia. China, on the other hand, views the deployment as meddling in regional affairs and has urged “Japan [and other non-regional states, like the United States,] to respect related countries’ efforts to maintain peace and stability on the South China Sea, and to refrain from causing trouble in the region.”⁶⁵ Beijing further warned that if Japan “refuses to realize its error and

⁶¹ *Joint Press Briefing by Secretary Mattis and Minister Inada in Tokyo, Japan*, Dep’t of Defense Press Operations, Feb. 4, 2017, <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1071436/joint-press-briefing-by-secretary-mattis-and-minister-inada-in-tokyo-japan>.

⁶² *Carrier Strike Group 1 Conducts South China Sea Patrol*, Carrier Strike Group One Public Affairs, Feb. 18, 2017, http://www.navy.mil/submit/display.asp?story_id=98973.

⁶³ *China opposes U.S. naval patrols in South China Sea*, Reuters, Feb. 21, 2017, <http://in.reuters.com/article/southchinasea-china-usa-idINKBN1600V2>.

⁶⁴ Frances Mangosing, *Japan’s largest warship since World War II to visit PH*, Inquirer, Mar. 27, 2017, <http://globalnation.inquirer.net/153980/japans-largest-warship-since-world-war-ii-visit-ph>.

⁶⁵ *China urges Japan not to stir up troubles on South China Sea issue*, Xinhuanet, Mar. 16, 2017, http://news.xinhuanet.com/english/2017-03/16/c_136134407.htm.

play up regional tensions, China will definitely respond to any action that harm China's sovereignty and security."⁶⁶

The South China Sea is home to the world's most strategic sea lines of communication (SLOC)—30 percent of global maritime trade (\$5 trillion) transits these SLOCs annually, including \$1.2 trillion in goods bound for the United States. These goods flow freely through the region thanks, in part, to the long-term presence of the United States Armed Forces. As Prime Minister Turnbull stated in January 2016,

the U.S.-anchored rules-based order has delivered the greatest run of peace and prosperity this planet has ever known. . . . The pace and scale of economic growth in our region is utterly without precedent in human history. It would not have happened, and its continuance cannot be assured, without the security and stability underwritten by a strong and enduring United States presence in our region."⁶⁷

Yet China seeks to alter the rules-based legal order to expand its influence in the region through intimidation, expropriation of large areas of the high seas and international airspace, and large-scale land reclamation activities. China's disruptive and destabilizing behavior at sea, on land and in the air undermines the rule of law and exposes China's penchant for disrupting time-honored freedoms of the seas, despite repeated affirmations that it has never interfered with freedom of navigation in the South China Sea.

Successfully confronting these challenges is best achieved through a united coalition of like-minded states. However, most Southeast Asian states are incapable or unwilling of standing up to China individually or collectively, and would prefer that the United States continue to do the heavy lifting to preserve their navigational rights and freedoms and economic prosperity. Thus, for the foreseeable future, preserving access to the South China Sea SLOCs will remain primarily a U.S.-only effort, with sporadic help from its allies and regional friends, but only when they deem it in their national interests to provide assistance.

As a Pacific nation, leader, and maritime power, the United States has a national interest in maintaining peace and stability in Southeast Asia. However, as noted by Senator McCain in December 2016— "Freedom of the seas and the principles of

⁶⁶ *Ibid.*

⁶⁷ Prime Minister Hon. Malcolm Turnbull, MP, Australia and the United States: New Responsibilities for an Enduring Partnership, Center for Strategic and International Studies, Jan. 18, 2016, <https://www.pm.gov.au/media/2016-01-18/australia-and-united-states-new-responsibilities-enduring-partnership>.

the rules-based order are not self-enforcing.”⁶⁸ Left unused, navigational rights and freedoms guaranteed to all states will atrophy over time. “American leadership is required in their defense.”⁶⁹

[China’s] brazen provocation fits a pattern of increasingly destabilizing... behavior, including bullying its neighbors and militarizing the South China Sea. And this behavior will continue until it is met with a strong and determined U.S. response, which until now the Obama administration has failed to provide.... [American] leadership has been sorely lacking. We are not witnessing a China committed to a ‘peaceful rise.’ Instead, we are confronting an assertive China that has demonstrated its willingness to use intimidation and coercion to disrupt the rules-based order that has been the foundation of security and prosperity in the Asia-Pacific region for seven decades.... [W]e must adapt U.S. policy and strategy to reflect this reality and ensure we have the necessary military forces, capabilities, and posture in the region to deter, and if necessary, defeat aggression.⁷⁰

A proactive and robust FON Program, coupled with a persistent presence of U.S. warships in the region, will demonstrate non-acquiescence in China’s unlawful claims and ensure access to the South China Sea SLOCs is preserved for the ships of all nations. To best accomplish this mission, U.S. forces must be allowed to operate freely, persistently, and without Washington hand-wringing and melodrama, within and beyond 12-nm of all of the South China Sea features. Perhaps one day, FON “operations will become so routine that China and other claimants will come to accept them as normal occurrences.”⁷¹

⁶⁸ Statement by SASC Chairman John McCain on China’s Seizure of U.S. Vessel in South China Sea, Dec. 16, 2016, <https://www.mccain.senate.gov/public/index.cfm/press-releases?ID=2F4E4075-DD83-4F71-820C-489907F77E9C>.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Sydney J. Freedberg, Jr., *McCain, Forbes Praise New Navy Challenge To China In Paracel Islands*, BREAKING DEFENSE, Jan. 30, 2016, <http://breakingdefense.com/2016/01/mccain-praises-new-navy-challenge-to-china-in-paracel-islands/>.

U.S. Department of Defense (DoD)
Freedom of Navigation (FON) Report for Fiscal Year (FY) 2016

CLAIMANT	EXCESSIVE MARITIME CLAIMS
Albania*	Prior authorization required for foreign warships to enter the territorial sea (TTS); excessive straight baselines.
Brazil	Consent required for military exercises or maneuvers in the exclusive economic zone (EEZ).
Cambodia	Excessive straight baselines.
China*	Excessive straight baselines; jurisdiction over airspace above the EEZ; restriction on foreign aircraft flying through an Air Defense Identification Zone (ADIZ) without the intent to enter national airspace; domestic law criminalizing survey activity by foreign entities in the EEZ; prior permission required for innocent passage of foreign military ships through the TTS.
Croatia	Prior notification required for foreign warships to exercise innocent passage in the TTS.
India*	Prior consent required for military exercises or maneuvers in the EEZ; security jurisdiction claimed in the contiguous zone.
Indonesia*	Limits on archipelagic sea lane passage through normal routes used for international navigation; prior notification required for foreign warships to enter the TTS and archipelagic waters; restriction on stopping, dropping anchor, or cruising without legitimate reason in seas adjoining TTS.
Iran*	Restrictions on right of transit passage through Strait of Hormuz to Parties of the United Nations Convention on the Law of the Sea; prohibition on foreign military activities and practices in the EEZ.
Italy	Claimed historic bay status for the Gulf of Taranto.
Japan	Excessive straight baselines.
Malaysia*	Prior authorization required for nuclear-powered ships to enter the TTS; military exercises or maneuvers in the EEZ requires prior consent.
Maldives*	Prior authorization required for foreign ships to enter the EEZ.
Malta	Passage by foreign warships through the TTS subject to prior consent or prior notification.
Oman*	Prior permission required for innocent passage of foreign military ships through the TTS; requirement for innocent passage through the Strait of Hormuz (an international strait).
Pakistan*	Prior consent required for foreign warships to conduct military exercises or maneuvers in the EEZ.
Philippines*	Claims archipelagic waters as internal waters.
South Korea	Excessive straight baselines; prior notification required for foreign military or government vessels to enter the TTS.
Taiwan*	Prior notification required for foreign military or government vessels to enter the TTS.
Thailand	Excessive straight baselines; consent required for military exercises in the EEZ.
Tunisia	Excessive straight baselines.
Venezuela*	Prior permission for overflight of the EEZ and Flight Identification Region (FIR).
Vietnam*	Prior notification required for foreign warships to enter the TTS.

*Note: * designates multiple challenges to the claim(s) during the reporting period.*